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Human Rights and Positive Obligations to Healthcare

Reading the European Convention on Human Rights through Joseph Raz's theory of Rights

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To the memory of my father Eleftherios Kolliniatis,
who has always been a source of inspiration for me.
Στη μνήμη του ανθρώπου που είναι πηγή έμπνευσης για μένα:
Στον πατέρα μου Λευτέρη Κολλινιάτη.

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This book is dedicated to the memory of my father Lefteris Kolliniatis, who has always been a source of inspiration for me.

Frankfurt am Main, February 2019

Inhaltsverzeichnis

Abbildungsverzeichnis

CHAPTER 1: Introduction

This study focuses on Joseph Raz's approach to rights and the application of the European Convention on Human Rights ("ECHR" or "Convention") to health-related issues. Given the absence of a positive obligation to provide healthcare in the Convention, is it possible for the ECHR effectively to protect healthcare? If so, what reasoning should the European Court of Human Rights ("ECtHR" or "Court") use to defend imposing positive obligations? How can a liberal philosophy of rights justify positive obligations? I argue that healthcare cases are the hardest to consider under the Convention, because the ECtHR's reasoning in its case law implies that there is a right to healthcare, even though the Convention does not guarantee one. If, in practice, the ECtHR does not clearly distinguish between negative and positive rights and duties, is there a plausible theoretical framework that can combine and justify them?

The main objectives of this book are threefold. First, it proposes that Joseph Raz's "double-dimension rights" offer a middle-ground approach to rights that judges can use to scrutinise the social aspects of rights when adjudicating cases concerning rights that have been read as containing social elements. What does it mean to argue that Razian double-dimension rights offer a middle-ground approach to rights, and why is a middle-ground approach important for the adjudication of rights? Raz's approach can be located in the middle ground of theories of rights for two reasons. First, he rejects natural rights theories that separate rights from social practices and collective goods. For him, certain rights exist if certain social practices exist. What rights there are in a society are determined by the society's social practices, not by a natural law or natural rights. Secondly, he does not argue solely that rights are defined by the society's social practices, but accepts the importance of rights for the preservation of the society's collective goods. The principal purpose of rights is to preserve collective goods, not to protect individuals. Rights also secure the realisation of individuals' autonomy, but, for Raz, the protection of autonomy gives rise to positive obligations, not solely to negative ones.

From this perspective, Razian rights can be located in the middle ground of the theories of rights because they serve individuals' autonomy but are not restricted to it; the well-being of the community is also a matter of rights, and the realisation of individual autonomy is shaped by the

existence of collective goods. Positive duties can also be derived from Razian rights. Raz's approach is therefore a middle-ground theory because it combines the liberal notion of autonomy with collective goods, which relate principally to communities, not individuals. Raz's middle-ground approach to rights is important because it demonstrates that the existence of rights is based on the relationship between autonomy and collective goods: the former needs the latter and vice versa, and rights serve them both.

Secondly, this book proposes that Joseph Raz's account of rights must be read as a theory of "double-dimension rights", rather than as an interest theory of rights. Raz's theory focuses on the "political conceptions" of human rights. I argue that the crucial aspect of Razian rights is their relationship with collective goods rather than, as has been proposed hitherto, with the interests of individuals. For Raz, interests are not a sufficient justification for securing rights. Categorising Razian rights as double-dimension rights is therefore crucial, because this approach underlines that rights exist as long as collective goods and social practices exist. Both the "why-dimension" and the "how-dimension" of Razian rights relate to social practices, which are at the core of his theory of rights. Moreover, the double-dimension approach highlights that Raz's rights are not individualistic; they can be used to justify positive obligations. Raz's approach is not individualistic, first, because it is not restricted to individuals' interests, and secondly, because his theory is not restricted to focusing on individual well-being, since it links rights directly to social practices and collective goods rather than human nature.

Thirdly, this book does not just focus on the theory of human rights; it also analyses how human rights are applied and read in practice, focusing on the ECHR and ECtHR case law. The main question that it seeks to answer is whether – and, if so, to what extent – ECHR rights, in the Court's reasoning, contain social elements that may give rise to positive obligations for Contracting States to provide free healthcare to individuals who reside within their territorial jurisdiction. If social elements are incorporated into the Convention rights, to what extent do those rights impose positive obligations on states, and to what extent do they imply other social rights, such as the right to health? In other words, to what extent does the ECtHR read the ECHR rights as encompassing social elements, and to what degree do the judges of the Court recognise that those social elements imply positive obligations on states to provide free healthcare to all individuals within their jurisdiction?

1.1 Summary of the main arguments

Following Raz's approach, I argue that, although ECtHR judges are not bound by precedent case law, in unregulated or partly-regulated cases that fall within the scope of Article 3 or Article 8 of the ECHR they consciously or unconsciously have a "law-creating" role and apply moral judgments to make "new law". In Article 3 or Article 8 cases relating to health issues in a broader sense, judges either do not apply a coherent approach to rights or apply a "minimally good life" principle that restricts rights within limited borders. The Court may use elements of the Razian account of rights, because Raz's approach highlights the social elements of rights and can help judges understand the social aspects of Articles 3 and 8.

For Raz, human rights are social facts; conceiving of them as social institutions can help us to understand societies. He states that, in practice, judges use moral judgments to make law. If this is correct then these moral judgments should be supported by a deeper understanding of human rights law. A political theory of rights may offer a deeper understanding of how a human right can be read in such a way as fully to realise its potential as a social institution. A deeper understanding of human rights as social facts may also help judges to be more conscious in their argumentation. Using Raz's theory would make it easier for judges to recognise the social elements of rights in all cases with similar facts, rather than only in some cases. Thus, although the ECtHR is not obliged to apply the doctrine of precedent and is therefore not bound by precedent cases, judges, finding common ground on the social aspects of human rights, may decide in favour of a broader application of Articles 3 and 8 rights that reflects their social elements, as expressed in cases such as *D v UK* (Article 3 – majority, Grand Chamber) and *Hatton and others v. UK* (Article 8 – dissenting opinion, Grand Chamber).

This book will show that, in most cases that fall within the scope of Article 3 and Article 8, the Court is reluctant to expand ECHR rights to reflect their social elements. However, in a few cases, the social elements of the ECHR rights have been reflected in either the dissenting opinion or the majority's argumentation. Thus, ECtHR case law demonstrates that the Court acknowledges the social elements of human rights only sporadically. However, if the Court considered the social aspects of the Convention rights, they would guarantee more than a "minimally good life". The ECtHR should take Razian rights seriously because, for Raz, the social aspects of human rights are expressed as both common goods and autonomy. If the ECtHR applied a specific theory of positive obligations in its reason-

ing, it would be able to offer a transparent justification for failing to treat similar cases alike.

Having a better understanding of the meaning of human rights law would help judges to apply a human rights theory that took into account the social aspects of Convention rights in unregulated or partly-regulated cases that fall within the scope of Article 3 or Article 8. I argue that judges can better understand human rights law by scrutinising precedent case law and applying a non-individualistic political theory of human rights. It is important that judges apply a non-individualistic theory of human rights, such as Raz's, as better theory makes better practice.

1.2 Structure

This book is divided into seven chapters. This introduction presents the main research arguments, the scope of the study, its methodology and the state of the art. The second chapter sets out the background and discusses the main issues in jurisprudence and contemporary theories of human rights. The third chapter is predominantly analytical: it discusses the formal characteristics of the ECHR and the legal methodology applied by the ECtHR. The fourth chapter develops Joseph Raz's political theory of rights in depth, proposing a reading of Razian rights as double-dimension rights with a "why-dimension" and a "how-dimension". It reconstructs Raz's conception of collective goods, taking into consideration John Finnis's notion of common good.

The fifth chapter presents ECtHR precedent case law in health-related positive obligations cases under Articles 3 and 8 of the Convention. It focuses on the Court's decisions in cases relating to expulsion, detention, medical treatment and environmental issues. It poses analytical questions about legal doctrinal methodology. In particular, it scrutinises the ECtHR's legal reasoning in positive obligation cases to understand the general principles of positive obligation case law. Taking account of the relevant literature, it focuses on how the Court defines these principles and tests whether it applies a coherent theory of positive obligations.

The sixth chapter analyses the similarities between the progressive reasoning developed by the ECtHR and Raz's theory of rights. It draws material from Raz's philosophy of rights and presents the affinities between the ECtHR's argumentation and Razian "double-dimension rights". The seventh chapter concludes the book by providing an overview of the main is-

sues, developing a critique of Raz's account of rights and presenting some questions raised by the study, which may form the basis of further research.

1.3 Scope

This book focuses on the principle of positive obligations and on the normative question of what ECHR rights means. I share the view that the ECtHR does not apply a specific theory of positive obligations in adjudicating cases relating to Articles 3 and 8 of the Convention. I argue that the absence of a theory of positive obligations is problematic in a practical sense, since there is insufficient justification for the Court's failure to treat similar cases alike, which causes the legitimacy of its decisions to be questioned. The Convention rights may be threatened if the Court does not use a clear theory to support its argumentation. A theory of positive obligations would be a solid foundation for the Court's reasoning and would make its reasons for deviating from precedent more transparent.

I aim to present a political account of rights that can be used as a starting point for a more coherent approach to ECtHR positive obligation cases. I will apply three stages of analysis. First, I will scrutinise Joseph Raz's political philosophy of rights and propose that his account should be read as setting out "double-dimension rights" rather than as an "interest theory" of rights. Secondly, I will scrutinise the legal basis of positive obligation cases (the internal approach) by examining ECtHR case law and legal literature, thereby identifying the legal scope of the Articles 3 and 8 rights. Thirdly, I will apply Raz's political approach to rights (the external approach) to the main legal principles of the rights of Articles 3 and 8 and the positive obligations that may derive from them.

1.4 Methodology

Is it methodologically "correct" to blur the boundaries between the ECtHR's legal reasoning and normative, political or philosophical assessments? I assume that "black letter" lawyers – the former ECtHR judge Franz Matscher, for example – would answer in the negative. Matscher points out that even if legal reasoning is philosophically valid, that is not a sufficient condition for the interpretation of ECHR rights:

> "Even if it is necessary, for purposes of autonomous qualification of a concept in an international convention, to depart from the formal

> qualification given to an institution in the legislation of a given State and to analyse its real nature, this process must never go too far — otherwise there is a danger of arriving at an abstract qualification which may be philosophically valid, but which has no basis in law." (Özturk v Germany, (Plenary), Application no. 8544/79, Judgment of 21 February 1984, Dissenting Opinion of Judge Matscher, B., para. 2).[1]

On the contrary, I argue that, as long as the Court's legal reasoning in positive obligation cases is not coherent, we should scrutinise the normative aspects of the rights and obligations in question. I share the view that "human rights law is not agnostic on values"[2]. The fact "the Court has found positive obligations under almost every Convention right"[3] can be explained by normative aspects of rights that can be defined by a political theory of rights. This book applies methodological pluralism, which encompasses both "internal" and "external" approaches. According to that methodological framework, the law is not just an autonomous apparatus that serves its own purposes and can legitimately be depicted by reference to its own sources (the internal approach); it also relates to moral, ethical and political principles and the perspectives of other social sciences (the external approach).[4]

Following the approach of methodological pluralism, it can be argued that the ECHR is not merely an autonomous device that can be interpreted solely by reference to its own legal principles. The Convention cannot be read merely by reference to its primary and secondary principles, as Greer, for example, argues.[5] It can also be understood from an external perspec-

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1 Quoted in George Letsas, "The Truth in Autonomous Concepts: How To Interpret the ECHR," *European Journal of International Law* 15, no. 2 (2004): 285.

2 Aruna Sathanapally, "Justifying procedural rights review," paper presentation at the Expert seminar on procedural review and the European Court of Human Rights, Ghent, 21-22 May 2015. Quoted in Laurens Lavrysen, *Human Rights in a positive state: Rethinking the relationship between positive and negative obligations under the European Convention on Human Rights*, (Doctoral thesis, University of Ghent, 2016), 27.

3 Laurens Lavrysen, "The scope of rights and the scope of obligations: Positive obligations," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerrards (New York: Cambridge University Press, 2013), 162.

4 Christopher McCrudden, "Legal Research and the Social Sciences," *Law Quarterly Review* 122 (2006), 632, 636-637, 640-641, 642-645.

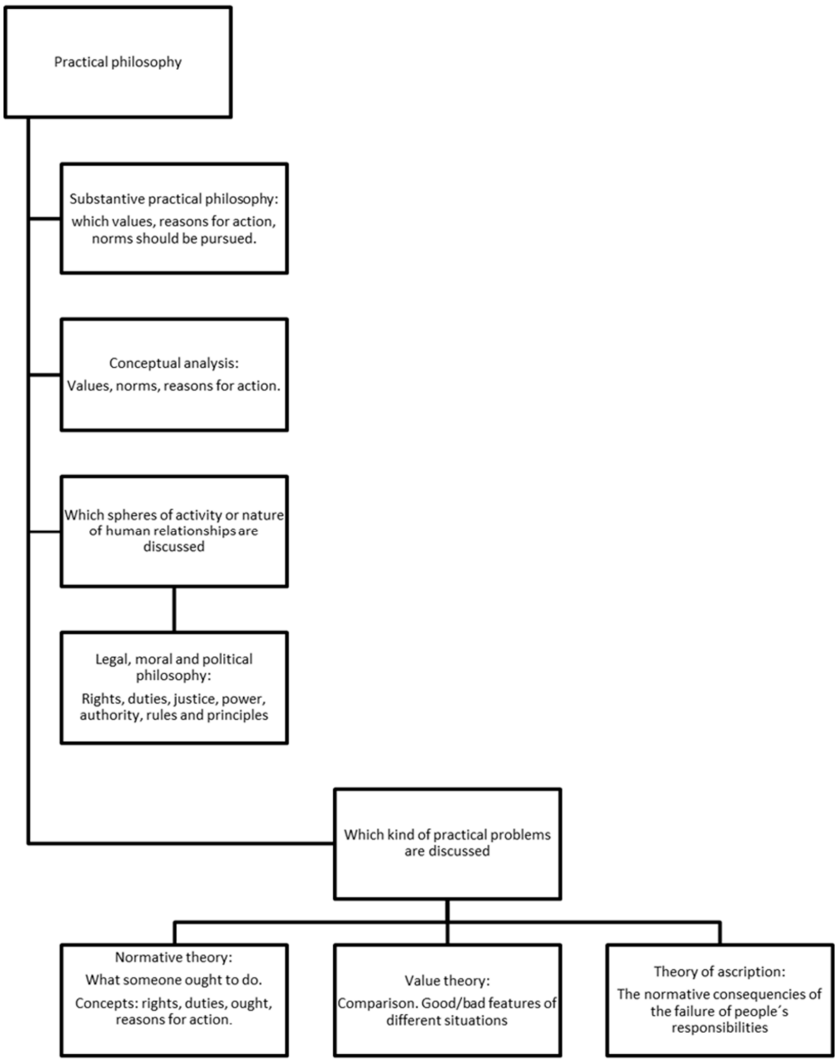
5 For a discussion of Greer's approach and primary and secondary constitutional principles, see section 3.1.1.

tive, which considers the relationship between the ECHR as law, social sciences, and moral, ethical and political principles.

This book also belongs to the broader field of practical philosophy, and the political philosophy of rights and duties in particular. Practical philosophy can be divided into "substantive practical philosophy", "conceptual analysis" and fields that seek to scrutinise "the spheres of activity or nature of human relationships" and different kinds of practical problems. The first attempts to understand which norms are binding, the values someone should pursue and the "reasons for action" that should guide a person's behaviour. The second category scrutinises concepts such as norms, values and reasons for action, seeking to address their logical features. The third branch of practical philosophy concerns legal, moral and political philosophy, and focuses on concepts such as "rights, duties, justice, power and authority, values and principles". The last concerns normative theories, value theories and theories of ascription.[6]

6 Joseph Raz, *Practical Reason and Norms*, (New York: Oxford University Press, 1999), 10-12.

Figure 1: Practical philosophy



Source: Author's compilation.

Given that this book's main objective is to gain a deeper understanding of the relationship between rights and duties – negative and positive – as "spheres of activities and aspects of life" rather than as "practical problems", it will principally use Joseph Raz's political philosophy rather than his nor-

mative theory. However, since there are overlaps between the above categories, it also discusses other relevant issues, including collective goods, values and autonomy, and aspects of legal philosophy.

Furthermore, it is accepted that precedent cases of the courts in general and of the ECtHR in particular, although they are not binding, create rules that, in novel decisions, reveal undiscovered aspects of rights and their relationship with duties. In general, the doctrine of precedent refers to earlier decisions of courts. A precedent can be defined as: a) a set of facts concerning the situation of the case; b) the rules of the case (in ECtHR case law, these rules consists of the principles embedded in the Convention rights); c) the *ratio*, or reasoning, developed by the judges; and d) the result of the decision.[7] This book accepts as a guiding premise Raz's flexible rule-based model, which supports the idea that precedent cases establish "rules". Raz's model holds that the relationship between precedent cases is not solely a "special type of reason", and that the law is a form of a rule-based decision making, rather than case-by-case decision making as in the reason-based model.[8]

Case-by-case decision making is constrained by the doctrine of precedent to the extent that this doctrine requires courts to treat precedent cases as correctly decided *on their facts*.[9] The (English) doctrine of precedent, which Raz accepts, gives courts the flexibility[10] to determine whether an earlier decision should be followed, taking into account the *ratio* of the precedent case.[11] Courts may therefore follow earlier decisions or "change the rule" by distinguishing the precedent decisions from the current case, taking into account the relevance of the facts, since the *ratio* might not apply in the current case. In that sense, "the power to distinguish is a power to develop the law."[12]

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7 John F. Horty, "Rules and reasons in the theory of precedent," *Legal Theory* 17 (2011), 3-5.

8 For the distinction between the rule-based model, according to which precedents create rules, and the reason-based model, see Grant Lamond, "Do precedents create rules?" *Legal Theory* 11 (2005), 1-2, 5-24.
For the distinction between the rule model, the reason model and the result model, according to which the crucial aspect of precedent cases is not the rule but the result, see John F. Horty, "Rules and reasons in the theory of precedent," *Legal Theory* 17 (2011), 3.

9 Grant Lamond, "Do precedents create rules?" *Legal Theory* 11 (2005), 1, 16, 20.

10 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 185.

11 *Ibid*, 184.

12 *Ibid*, 185, 188.

The main difference between the conventional doctrine of precedent accepted by Raz (the rule-based model) and the doctrine of precedent of the reason-based model (case-by-case decision making) is that the starting point for the former is the *ratio(nes)* that justified the courts' decisions,[13] whereas the starting point for the latter is the cases. Therefore, in case-by-case decision making, the court scrutinises the facts as presented by the earlier court and decides "any case with the same facts in the same way."[14] The conventional doctrine of precedent accepts that precedents establish common-law rules in their *rationes* – the *ratio* is a rule[15] – whereas the doctrine of precedent in case-by-case decision making does not.[16] In the reason-based model, the doctrine of precedent does not provide the courts with the power to make law; when a court makes a decision about a case, it does not change the law.[17]

The advantage of the "distinguishing" approach adopted by the reason-based model is that it avoids the problems that may arise from applying the doctrine of precedent on the basis of the *rationes* of earlier decisions. One of the main problems with the conventional doctrine of precedent, which "distinguishing" seeks to confront, is that even if different judges agree on the appropriate result, they may develop different reasons to justify the decision. It is therefore difficult to identify whose *ratio* is binding. In some cases, "no binding ratio is to be found" and "sometimes a decision will fail to issue in a binding ratio."[18]

In pointing out the deficits of the conventional account of the doctrine of precedent, Raz notes that distinguishing may resolve such issues because "to distinguish a binding precedent is simply to determine that its *ratio* does not apply to the instant case."[19] The borders of precedent cases are therefore not fixed, since judges have the flexibility to interpret precedent decisions as forming several rules.[20] That means that rules of precedent are "less binding" than the rules of statutory law, because the courts can modi-

13 *Ibid*, 184.
14 Grant Lamond, "Do precedents create rules?" *Legal Theory* 11 (2005), 15.
15 *Ibid*, 2.
16 "Common law" refers to the laws developed by the decisions of the courts.
17 Grant Lamond, "Do precedents create rules?" *Legal Theory* 11 (2005), 5-26.
18 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 184.
19 *Ibid*, 185.
20 *Ibid*, 185.

fy common-law – case law or precedent – rules by applying "the rule of distinguishing.[21]

Courts can narrow down the rules by applying the rule of distinguishing, but in some cases they may not use distinguishing to do so.[22] Under the flexible rule-based model, courts can exercise a restricted form of law-making by distinguishing precedent cases. The role of distinguishing in the doctrine of precedent implies that courts are always free to change precedents, but for Raz, "in distinguishing courts can only narrow down rules. They cannot extend them." In distinguishing, courts can narrow the rules only by adding a new condition, thereby creating a new rule that does not apply to the current case.[23] However, the court cannot replace the earlier rule with any rule that it wished, even if the new rule restricted the application of the previous one. However, the "modified rule would be a possible alternative basis for the original decision."[24] In some cases, courts may extend the scope of the rules, but Raz shares the view that "there are no formal legal rules about how courts may extend rules."[25] In general, courts avoid making decisions that are too innovative "in order to avoid the need to bear full responsibility for it," or to avoid time-consuming justifications.[26]

This book, applying the methodology described above, discusses ECtHR case law in cases relating to Articles 3 and 8 of the ECHR and the broad field of health issues. It focuses in particular on cases relating to the expulsion of migrants, detention, medical treatment and environmental protection. It tests whether the Court has extended or narrowed the rules of precedent in ECtHR case law and whether it has extended or limited the application of Convention rights. It also tests whether Raz's theory of rights provides an adequate reading of rights and whether there are similarities between the Razian approach to rights and the reasons developed by the ECtHR in its (progressive) precedents.

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21 *Ibid*, 189.
22 *Ibid*, 207.
23 *Ibid*, 186.
24 *Ibid*, 186.
25 *Ibid*, 207.
26 *Ibid*, 208.

1.5 State of the art: negative and positive obligations, negative and positive freedom

The following sections discuss the distinction between negative and positive obligations, and negative and positive rights and freedoms. It is important to study the way that positive obligations have developed under the ECHR, because the way the ECtHR has read the Convention in several cases has blurred the boundary between civil/political rights and social/economic rights, and the related distinction between the negative and positive obligations those rights imply. More specifically, the positive obligation to provide healthcare does not derive directly from the Convention because the positive social right to health is not guaranteed by the ECHR. The Court has nevertheless derived positive obligations to provide healthcare from the Convention rights. The ECtHR accepts that the ECHR rights contain social elements, but also points out that social rights do not fall within the scope of the Convention since they are guaranteed by the European Social Charter (ESC), an independent Council of Europe treaty.

This study focuses on health-related issues and ECHR rights. Is it justified to read negative ECHR rights as implying positive obligations? This would blur the boundary between negative (civil/political) and positive (social/economic) rights. I argue that the ECtHR could apply a liberal theory to justify positive obligations to provide healthcare. The Court cannot use egalitarian theories or develop political reasoning that supports social justice, because that would not be tolerated, and it cannot use communitarian approaches to rights, since the ECHR is not a communitarian treaty. Positive obligations grounded in the ECHR cannot be justified by an egalitarian theory or a communitarian one, since Convention rights are not communitarian and the idea of equality developed by egalitarians is not at the core of the Convention's foundations.

The debate about the division between different forms of rights that imply different duties is founded in international law. There are three generations of human rights in international law. Each generation concerns either negative or positive rights that respectively imply either negative or positive obligations. The ECHR contains first-generation civil and political rights, which conventionally imply negative obligations. However, the idea that there is a clear-cut division between negative and positive rights and obligations has been challenged both in practice by the ECtHR and in theory by contemporary political science.

Although the distinction between negative and positive obligations has been questioned both in theory and in practice, it is commonly accepted

that the Court does not apply a theoretical framework to justify the positive obligations it has read into the ECHR rights, which traditionally lead to negative obligations. This book focuses on the positive obligations to provide healthcare that may derive from the Convention rights, and argues that the most appropriate theoretical framework to justify such positive obligations is Joseph Raz's liberal theory of rights.

1.5.1 State of the art in international law and in political science

As mentioned above, there are three generations of human rights in international law. The first concerns civil and political rights, the second social, economic and cultural rights, and the third solidarity rights.[27] However, the "maximalist" approach to human rights blurs the boundary between them, highlighting that there are social and economic aspects to civil and political rights. According to the maximalist approach, human rights protect human dignity. This implies that the rights to health and food, and other rights that are traditionally conceived of as social rights, are human rights. On the other hand, the "minimalist" approach contends that human rights can be used as a minimum ground to secure mainly fundamental and negative liberties.[28]

Henry Shue (1980) argues that it is a mistake to draw a sharp distinction between negative and positive rights. Negative rights imply that public authorities or individuals should refrain from action, whereas positive rights require authorities or individuals to act positively to protect them. Negative rights therefore imply negative duties, and positive rights imply positive duties. However, Shue contends that the distinction between negative and positive rights is not morally important, and that the conventional "dichotomy between negative and positive rights is intellectually bankrupt."[29] Jack Donnelly (2013) sees the categories "civil/political rights" and "social/

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27 The explicit categorisation of human rights into three generations was mainly initiated in 1979 by the Czech jurist Karel Vašák. See Patrick Macklem, *The Sovereignty of Human Rights*, (New York: Oxford University Press, 2015), 51-52.

28 For the minimalist and maximalist approach of human rights see Eva Brems, "Human Rights: Minimum and Maximum Perspectives," *Human Rights Law Review* 9 (2009). See also Colm O'Cinneide, "The triumph of Human Rights: dream or nightmare?," UCL lectures, 2012. Online access: http://www.ucl.ac.uk/lhl/Spring2012/04_26012012 (last accessed: May 17, 2017).

29 Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, (Princeton, New Jersey: Princeton University Press, 1980), 36-37, 51.

economic/cultural rights" as "seriously misleading" and argues that they can be (mis)read as antithetical.[30]

The ECHR principally protects civil and political rights. It does not protect social rights such as the rights to health, housing and social security, or solidarity rights such as the right to a healthy environment. From the traditional perspective, civil and political rights, or "classical rights", imposer negative obligations: they place a negative duty on states to refrain from action. Second-generation rights – social and economic rights – place a positive obligation on states to act[31] to ensure their fulfilment.

According to the traditional view, Contracting States do not have a positive obligation to act to secure the ECHR rights, since those rights entail only negative obligations.[32] Contracting States therefore have a negative obligation to refrain from action to secure the provisions of the ECHR rights. The traditional interpretation of ECHR rights, in which the rights are conceived of as negative rights that give rise to negative obligations, accords with Isaiah Berlin's approach, according to which negative freedoms imply negative duties.

To the extent that civil and political rights are traditionally related to a state's negative duty to refrain from action or interference, those "classical rights" mainly protect "negative freedom". In political theory, a state's positive and negative obligations to act or refrain from interference relates to the distinction between negative and positive freedom, which was spelled out by Isaiah Berlin (1969) in *Four essays on Liberty.* Berlin defines "negative freedom" as an inviolable "land" within which the individual can act freely and without any interference by anyone. Negative freedom relates to "freedom *from.*"[33]

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30 Jack Donnelly, *Universal Human Rights in Theory and Practice*, (Ithaca and London: Cornell University Press, 2013), 40. This book was first published in 1989 but was extensively revised and updated by Donnelly in 2003 and 2013. This research uses the third edition (2013).

31 Ingrit Leijten, "Defining the scope of economic and social guarantees in the case law of the ECtHR," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerrards (New York: Cambridge University Press, 2013), 110-111.

32 Laurens Lavrysen, "The scope of rights and the scope of obligations: Positive obligations," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerrards (New York: Cambridge University Press, 2013), 162.

33 Isaiah Berlin, *Four essays on Liberty,* (New York: Oxford University Press, 1969), 127.

Berlin writes that "by being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom,"[34] and, "the whole function of law was the prevention of just such collisions: the state was reduced to what Lassalle[35] contemptuously described as the functions of a night-watchman or traffic policeman."[36] According to Ronald Dworkin (2011), it is widely accepted in political theory that the distinction between negative and positive liberty can be demonstrated by two questions: negative freedom concerns the question, "Should I be coerced?", while positive freedom asks, "How much should I be coerced?"[37] He suggests that "we must treat liberty as an interpretive concept" to the extent that there is disagreement about what it is, despite the fact that there is agreement among politicians that it should be respected.[38]

Despite the traditional distinction between negative and positive freedom, negative and positive duties, Jack Donnelly (2013) points out that even "archetypal negative rights", such as the right not to be tortured, also imply positive duties. In practice, the state must act to protect a person's right not to be tortured by introducing and supporting "positive" training and supervision programmes for the police and security forces – programmes that are tremendously expensive.[39] Moreover, as mentioned above, Henry Shue (1980) argues that the distinction between "negative" and "positive" rights is of minor moral significance and incompatible with

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The concept of negative liberty developed by Isaiah Berlin has been challenged by Quentin Skinner, among others. See, for example, Quentin Skinner, "The idea of negative liberty: Philosophical and historical perspectives," in *Philosophy in History: Essays in the Historiography of Philosophy*, ed. Richard Rorty, Jerome Schneewind, and Quentin Skinner (Cambridge: Cambridge University Press, 1984), 193-222.

34 Isaiah Berlin, *Four essays on Liberty*, (New York: Oxford University Press, 1969), 123.

35 Ferdinand Johann Gottlieb Lassalle (1825-1864) was a German-Jewish jurist and philosopher, and is categorised as pre-Marxian socialist, see Phillip J. Bryson, *Socialism: Origins, Expansion, Decline, and the Attempted Revival in the United States*, (Bloomington, Indiana: Xlibris, 2015), 130-131.

36 Isaiah Berlin, *Four essays on Liberty*, (New York: Oxford University Press, 1969), 127.

37 Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Massachusetts: The Belknap press of Harvard University Press, 2011), 365.

38 *Ibid*, 364-371.

39 Jack Donnelly, *Universal Human Rights in Theory and Practice*, (Ithaca and London: Cornell University Press, 2013), 43.

the distinction between civil/political and social/economic rights.[40] Raz (1988) shares the idea that freedom has both negative and positive aspects, meaning that both negative and positive obligations are required for it to be realised. Accordingly, the realisation of freedom requires several capacities, including health, to be secured.[41]

For Raz, unlike Dworkin, liberty is not an interpretative notion. Furthermore, he rejects Berlin's idea that freedom is related solely to negative obligations to refrain from interference. He develops an autonomy-based doctrine of freedom. For him, negative freedom is valuable not because it indicates that the state or other authorities must refrain from interference, but because "it serves positive freedom and autonomy,"[42] meaning that the preservation of freedom justifies the demand of both negative and positive obligations. In Razian thinking, freedom is closely related to autonomy; positive freedom refers to autonomy as capacity.[43] For him, the principle of

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40 Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, (Princeton, New Jersey: Princeton University Press, 1980), 51. See also Jack Donnelly, *Universal Human Rights in Theory and Practice*, (Ithaca and London: Cornell University Press, 2013), 42-43.

41 Amartya Sen has developed a similar approach, the "capability approach", which can be used to justify the provision of healthcare. Sen supports the view that freedom requires the existence of choices and opportunities, so people can pursue the life they choose. The capability approach concerns all members of a society and leads to a worthwhile life and well-being. It has been compared with Aristotle's social and political ethics and the importance of capability for social evaluation in Aristotelian thought. See Jennifer Prah Ruger, "Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements," *Yale Journal of Law & the Humanities* 18 (2006), 293-295. In that article, the following relevant contributions are mentioned: Aristotle, *Nicomachean Ethics*; see Αριστοτέλης [Aristotle], *Ηθικά Νικομάχεια [Nicomachean Ethics],* (μτφρ. Φιλολογική ομάδα Κάκτου), (Αθήνα: Κάκτος, 1993); Amartya Sen, *Inequality Reexamined* (Cambridge: Harvard University Press, 1992); Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).
For the capability approach as developed by economist Amartya Sen and philosopher Martha Nussbaum, see Grace Y. Kao, *Grounding Human Rights in a Pluralist World* (Washington, DC: Georgetown University Press, 2011), 101-130; see also Martha Nussbaum and Amartya Sen, *The Quality of Life*, (Chicago: University of Chicago Press 1993), published to Oxford Scholarship Online: November 2003, see the online version at: http://www.oxfordscholarship.com/view/10.1093/0198287976.001.0001/acprof-9780198287971.

42 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 410.

43 *Ibid*, 409.

autonomy gives rise not only to negative obligations of non-interference but to positive duties.[44]

For Raz, "the principle (of autonomy) requiring people to secure the conditions of autonomy for all people, yields duties which go far beyond the negative duties of non-interference, which are the only ones recognised by some defenders of autonomy."[45] So-called autonomy-based duties towards persons[46] are grounded in the value of the autonomous life and refer to an obligation to secure autonomy as capacity, meaning an obligation to secure the conditions that help people develop their inner capacities, including cognitive capacities and "health, and physical abilities and skills."[47] For Raz, positive freedom is the capacity of autonomy that requires "both the possession of certain mental and physical abilities and the availability of an adequate range of options."[48] Positive freedom "derives its value from its contribution to personal autonomy. Positive freedom is intrinsically valuable because it is an essential ingredient and a necessary condition of the autonomous life. It is a capacity whose value derives from its exercise. This provides the clue to its definition."[49]

That approach to freedom and autonomy demonstrates that, in Razian thinking, the traditional distinction between negative and positive duties is flawed, since not only negative but positive obligations may be associated with "negative freedoms" and civil and political rights alike. Accordingly, in practice, not only is the distinction between negative and positive duties flawed, but the distinction between so-called first and second-generation rights is not clear-cut.

That is the case because the ECHR rights may indirectly lead not only to positive obligations but to social rights. The Court itself has pointed out that the division between first and second-generation rights is not strict, since the spheres of civil and political rights, and economic and social rights, are themselves not clearly separated[50]. Although the Court has argued that many of the Convention rights "have implications of a social and

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44 *Ibid*, 425.
45 *Ibid*, 408.
46 *Ibid*, 407.
47 *Ibid*, 408.
48 *Ibid*, 408.
49 *Ibid*, 409.
50 Ingrit Leijten, "Defining the scope of economic and social guarantees in the case law of the ECtHR," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerrards (New York: Cambridge University Press, 2013), 112.

economic nature,"[51] it nevertheless asserts that social rights are excluded from the scope of the ECHR because they are contained in the European Social Charter, a distinct and independent legal instrument.[52] However, a significant body of the Court's case law[53] protects aspects of those rights, and in a considerable number of cases the Court has decided that civil and political rights contain or encompass social elements.[54]

ECtHR case law confirms that, in practice, there is a correlation between negative and positive duties. In a large number of cases, the Court has asserted that states have a positive obligation to act to protect an ECHR right. The positive obligations implied by the Court's decisions are justified on the grounds that the exercise of the Convention rights must be "practical and effective."[55] Further, "the Court has found positive obligations under almost every Convention right."[56] The Court has implicitly developed "doctrine of positive obligations"[57] in its jurisprudence. Therefore,

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51 ECtHR decision in *Airey v. Ireland* (Chamber), in Ingrit Leijten, "Defining the scope of economic and social guarantees in the case law of the ECtHR," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerrards (New York: Cambridge University Press, 2013), 112.

52 Virginia Mantouvalou, "Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation," *Human Rights Law Review* 13:3 (2013), 531-532.

53 For example, see *Darby v. Sweden* (Chamber); *Van Raalte v. Netherlands* (Chamber); *Gaygusuz v. Austria* (Chamber); *Willis v. United Kingdom* (Fourth Section); *Michael Matthews v. United Kingdom* (Third Section); *Vasilopoulou v. Greece* (First Section). These cases are mentioned in Lisa Conant, "Individuals, Courts, and the Development of European Social Rights," *Comparative Political Studies* 39 (2006), 91.

54 Ida Elisabeth Koch, "Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective," *The International Journal of Human Rights* 10 (2006), 405.

55 Alistair R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, (Oxford-Portland Oregon: Hart Publishing, 2004), 2, 196-198, 221.

56 See Laurens Lavrysen, "The scope of rights and the scope of obligations: Positive obligations," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerrards (New York: Cambridge University Press, 2013), 162.

57 Council of Europe, "Manual on Human Rights and the Environment," 2nd ed. (Strasbourg: Council of Europe Publishing, 2012), 35. (Reports and manuals that were not written by individual authors are quoted according to the directions I received in email correspondence with the Council of Europe, Case-Law Information and Publications Division).

in some cases ECHR rights may indirectly impose on public authorities a duty to act to guarantee such rights.[58]

It is nevertheless necessary to scrutinise the positive obligations under the Convention rights, because the ECtHR has not developed a general theory of positive obligations. This book presents a reconstruction of the Razian theory of rights and identifies similarities between Raz's theory and the reasoning developed by the Court in positive obligation case law. Where such similarities are identified, Raz's theory of rights is used as a theoretical framework for the justification of positive obligations that the Court has read in ECHR rights. In cases where differences prevailed, Raz's theory may indicate that Convention rights might be expanded to realise their potential for containing positive obligations in respect of healthcare. This book argues that the way the Court has interpreted Convention rights in some cases accords with Raz's approach. Indeed, as mentioned above, for Raz, the traditional division between negative and positive freedoms and the respective negative and positive obligations is not clear-cut; there is no clear separation between negative and positive duties. In Razian thought, the autonomy-based doctrine of freedom holds that states have both negative and positive obligations.

Is the Razian liberal theory of rights the only theory in the analytical tradition of political philosophy that can underpin such a justification, or can positive obligations to provide healthcare also be derived from communitarian or egalitarian liberal theories? If the latter is the case, why was the Razian theory of rights chosen? The following section seeks to answer those questions.

1.5.2 State of the art and positive obligations to health care

According to Carens (1986), most contemporary liberal political theories focus mainly on rights and downplay positive duties. Although we might expect positive social duties to be absent from a libertarian theory such as Robert Nozick's, that is not the case for theories that develop more egalitarian liberal principles. However, Carens observes that positive duties are not explicitly present in the theories developed by egalitarian liberals such as John Rawls and Ronald Dworkin.[59] Nevertheless, scholars have used

58 *Ibid*, 35.

59 Joseph H. Carens, "Rights and Duties in an Egalitarian Society," *Political Theory* 14 (1986), 31.

both Rawls's and Dworkin's theories in connection with the provision of healthcare.

In *A Theory of Justice*, Rawls (1999) develops the idea that principles of justice that maximise the minimum level of primary goods can be chosen by rational persons who are in a hypothetical original position of equal liberty and act (hypothetically) under a veil of ignorance about their personal position in society. Those principles will allocate basic rights and duties, and define the division of social benefits.[60] The principles chosen in the initial contractual situation will be "contrary to utilitarianism and perfectionism."[61] For Rawls, health is a natural good that is influenced by the basic structure of society, but it is "not so directly under its control."[62] In his theory, "the question of health care does not arise."[63] Rawls neglects health in *A Theory of Justice* because no society can guarantee it to its members. However, in *The Law of Peoples*, he regards health as one of the primary goods that derive from the "fair equality of opportunity" and are allocated to individuals.[64]

In the literature, some notions of the Rawlsian theory have been used to justify healthcare. For example, Norman Daniels argues that healthcare may be a means of reaching the Rawlsian "fair equality of opportunity". Daniels does not support the view that Rawlsian theory can secure the right to health as a basic human right, but he stresses that healthcare can be seen as a social ideal that may give rise to particular legal rights.[65] For Rawls, a minimum level of welfare should be secured to provide equal access to liberties and equality of opportunity. Rawls's "difference principle" has been read as imposing on everyone the positive duty to distribute their talents.[66] However, Rawls does not use the word "duty" in this context; rather, he develops the idea that the difference principle implies the need

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60 John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1999), 10, 118-123.

61 *Ibid*, 14.

62 *Ibid*, 54.

63 *Ibid*, 83-84.

64 Jennifer Prah Ruger, "Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements," *Yale Journal of Law & the Humanities* 18 (2006), 282-283.

65 J. C. Moskop, "Rawlsian justice and a human right to health care," *The Journal of medicine and philosophy* 8, no. 4 (1983), 329-338.

66 Anthony Kronman reads Rawls's distribution of natural talents as a positive duty. See Anthony T. Kronman, "Talent Pooling," *Nomos* 23 (1981). It is mentioned in Joseph H. Carens, "Rights and Duties in an Egalitarian Society," *Political Theory* 14 (1986), 38-39.

"to regard the agreement" to distribute people's natural talents.[67] The difference principle treats such talents and skills as a "common asset", but this does not mean society owns them. Talents and skills are owned by individuals, but their benefits are distributed by a structure of rules in such a way that they "work to everyone's advantage." In Rawls's conception of justice, morally arbitrary contingencies of birth will be mitigated.[68]

Daniels (2008) conceives Rawls's democratic equality as a complex form of egalitarianism. For him, health issues such as diseases and disabilities can be captured by the Rawlsian index of primary social goods, so one of the goals of democratic equality is to protect individuals' positive freedom (or capabilities).[69] Democratic equality rests on Rawls's first and second principles. The fair equality of opportunity and the difference principle, which both constitute principles of justice in the Rawlsian second principle, limit inequalities. In particular, the fair equality of opportunity principle aims to reduce socioeconomic inequalities, and has been related to healthcare. According to Daniels (2008), in the Rawlsian theory of justice, access to healthcare is required to limit socioeconomic inequalities. Moreover, educational equality is pursued to confront the negative results of race and class, but educational equality and educational levels are also conceived of as crucial social determinants of health.[70] Thus, if we accept Daniels' reading of the Rawlsian theory of justice, a society may have a positive obligation to provide access to healthcare to serve Rawls's principles of justice, with the aim of reducing inequalities arising from the morally arbitrary distribution of natural assets, namely the talents and skills individuals derive from the natural lottery.[71]

Carens (1986) argues that, although Rawls does not admit it, his principles could require a kind of social duty.[72] Carens develops his argument using three elements of Rawls's theory: the difference principle, the back-

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67 John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1999), 87.

68 Norman Daniels, "Democratic Equality: Rawls's Complex Egalitarianism," in *The Cambridge companion to Rawls*, ed. Samuel Freeman, Cambridge companions to philosophy (Cambridge: Cambridge University Press, 2008), 251, 255.

69 *Ibid*, 271.

70 *Ibid*, 257-262, 271.

71 John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1999), 63-65, 65-68, 89-90, 329.

72 Joseph H. Carens, "Rights and Duties in an Egalitarian Society," *Political Theory* 14 (1986), 31-32.

ground institutions of distributive justice, and natural duties.[73] In the (hypothetical) Rawlsian original position, natural duties would be agreed. Natural duties are not necessarily connected to institutions or social practices, and they encompass both negative and positive duties. Positive natural duties include mutual aid – in other words, the duty to help someone who is in need or in danger[74] – mutual respect, the duty to support (and to comply with) just institutions (to support justice),[75] and the duty to make good use of one's talents.[76] Ultimately, however, such positive duties place requirements on individuals[77] and cannot be used as a basis for a positive obligation on states to provide healthcare.

Positive obligations on communities to provide healthcare can be justified by Ronald Dworkin's account of distributional equality. Dworkin accepts two theories of distributional equality: the equality of welfare and the equality of resources. The objective of both is to treat people as equals. The former aims to distribute or transfer resources among individuals "until no further transfer would leave them more equal in welfare." The latter relates to the idea that individuals are treated as equals when resources are distributed in such a way that "no further transfer would leave their shares of the total resources more equal."[78]

Dworkin argues that societies have a positive obligation to provide healthcare to individuals for health issues caused by "brute luck". However, they do not have a positive obligation to contribute to the health insurance of an individual who is in need because of "option luck". If an individual faces health problems because of their own choices – due to a skiing accident, for example – it is not legitimate to claim that public or private insurers must provide them with medical treatment, because their illness was caused by a voluntary risk rather than by natural inequalities.[79]

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73 *Ibid*, 38.

74 John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1999), 98.

75 For a diagram showing the Rawlsian positive and negative natural duties see John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1999), 94.

76 *Ibid*, 99.

77 *Ibid*, 94.

78 Ronald Dworkin, "What Is Equality? Part 1: Equality of Welfare," *Philosophy & Public Affairs* 10, no. 3 (1981), 186-220.

79 *Ibid*. See also Norman Daniels, "Democratic Equality: Rawls's Complex Egalitarianism," in *The Cambridge companion to Rawls*, ed. Samuel Freeman, Cambridge companions to philosophy (Cambridge: Cambridge University Press, 2008), 253-254.

Communitarian theorists such as Michael Waltzer advance a relativist account of justice and healthcare. From this point of view, the distribution of social goods is not governed by the principle of justice. However, principles are constructed internally by human societies, which constitute "spheres of justice". Therefore, whether healthcare is conceived of as a special good depends not on a universal concept of justice but on a community's shared principles and values. Thus, what constitutes health, or "good" health, may vary from community to community from the outset. However, although the meaning of good health is assessed within a given community, from a communitarian perspective, a positive obligation to provide healthcare might derive from the primary features of health conceived of as having priority in order to evaluate political arrangements.[80]

I argue that communitarian and egalitarian liberal theories cannot be used to justify the positive obligations on states to provide healthcare that are implied by the ECHR rights, for two main reasons. First, ECHR rights have liberal, not communitarian, foundations. Therefore, communitarian perspectives, irrespective of their plausibility, are incommensurable with ECHR rights because of their divergent legal foundations. Secondly, the positive obligations to provide healthcare that derive from egalitarian theories aim mainly to ameliorate social inequalities. Dworkin's account of liberal distributional equality does not refer to individual rights such as the Convention rights. He argues that distributional equality "is not concerned with […] individual rights other than rights to some amount or share of resources."[81] Furthermore, ECHR rights are not egalitarian and, unlike Rawls's theory, do not directly support a welfare state. The ECHR is not an egalitarian text that seeks to overcome social inequalities to promote and support a social welfare state. The Council of Europe treaty that plays that role and could be interpreted with egalitarian liberal theories is the European Social Charter, which guarantees social and economic rights.

This book is inspired by the idea that the positive obligations to provide healthcare that derive indirectly from the ECHR rights can be justified by a theory with foundations similar to the ECHR's. Therefore, although such

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80 Jennifer Prah Ruger, "Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements," *Yale Journal of Law & the Humanities* 18 (2006), 281-282. This article references Michael Walzer, "The Communitarian Critique of Liberalism," *Political Theory* 18, no. 1 (1990), 6; and Michael J. Sandel, ed., *Liberalism and its critics*, Readings in social and political theory (New York: New York University Press, 1984).

81 Ronald Dworkin, "What Is Equality? Part 1: Equality of Welfare," *Philosophy & Public Affairs* 10, no. 3 (1981), 186.

positive obligations can be justified by several approaches, this book applies a liberal theory to ECtHR case law because the ECHR is a liberal text. The Convention is not a communitarian text. Neither is it egalitarian, to the extent that it is not founded on the ideal of equality. Although liberal rights assume a form of ideational equality, that kind of equality is based on the equal (imagined) worth of the individual, who is thus inviolable, rather than on the equal opportunity or equal outcome that egalitarian theories pursue.

As long as egalitarian liberalism supports a form of welfare state, it is incompatible with both the ECHR and the reasoning developed by the ECtHR, since it is not legitimate for the Court to regulate the welfare policies of the Contracting States. This book aspires to demonstrate that the positive obligations to provide healthcare that derive indirectly from purely liberal individual rights can be justified by a liberal theory of rights without invoking theories that are disconnected from the Convention rights. That may raise the question whether a political theory developed by a philosopher can be applied to the practice of a court and used to read a legal text. In addressing precisely that concern, chapter 2 discusses the relationship between the practice of courts, the law and theories of law.

1.6 Why Joseph Raz's theory of rights?

I do not argue that Raz's account of rights constitutes the foundation of human rights in general or of ECHR rights in particular, since "there is no 'one-size-fits-all' theory of human rights, either of their moral foundations, nor of their scope."[82] The aim of this book is to present a basis for establishing some starting points for ameliorating the ECtHR's practice. I intend to demonstrate how the Razian approach to rights provides an accurate and deeply intuitive understanding of the scope of human rights and the correlated prima facie positive obligations of a State. But why use Joseph Raz's approach in particular? First, unlike other contemporary theories of rights, Raz's account can be used to scrutinise the relationship between rights and duties, since he "suggests that in practical terms the specific role of rights is to ground duties."[83] Raz notes that one of the central themes of his rights is

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82 George Letsas, *A theory of interpretation of the European Convention on Human* (Oxford: Oxford University Press, 2007), 25.

83 Michael Freeman, "The Philosophical Foundations of Human Rights," *Human Rights Quarterly* 16 (1994), 512.

that, on the grounds of right-holders' well-being, "having a right" implies duties.[84]

Secondly, Razian double-dimension rights provide a political account of rights that escapes the concepts of "minimally good life"[85] and "minimum core obligations",[86] and places rights in the arena of the ideal of autonomy, the autonomy-based doctrine of freedom and the concepts of worthwhile life and collective goods. Accordingly, Razian rights may impose a positive obligation on states to take proper steps to secure the conditions for a life that fosters an individual's well-being – a "worthwhile life", not just a "minimally good life".

Thirdly, the Razian approach to rights escapes an "individualistic" approach, because it sees the objective of human rights as not only to safeguard individual well-being but to protect and preserve collective goods. Fourthly, unlike other liberal theories, which support the idea of a neutral state, the Razian liberal theory concerns a perfectionist state, which may have both negative and positive obligations.

Why should we take seriously the relationship between rights and collective goods? Scrutiny of the correlation between rights and "collective goods", "collective goals" or "public interests" is crucial for four reasons. First, since the ECtHR is used to address the relationship between rights and public interests, or individual freedoms and collective goals (the *substantive* concept),[87] and the Court tries to balance rights and public inter-

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84 Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 255.

85 According to James Nickel, social rights preserve the "minimally good life", which means they tend to protect some standards of a "decent life", focusing on the worst problems, and their scope does not extend to the preservation of "the highest possible standards of living". One might suggest that individual rights in the ECHR fulfil the same role: the preservation of a "minimally good life". Nickel proposes the "Vance conception" of rights, which includes healthcare and education as human rights that serve vital needs. In his view, social and economic rights could be kept "minimal" in order also to be realised in poorer countries. For the notion "minimally good life", see James W. Nickel, "Poverty and Rights," *Philosophical Quarterly* 55, no. 220 (2005), 386-392. See also Kimberley Brownlee, "A Human Right against social deprivation," *The Philosophical Quarterly* 63, no. 251 (2013), 201-205.

86 Ingrit Leijten, "Defining the scope of economic and social guarantees in the case law of the ECtHR," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerrards (New York: Cambridge University Press, 2013), 116, 125-134.

87 George Letsas, *A theory of interpretation of the European Convention on Human* (Oxford: Oxford University Press, 2007), 80-81, 128, 130.

ests or collective goals, the meaning of the term "public interests" should be clarified and distinguished from the term "collective goods or interests", which may not be in tension with rights.

Secondly, because many approaches adopt the idea that there is a tension between rights and public interests, or an "inherent tension between individual freedoms and collective goals,"[88] the notion "public interests" should be clarified to outline its different meanings and qualities, and to shed light on the so-called tension between collective goods and rights, and between rights and the economic account of public interests. To balance individual rights and collective goals, we must conceive of rights as part of a broader concept of political morality,[89] so we must take seriously a theory that places rights in such a political concept.

Thirdly, it is crucial to identify the relationship between individual rights and collective goods because in some cases collective judgments and intentions may not accord with the intentions or judgments of individuals.[90] Last but not least, because the idea of collective goods can be used to justify positive obligations as aspects of individual rights, endorsing the correlation between rights and collective goods may shed light on the social functions of human rights.

Raz's theory of rights was selected for scrutinising the relationship between rights, collective goods and positive duties to provide healthcare for one further reason: perfectionist theories in general seek to balance individual rights and public goods.[91] Accepting that assumption, Raz was chosen because he is a perfectionist liberal thinker whose theory provides an alternative view of rights. His account in particular protects autonomy, but he attempts to bridge the gap between rights and collective goods by proposing that rights depend on and serve collective goods, which is the principal reason that rights are preserved.[92]

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88 *Ibid*, 89.

89 *Ibid*, 90.

90 Philip Pettit, *A theory of freedom: From the psychology to the politics of agency* (Oxford: Oxford University Press, 2001), 115.

91 George Letsas, *A theory of interpretation of the European Convention on Human* (Oxford: Oxford University Press, 2007), 102.

92 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 251-252, 255-256, 261-262; see also Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 52-53, 57, 59.

CHAPTER 2: Background question: Jurisprudence and human rights

2.1 Background question and jurisprudence

This study relates not only to political theory, but to jurisprudence, as it seeks to reach a deeper understanding of Convention rights and the legal reasoning in ECtHR case law. Although its purpose is to apply Raz's political theory of human rights – not his legal theory – to ECtHR case law, it is concerned with the role of both the law and the courts.

It is often said that one of the principal problems with the law, and with jurisprudence in general, is that there is no theory that can give answers to all theoretical disputes about the law. This relates to most legal texts, and the ECHR in particular. The problem is not only that we lack an ideal theory that can resolve all disagreements about the law, but that the nature of the disagreements is not always intelligible to legal or political philosophers.[93] Although there is no agreement about which theory can best resolve the theoretical disputes about the law, this study proposes that Raz's political theory of rights and his legal theory (exclusive legal positivism) can give a more plausible account of the law and legal reasoning in cases that relate to human rights and states' positive obligations. Debates about legal theory revolve around two principal, interrelated considerations: the role of the law, and the role of the courts and their precedents.

In legal theory, the understanding of how judges develop their argumentation depends on how the law is conceived. Different schools of thought have different conceptions of the law's role and function. Theories of law can be divided into to two main categories. The first distinguishes between legal formalism and legal realism, and the second distinguishes between natural law theories and legal positivism. However, these categories overlap and are divided into sub-categories with variations in their understanding of the law and its adjudication. According to Jules Coleman (2009), the debates within contemporary analytic jurisprudence can be broken down into legal positivism vs. natural law theories, legal realism vs. legal formal-

93 Ronald Dworkin, *Law´s Empire* (Cambridge, Massachusetts: The Belknap press of Harvard University Press, 1986), 6-7.

ism, legal positivism vs. Dworkinian/interpretivist approaches, and inclusive vs. exclusive legal positivism.[94]

Some jurisprudence scholars conceive of the law as a self-contained textual system (legal formalism), and others conceive of it as an incomplete system that requires non-legal considerations to be taken into account when a case is adjudicated (legal realism). There are also debates about the relationship between law and morality. Some scholars claim that there is necessarily a connection between law and morality (natural law theory); whereas others argue that law and morality are not necessarily connected, and that the law is constituted by social, not normative facts (legal positivism). Some scholars conceive of the law as a practice of interpretation. Debates in contemporary analytic jurisprudence continuously seek to address "the relationship between law and morality, the nature of adjudication, and constraints on the criteria of legality."[95]

This chapter presents the main philosophical approaches to these issues and highlights several important points that various scholars have rejected. However, it is beyond the scope of this study to discuss in detail every aspect of these approaches and the differences between them. The purpose of the following sections is to present the main accounts of jurisprudence that deal with the role of the law and courts, in order to shed light on the different approaches to the law is and how it is read by judges.

2.1.1 Legal formalism

Legal formalism (or analytic jurisprudence) is a theory of adjudication that seeks to articulate how judges decide cases and how they ought to do so.[96] It considers the law to be a self-contained system of rules, or a textual system.[97] It is thus a kind of "mechanical jurisprudence".[98] Judges develop

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94 Jules L. Coleman, "Beyond Inclusive Legal Positivism*," *Ratio Juris* 22, no. 3 (2009), 359-360.

95 *Ibid*, 360.

96 Brian Leiter, "Positivism, Formalism, Realism: Reviewed Work: Legal Positivism in American Jurisprudence by Anthony Sebok," *Columbia Law Review* 99, no. 4 (1999), 1144.

97 Richard A. Posner, "Legal formalism, legal realism, and the interpretation of statutes and the constitution," *Case Western Reserve Law Review* 37, no. 2 (1986), 186.

98 According to Green, the term "mechanical jurisprudence" comes from the legal realist Roscoe Pound. See Roscoe Pound, "Mechanical Jurisprudence," *Columbia*

their legal reasoning and find answers to legal questions through the "mechanical application" of the law[99]. The law is considered to be a gapless and complete system whose formal structure contains the answer to all legal questions. Questions about justice, politics or morality are distinct from questions about the law; consequently, legal reasoning is separate from considerations about morality and the social sciences.[100] For legal formalists, adjudications are "logical deductions":[101] courts make decisions by applying deductive logic to authoritative premises that derive from the law itself.[102] Formalists maintain that judicial discretion can threaten democracy. Judges must be strictly restricted by the objective meaning of the law itself, because "if unelected judges exercise much discretion in these cases, democratic governance is threatened."[103] Formalists are concerned that overly loose interpretations of the law in effect change the law, and they think that judges do not have this authority.

Law Review 8, no. 8 (1908). It is quoted in Michael S. Green, "Legal realism as theory of law," *William & Mary Law Review* 46, no. 6 (2004), 1982.

99 Brian Leiter, "Legal Formalism and Legal Realism: What is the Issue?," *Legal Theory* 16, no. 02 (2010): 7, and Scott Veitch, Emilios A. Christodoulidis and Lindsay Farmer, *Jurisprudence: Themes and concepts*, 2nd ed. (London: Routledge, 2012), 118.

100 Brian Leiter, "Positivism, Formalism, Realism: Reviewed Work: Legal Positivism in American Jurisprudence by Anthony Sebok," *Columbia Law Review* 99, no. 4 (1999): 1146. Leiter refers to Anthony James Sebok, *Legal positivism in American jurisprudence*, Cambridge studies in philosophy and law (Cambridge: Cambridge University Press, 1998), 79, 80, 82.

101 Michael S. Green, "Legal realism as theory of law," *William & Mary Law Review* 46, no. 6 (2004), 1982.

102 Richard A. Posner, "Legal formalism, legal realism, and the interpretation of statutes and the constitution," *Case Western Reserve Law Review* 37, no. 2 (1986), 181-182, 184.

103 Brian Leiter, "Positivism, Formalism, Realism: Reviewed Work: Legal Positivism in American Jurisprudence by Anthony Sebok," *Columbia Law Review* 99, no. 4 (1999), 1144. Leiter refers to William N. Eskridge Jr., "The New Textualism," *UCLA Law Review* 37, no. 621 (1990), 621-691.

2.1.2 American legal realism

Legal formalism has been challenged by American legal realism, and vice versa.[104] Legal realist scholars, including Oliver Wendell Holmes,[105] Karl Llewellyn, Leon Green, Jerome Frank, Underhill Moore, Roscoe Pound and Benjamin Cardozo,[106] are concerned with "what judges *really* do."[107] Legal realism is characterised by rule-scepticism – the idea that judges' decisions cannot solely be based on the rules contained within the law, because these rules are never concrete and specific. Judges take non-legal considerations into account when deciding cases because statutory law is "too indeterminate".[108]

American legal realism focuses on the "law in action". Most legal realist scholars think that the law is in flux, that it is shaped by judges, and that its interpretation must accord with its purpose.[109] The law is conceived of as an "argumentative practice" that reflects morality and politics. Judicial decision-making is based on experience, which may be shaped by "the prevalent moral and political theories," or by the biases of the judges themselves.[110] Several Marxist approaches and critical legal studies adopt a radical version of legal realism. These versions of realism criticise formalist approaches to the rule of law, considering them "an important myth legitimating an inherently oppressive system, a symbolic/ideational device to make injustice seem morally acceptable to its victims."[111] From the perspective of legal realism, interpreting the law must strike a balance between

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104 Richard A. Posner, "Legal formalism, legal realism, and the interpretation of statutes and the constitution," *Case Western Reserve Law Review* 37, no. 2 (1986), 181.

105 "The Path of the Law" by Oliver Wendell Holmes (1897) is conceived as predecessor of the American legal realism. Michael S. Green, "Legal realism as theory of law," *William & Mary Law Review* 46, no. 6 (2004), 1936-1937.

106 Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton, N.J.: Princeton University Press, 2009), 1.

107 Brian Leiter, "Legal Formalism and Legal Realism: What is the Issue?," *Legal Theory* 16, no. 02 (2010), 2-3.

108 Michael S. Green, "Legal realism as theory of law," *William & Mary Law Review* 46, no. 6 (2004), 1918.

109 Scott Veitch, Emilios A. Christodoulidis and Lindsay Farmer, *Jurisprudence: Themes and concepts*, 2nd ed. (London: Routledge, 2012), 124-125.

110 See Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 457, no. 10 (1897), 460-461, it is quoted in Scott Veitch, Emilios A. Christodoulidis and Lindsay Farmer, *Jurisprudence: Themes and concepts*, 2nd ed. (London: Routledge, 2012), 125.

111 *Ibid*, 131.

constructing/interpreting the legal text, its adaptability, and the realisation of rights.

2.2 Legal positivism, natural law theory and legal non-positivism

The distinction between legal formalism and legal realism is an important way of categorising the different schools of legal theory. As mentioned above, another way to categorise theories of law is to distinguish between natural law theories on the one hand and legal positivist theories on the other hand. The distinction between legal positivism and legal non-positivism is also prominent in jurisprudence. However, natural law theory has some similarities with legal non-positivism. These divisions are discussed in the next sections.

2.2.1 Natural law theory

In the traditional form of natural law theory, positive law and morality are necessarily connected. Positive law is therefore a kind of universal moral law, and valid positive law accords with natural law. For traditional natural law theorists, morality derives from human nature; therefore, "moral truths are to be derived from truths about human nature."[112] Although natural law theorists generally consider values to be objective and accessible to human reason, there is no single definition of natural law theory. Contemporary or modern natural law theories are distinct from classical or traditional ones.[113]

Aristotle, Thomas Aquinas and Marcus Tullius Cicero belong to the category of classical natural law theory.[114] However, thinkers who adopt Thomas Aquinas's approach are generally distinguished from those who

112 Brian Bix, "On the dividing line between natural law theory and legal positivism," *Notre Dame Law Review* 75, no. 5 (1999), 1614-1615.

113 Brian Bix, "Natural Law: The Modern Tradition," in *The Oxford handbook of jurisprudence and philosophy of law*, ed. Jules L. Coleman, Scott Shapiro and Kenneth E. Himma (Oxford, New York: Oxford University Press, 2004), 64-66.

114 Brian Bix, "On the dividing line between natural law theory and legal positivism," *Notre Dame Law Review* 75, no. 5 (1999), 1622-1623.

do not.[115] Contemporary natural law theorists include Ronald Dworkin, Lon Fuller, John Finnis, Germain Grisez and Robert George. The last three thinkers are generally distinguished from conventional natural law theory, as they express a minority point of view.[116] Modern natural law theorists consider legal rules to be "what law really is" (e.g. Ronald Dworkin) or "what law must try to be" (e.g. Lon Fuller).[117] Natural law theorists have developed a natural theory of rights, according to which human rights are natural and human beings are right-holders simply as human beings. This natural theory of rights is discussed later.[118]

2.2.2 Legal positivism and legal non-positivism

Some scholars consider legal formalism to be a form of legal positivism,[119] while others argue that there is no conceptual connection between formalism and positivism.[120] Although legal positivism contains many sub-categories, they all derive from the premise that the law is a social institution – a set of social facts (the "social thesis"),[121] rather than a set of normative

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115 Brian Bix, "Natural Law: The Modern Tradition," in *The Oxford handbook of jurisprudence and philosophy of law*, ed. Jules L. Coleman, Scott Shapiro and Kenneth E. Himma (Oxford, New York: Oxford University Press, 2004), 66.

116 Brian Bix, "On the dividing line between natural law theory and legal positivism," *Notre Dame Law Review* 75, no. 5 (1999), 1615.

117 Brian Bix, "Natural Law: The Modern Tradition," in *The Oxford handbook of jurisprudence and philosophy of law*, ed. Jules L. Coleman, Scott Shapiro and Kenneth E. Himma (Oxford, New York: Oxford University Press, 2004), 67.

118 See section 2.3.1.

119 Anthony Sebok points out the similarities between positivism and formalism. See Anthony James Sebok, *Legal positivism in American jurisprudence,* Cambridge studies in philosophy and law (Cambridge: Cambridge University Press, 1998), 108. It is referred to in Brian Leiter, "Positivism, Formalism, Realism: Reviewed Work: Legal Positivism in American Jurisprudence by Anthony Sebok," *Columbia Law Review* 99, no. 4 (1999), 1139.
When Leiter's review is quoted in this study, the relevant references in Anthony Sebok's book will also be quoted.

120 Brian Leiter points out that, contrary to Anthony Sebok's view, there is a conceptual distance between positivism and formalism. See *ibid*, 1138, 1150-1153.

121 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 37. See also Michael S. Green, "Legal realism as theory of law," *William & Mary Law Review* 46, no. 6 (2004), 1940. See also Brian Leiter, "Positivism, Formalism, Realism: Reviewed Work: Legal Positivism in American Jurisprudence by Anthony Sebok," *Columbia Law Review* 99, no. 4 (1999), 1138.

facts.[122] Legal positivists of the 18th and 19th centuries such as Jeremy Bentham and John Austin developed an account called "classical positivism".[123] In his analysis of classical positivism, Sebok (1998) distinguishes between "the command theory of law" and "the source thesis." The command theory of law relates to the idea that law is an expression of human will. This idea is rejected by contemporary positivists. The source thesis relates to the idea that valid legal norms depend on their sources, not on moral arguments.[124] Contemporary legal positivists include H.L.A. Hart, Jules Coleman and Joseph Raz.[125] Joseph Raz points out that "legal positivism is essentially independent (even though not historically unrelated) both of the positivism of nineteenth-century philosophy and of the logical positivism of the present century."[126]

In contemporary analytic jurisprudence, there is a distinction between legal positivism and legal non-positivism. According to Robert Alexy[127] (2008), these two approaches have different conceptions of the *nature* and *concept* of law, and therefore of the relation between law and morality. They both agree that moral arguments are necessary in the legal reasoning of the adjudication of a decision,[128] but they disagree about how such ar-

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122 Jules L. Coleman, "Beyond Inclusive Legal Positivism"," *Ratio Juris* 22, no. 3 (2009), 369.

123 Brian Leiter, "Positivism, Formalism, Realism: Reviewed Work: Legal Positivism in American Jurisprudence by Anthony Sebok," *Columbia Law Review* 99, no. 4 (1999), 1138.

124 *Ibid*, 1141.
According to Austin, valid legal systems relate to the command of a sovereign person or sovereign group of people. Michael S. Green, "Legal realism as theory of law," *William & Mary Law Review* 46, no. 6 (2004), 1940.

125 H.L.A. Hart and Joseph Raz were both influenced by Hans Kelsen. Kelsen acknowledges that there is scope for free discretion at all levels of legal norm production, but he denies that the judges have the right to generate new law arbitrarily by referring to the (nomological) construction of law (Stufenbau der Rechtsordnung). Hans Kelsen, *Pure theory of law*. Translation: Max Knight (Berkeley and Los Angeles: University of California Press, 1967).

126 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 37.

127 In the debate about legal positivism and legal non-positivism, Aelxy mentions the "Radbruch formula", according to which the law has a double dimension – an ideal one and a pragmatic one. Alexy himself supports the view that the law has a double nature (dual-nature thesis). Robert Alexy, "On the concept and the nature of law," *Ratio Juris* 21, no. 3 (2008), 281-283.

128 Joseph Raz, "On the Autonomy of Legal Reasoning," *Ratio Juris* 6, no. 1 (1993): 7-9. It is quoted in Robert Alexy, "On the concept and the nature of law," *Ratio Juris* 21, no.3 (2008), 283.

guments are interpreted. These two distinctive approaches relate to judges' self-understanding. For legal positivists, when judges apply the law, they must distinguish between moral and legal viewpoints.[129] Dworkin (1982) criticises legal positivist theories that conceive of the propositions of law as "pieces of history", or past decisions made by institutions.[130] Dworkin (1986) highlights legal positivism's interpretive defects: in contestable legal questions "there cannot be 'right' answers", but "only 'different' answers."[131]

According to Brian Leiter (1999), most legal positivist theories of the law incorporate both the "social thesis", which conceives of the law as a social fact, and the "separation thesis", which distinguishes between what the law *is* and what it *ought to be*.[132] According to Alexy (2008), legal positivist theories are based on the "separation thesis",[133] according to which "there are no necessary connections" between what the law is and what it ought to be, whereas legal non-positivists adopt the "connection thesis" – the view that there is an indispensable connection between law and morality, and therefore legal validity relates to the moral merits or demerits of the law.[134] Legal non-positivism can be divided into exclusive, inclusive, and super-inclusive branches.[135] It may even be claimed that "non-positivism" is another term for "natural law theories".[136] The principal variants of legal positi-

129 Robert Alexy, "On the concept and the nature of law," *Ratio Juris* 21, no.3 (2008), 283.

130 See Ronald Dworkin, "Law as interpretation," *Texas Law Review* 60 (1982), 528, 529.

131 Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: The Belknap press of Harvard University Press, 1986), viii.

132 Brian Leiter, "Positivism, Formalism, Realism: Reviewed Work: Legal Positivism in American Jurisprudence by Anthony Sebok," *Columbia Law Review* 99, no. 4 (1999), 1141-1142.

133 As the general category for legal positivism, Alexy mentions the "separation thesis", whereas Leiter mentions the "separabilty thesis". However, these two terms are not identical. According to Alexy, inclusive positivism supports the "separability thesis" according to which "there are no necessary connections" between "what the law is" and "what the law ought to be". Exclusive positivism maintains the "separation thesis", which implies that "there are necessarily no connections" between these two questions. See Robert Alexy, "On the concept and the nature of law," *Ratio Juris* 21, no.3 (2008), 286, footnote 5.

134 *Ibid*, 285.

135 *Ibid*, 286-290.

136 Alexy refers to La Torre, who uses the terms inclusive and exclusive natural law, instead of inclusive and exclusive non-positivism. In particular, Alexy refers to

vism are inclusive legal positivism and exclusive legal positivism.[137] Inclusive legal positivist scholars include H.L.A. Hart, Jules Coleman[138] and Wilfrid Waluchow, and exclusive legal positivist scholars include Joseph Raz and Scott Shapiro. Ronald Dworkin's[139] account of adjudication is considered a non-positivist approach.[140]

Jeremy Bentham and the ruling theory of law

Jeremy Bentham's ruling theory of law is a general theory of law formed of a conceptual and a normative part. The conceptual part of Bentham's theory relates to legal positivism, and the normative part relates to economic utilitarianism.[141] The ruling theory of law has been criticised by so-called "left"[142] political approaches for being rationalistic and individualistic because it rejects the idea that the law is made by "an implicit general or corporate will," and instead focuses on the law as a product of "explicit social practice or institutional decision."[143] Moreover, as Dworkin writes, left critics "believe that the formalism of legal positivism forces courts to substitute a thin sense of procedural justice, which serves conservative social policies, for a richer substantive justice that would undermine these policies."[144]

Furthermore, economic utilitarianism has been criticised as an individualistic account of law, because it considers the law's goal to be the "overall

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Massimo La Torre, "On Two Distinct and Opposing Versions of Natural Law: "Exclusive" versus "Inclusive"," *Ratio Juris* 19, no. 2 (2006): 200, 207. See Robert Alexy, "On the concept and the nature of law," *Ratio Juris* 21, no.3 (2008), 287, footnote 8.

137 Robert Alexy, "On the concept and the nature of law," *Ratio Juris* 21, no.3 (2008), 285-286.

138 Coleman states that, although he has been associated with inclusive legal positivism, he is "more closely associated with corrective justice in tort law". See Jules L. Coleman, "Beyond Inclusive Legal Positivism"," *Ratio Juris* 22, no. 3 (2009), 364, footnote 11.

139 Colleman points out that many scholars have exclusively associated Dworkin with the natural law theory. See *ibid*, 360, footnote 2.

140 Robin B. Kar, "Hart's Response to Exclusive Legal Positivism," *Georgetown law Journal* 95 (2006), 393.

141 Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), ix.

142 *Ibid*, x.

143 *Ibid*, x.

144 *Ibid*, x.

or average welfare". Economic utilitarianism is considered to be individualistic because the "overall or average welfare" relates to "the welfare of distinct individuals"; it does not conceive of communities as having independent interests.[145] This approach reflects Bentham's definition of common welfare as the "greatest happiness for the greatest number of people", and the idea that the interest of the community is "the sum of the interests of the several members who compose it."[146]

Moreover, opponents of economic utilitarianism characterise it as unjust, as "it perpetuates poverty as a means to efficiency". The anthropology of this approach has been criticised as deficient, as it conceives of individuals "as self-interested atoms of society rather than as inherently social beings whose sense of community is an essential part of their sense of self."[147] It may therefore be concluded that economic utilitarianism is unable to offer a theory that can simultaneously serve the interests of individuals and the interests of the community.

H.L.A. Hart and open-textured language of the law

H.L.A. Hart articulates one of the more influential contemporary versions of the conceptual part of the ruling theory of law: legal positivism.[148] For Hart, the ultimate explanation a law's validity depends on a set of social facts (the "social thesis"). In other words, a law is ultimately explained by the beliefs, attitudes and behaviour of a population. If the law is seen as a set of facts, this can help to explain why it provides reasons for action – in other words, it explains the normativity of the law.[149] According to Dworkin[150] (1978), the four main attributes of Hart's approach are the "discretion thesis", the "separability thesis", the idea that "legal norms are

145 *Ibid*, x.

146 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, [first ed. 1781], (Kitchener: Batoche Books, 2000), 15.

147 Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), x.

148 *Ibid*, ix.

149 Michael S. Green, "Legal realism as theory of law," *William & Mary Law Review* 46, no. 6 (2004), 1940.

150 Coleman refers to Dworkin´s objections against Hart. See Jules L. Coleman, "Beyond Inclusive Legal Positivism"," *Ratio Juris* 22, no. 3 (2009), 365. For Dworkin´s objections against Hart see also Ronald Dworkin, "The Model of Rules," *The University of Chicago Law Review* 35, no. 14 (1967), 14-46.

rules" and the idea that the "rule of recognition" distinguishes legal rules from other rules.[151] Hart criticises the rule-scepticism of the legal realists.[152] He also conceives of rule-scepticism as a theory of adjudication;[153] he stresses that rules are "rules of adjudication" and thus cannot predict what judges will decide.[154]

For Hart, the law has an open-textured language, which makes it indeterminate at the margins; however, unlike the legal realists, he does not consider it to be indeterminate at its core.[155] Consequently, judges enjoy judicial discretion (the "discretion thesis"). This is most obvious in "hard" cases, when judges take into account not only formal, but substantive and non-legal political or moral considerations.[156] For Hart, rules of law are valid if they were created by a legislature – statutory law – were established by custom,[157] or are precedents that were created by judges in adjudicating a case.[158] Hart conceives of rules as comprising not only legal rules, but principles.[159] The law is open to interpretation because it may contain gaps, or because it may seem inapplicable because the rules cannot foresee

151 Jules L. Coleman, "Beyond Inclusive Legal Positivism?," *Ratio Juris* 22, no. 3 (2009), 365-366.

152 See Herbert L. A. Hart, *The concept of law*, 3rd ed., Clarendon law series (Oxford: Oxford University Press, 2012). It is referred in Michael S. Green, "Legal realism as theory of law," *William & Mary Law Review* 46, no. 6 (2004), 1917-1918.

153 Michael S. Green, "Legal realism as theory of law," *William & Mary Law Review* 46, no. 6 (2004), 1918.

154 Scott Veitch, Emilios A. Christodoulidis and Lindsay Farmer, *Jurisprudence: Themes and concepts*, 2nd ed. (London: Routledge, 2012), 132.

155 Michael S. Green, "Legal realism as theory of law," *William & Mary Law Review* 46, no. 6 (2004), 1918.

156 Jules L. Coleman, "Beyond Inclusive Legal Positivism," *Ratio Juris* 22, no. 3 (2009), 366.

157 Unlike Hart, Austin supports the view that in order for customary practices to be conceived as law, the courts must recognise them as law. This is the case, because for Austin law is the command of a determinate sovereign, and thus custom cannot be considered law unless the courts, as the agents of the sovereign, recognise it as such. See Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), 41-42.

158 *Ibid*, 40.

159 *Ibid*, 59.

all possible contingencies.[160] According to Hart, rights and duties exist because social practice recognises them.[161]

The hermeneutic approach

According to Hans-Georg Gadamer's philosophical hermeneutics, for someone to understand a text (or an event), they do not have to "scientifically" analyse it. On the contrary, a text must be interpreted using the model of "speech-partners who come to an understanding (Verständigung)."[162] Traditionally, "hermeneutics" conceives of "itself as an art or technique".[163] In hermeneutics, "understanding" is a process that consists of three distinct elements, which require a "particular finesse of mind", rather than "methods". These elements are understanding (subtilitas intelligendi), interpretation (subtilitas explicandi) and application (subtilitas applicandi).[164] The main objective of hermeneutics is "to explore what understanding *is* rather than what it *ought to* be."[165] The hermeneutic approach has a horizontal and a vertical structure: in interpreting the law, a person must bring into harmony the "past-present meeting" (the horizontal structure)[166] and the "text-context meeting" (the vertical structure).[167]

For example, in the case of the law, the "historical" dimension of hermeneutics brings together the past and the present: the law is interpreted in the light of the contemporary conditions. The task of the interpreter

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160 Jules L. Coleman, "Beyond Inclusive Legal Positivism," *Ratio Juris* 22, no. 3 (2009), 366.

161 Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), 48. Dworkin refers to Herbert L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).

162 Charles Taylor, "Gadamer on the Human Sciences," in *The Cambridge Companion to Gadamer,* ed. Robert J. Dostal. 126-142. (Cambridge: Cambridge University Press, 2002), 126.

163 Hans-Georg Gadamer, *Truth and method*, translation revised by: Marshall, Donald G; Weinsheimer, Joel, Continuum impacts 2nd, rev. ed. (London, New York: Continuum, 2004), 268.

164 *Ibid*, 306.

165 Ida Elisabeth Koch, "Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective," *The International Journal of Human Rights* 10 (2006), 423.

166 For the "Horizontal Structure of the Hermeneutic Circle" and its application on the ECHR see *ibid*, 417-419.

167 For the "Vertical Structure of the Hermeneutic Circle" and its application on the ECHR see *ibid*, 419-423.

is to reconstruct the situation, not the intention of the drafters of the law.[168] In other words, the interpreter's task is to give a form to a law by interpreting it: "a law does not exist in order to be understood historically, but to be concretized in its legal validity by being interpreted." "Formerly it was considered obvious that the task of hermeneutics was to adapt the text's meaning to the concrete situation to which the text is speaking."[169]

In hermeneutics, the role of the "interpreter" is similar to that of a translator interpreting a discussion. Their task "is not to repeat" the dialogue word for word, but "to express what is said in the way that seems most appropriate", taking into account "the real situation of the dialogue."[170] Understanding and applying[171] the law requires a similar procedure. For the law to be understood and applied properly, the role of the "interpreter" of the law "is not to repeat" the legal text, but to interpret it "at every moment, in every concrete situation, in a new and different way",[172] taking into account the "claim" that it makes. This is the "vertical structure" (the text-context meeting) of hermeneutics, because the interpretation brings together the text and the context of the law.

Charles Taylor (2002) writes that one of the greatest challenges in the 21st century is "understanding the other" – namely, other cultures and times – without taking Western culture as a norm, but also without being relativistic and undermining objectivity and truth in human affairs. Gadamer's philosophical hermeneutics can help us to avoid these tensions and understand "alien societies and epochs."[173] In legal theory, contemporary hermeneutics was initially articulated by Martin Heidegger and Hans-Georg Gadamer. Ronald Dworkin's theory of law in *Law's Empire* (1986) was, to an extent, influenced by the legal interpretation of Gadamer's philosophical hermeneutics in *Truth and Method.*[174]

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168 *Ibid*, 418.

169 Hans-Georg Gadamer, *Truth and method*, translation revised by: Marshall, Donald G; Weinsheimer, Joel, Continuum impacts 2nd, rev. ed (London, New York: Continuum, 2004), 307.

170 *Ibid*, 307.

171 *Ibid*, 308.

172 *Ibid*, 307-308.

173 Charles Taylor, "Gadamer on the Human Sciences," in *The Cambridge Companion to Gadamer,* ed. Robert J. Dostal. 126-142. (Cambridge: Cambridge University Press, 2002), 126, 140-142.

174 Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: The Belknap press of Harvard University Press, 1986), 419-420, footnote 2.

Non-positivism: Ronald Dworkin and law as a practice of interpretation

According to Ronald Dworkin, "law is a political enterprise". If it has a general purpose, it is to co-ordinate between "social and individual effort," to resolve "social and individual disputes," or to secure justice.[175] Dworkin is an opponent of legal positivism[176] and supports the view that in most "hard" cases, complex questions of law and political morality have "a single right answer," not "answers":[177] "the no-answer-thesis is hostile to the rights thesis"[178] that he supports. For him, the law is not only a system of rules, which in "hard" cases the judges have a strong discretion to interpret according to their "own preferences."[179]

There are two principal elements to Dworkin's approach to the law. First, in contrast to the positivists, he considers that the law is not just made up of formal rules; rather, it comprises rules and principles.[180] Judges take into account not only "black-letter" legal rules, but legal principles that are not established in statutory law.[181]

To the extent that principles are law, a legal obligation can be imposed not only by a statutory rule, but "by a constellation of principles."[182] In "hard" cases, and in the absence of the rules of the law, the decision of a judge is based on the principles derived from the law, not on their moral standing. Thus, according to Dworkin, judges do not exercise discretion in the strong sense, because the principles that they rely on derive from and are part of the law.[183] Even in "hard" cases, they exercise weak discretion, because their answers are found in legal principles that are simply discovered, not "invented" by the courts.[184]

Secondly, Dworkin's theory of law that conceives of the law as a practice of interpretation. He describes interpretation as a "general activity" and

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175 Ronald Dworkin, "Law as interpretation," *Texas Law Review* 60 (1982), 543-544.
176 Dworkin develops a criticism of legal positivism, referring mainly to the account of H. L. A. Hart as the clearest example of legal positivism. See Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), 47.
177 *Ibid*, 279.
178 *Ibid*, 280, 282-283.
179 *Ibid*, 37.
180 *Ibid*, 35, 37, 39.
181 *Ibid*, 46, 111.
182 *Ibid*, 44.
183 *Ibid*, 38-39.
184 *Ibid*, 81.

a "mode of knowledge."[185] Legal interpretation is not an attempt to discover the intentions of the author of the legal text – in other words, it does not aim to discover the intentions of the actors (e.g. legislatures or judges) involved in the legal process.[186] Judges adjudicating case law must be regarded as partners "in a complex chain enterprise". The history of this "enterprise" includes conventions, past decisions and past case law. The judge's job is to interpret "what has gone before," in order "to advance the enterprise in hand," and "to continue that history into the future through what they do", rather than give directions of their own.[187] For Dworkin, the law is not solely the text of the law, but the practice of interpretation. However, even in hard cases judges do not play the role of legislator; they have judicial discretion to interpret the law and find principles that exist within it. They do not legislate new rights and make new law. On the contrary, if unelected judges act as legislators, this would have a negative impact on the values of representative democracy[188] – it would "stand in contrast" to the values of representative democracy.

In the adjudication of hard cases, two concepts are applied: the concept of the "legislative purpose" and the concept of "common law principles". The former relates to the intention or purpose of a specific statute, and the latter relates to the principles that are "'embedded in' the positive rules of law" and the doctrine that like cases should be treated alike.[189] In these terms, in courts' decisions, the reasons developed by the judges contain precedents and principles. In adjudicating cases, judges take into account precedent decisions; for Dworkin, the gravity of precedent decisions is related to the doctrine that like cases should be decided alike.[190] The binding component of a precedent decision is not its *ratio* (reason), but the *principles* that justified it. However, these principles are not just those that applied to the precedent case; later courts are bound by the principles that give the best justification for the decisions that fall within "the body of

185 Ronald Dworkin, "Law as interpretation," *Texas Law Review* 60 (1982), 529.
186 *Ibid*, 546-547.
187 *Ibid,* 543.
188 Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), 84-85.
189 *Ibid*, 105.
190 *Ibid*, 112-113.

cases to which the precedent belongs."[191] Dworkin develops the "rights thesis", which also contains a theory of precedent courts' decisions.[192]

2.3 Background question and human rights

As the previous sections indicate, different schools of thought give different accounts of the role of the law and the way that (hard) cases are adjudicated by courts. The same is true of human rights: there is no general agreement about how questions relating to human rights should be articulated either in theory or in practice, and how unregulated or partly-regulated cases should be adjudicated. As Freeman (1994) pointed out, "some hope that a clarification of the 'philosophical foundations' of human rights will solve the theoretical problems and thereby indicate how practical problems ought to be solved."[193] However, although the notion of human rights appeared in the Western world in the mid-17th century,[194] there is still no agreement about the definition and the role of human rights. Questions relating to the foundations of rights, the obligations of a state or the relationship between rights and duties have been articulated in different ways from various theoretical streams, and by the followers of different theoretical schools, including natural law theorists, legal positivists and legal non-positivists.

There are not only many definitions of rights, but many categories of theories of rights. For example, the tradition of analytical legal theory distinguishes between the "will theory" (or "choice theory") of rights and the "interest theory" (or "benefit theory"). Both focus on the relationship between rights and duties.[195] Wesley Newcomb Hohfeld, for instance, distinguishes between rights that imply claims and rights that give liberties. Hohfeld develops a theory of legal rights containing eight normative pos-

191 Grant Lamond, "Do precedents create rules?" *Legal Theory* 11 (2005), 2.

192 Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), 89.

193 Michael Freeman, "The Philosophical Foundations of Human Rights," *Human Rights Quarterly* 16 (1994), 511.

194 Jack Donnelly, *Universal Human Rights in Theory and Practice*, (Ithaca and London: Cornell University Press, 2013), 81.

195 Jeremy Waldron, *Nonsense upon stilts: Bentham, Burke and Marx on the Rights of Man* (London and New York: Methuen, 1987), 162.

itions.[196] These theories of rights will not be discussed in this chapter because the interest theory of rights is addressed in the next chapter and because Hohfeldian rights are not relevant to the purposes of this study.

2.3.1 Natural theories of rights

Human rights are defined differently in different schools of thought and contexts. For example, lawyers may think of human rights as legal rights that are guaranteed by international treaties – in other words, they may adopt a legal positivist position. On the contrary, natural theories of rights consider human rights to be "a contemporary idiom for natural rights."[197] For legal or political theorists who follow natural law theories, the term human rights is synonymous with "natural rights" or "moral rights". For example, John Finnis uses the terms "human rights" and "natural rights" synonymously, but he also uses the terms "natural" and "legal".[198] He points out that "this vocabulary and grammar of rights is derived from the language of lawyers and jurists, and is strongly influenced by its origins. […] our concern is primarily with the human or natural rights that may be appealed to whether or not embodied in the law of any community."[199] The idea of natural rights has its roots deep in history.[200] Natural rights theorists support the view that all people hold natural rights simply as human beings. Natural rights, which originate in human nature, pre-exist the rights that are posited by sovereign law or contracts. Some of the most prominent natural rights theorists are John Locke, Hugo Grotius, Thomas Hobbes and Samuel Pufendorf.[201]

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196 Rowan Cruft, "Rights: Beyond Interest Theory and Will Theory?," *Law and Philosophy* 23, no. 4 (2004), 349-355.

197 John Finnis, *Natural Law and Natural Rights*. 5th ed. (New York: Oxford University Press, 1988), 198.

198 For example, see "…in terms of rights, human or natural, or legal," *ibid*, 211.

199 *Ibid*, 198.

200 According to some scholars, a kind of natural rights can be observed even in ancient Athens. Ellen F. Paul, Fred D. Miller and Jeffrey Paul, eds., *Natural rights liberalism from Locke to Nozick* (Cambridge: Cambridge University Press, 2005), vii. Nevertheless, I should point out that the contemporary conception of rights did not exist in ancient Athens.

201 Hugo Grotius (1625) claims that human beings have duties in all cases. See Hugo Grotius, *The Rights of War and Peace, including the Law of Nature and of Nations: translated from the Original Latin of Grotius, with Notes and Illustrations from*

Natural theories of rights were initially conceived in opposition to claims of the existence of "natural hierarchy". For example, Locke attacked the "divine right of kings" with the idea of "natural equality". Accordingly, he claimed that all individuals, as creatures of God, are equal, born free and hold natural rights, which cannot be alienated by society. In these terms, nature is a divine creation and natural rights are grounded on a kind of divine law.[202] For Hobbes, natural rights relate to the social contract – an agreement among the people living in a territory to establish institutions to protect their lives and rights.[203]

In the 19th century, the debate about natural rights was overshadowed by the rise of utilitarianism. At the end of the 18th century, the idea of natural rights was criticised by scholars such as David Hume and Jeremy Bentham. Hume rejected Locke's theory of natural rights, and Bentham criticised the French Declaration of Rights of 1789, contending that "natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, -nonsense upon stilts."[204] The legal positivist Bentham claimed that the noun "right" must always refer to "legal rights" in both descriptive and normative accounts.[205]

Political and Legal Writers, by A.C. Campbell, A.M. with an Introduction by David J. Hill (New York: M. Walter Dunne, 1901 ed. [1625]).
Thomas Hobbes and Samuel Pufendorf were opponents of this claim. They stated that moral conduct may be useful, but it is not obligatory and does not lead to duties. According to their approach, moral conduct becomes obligatory through sovereign power and sanctions, see Christine M. Korsgaard et al., *The Sources of Normativity*, 14th Ed. (Cambridge: Cambridge University Press, 2010), 7, 104-105.

202 John Locke, *Second Treatise of Government*, ed. C. B. Macpherson, (Indianapolis: Hackett Publishing Company, 1980), Chapter II, para.5, Chapt. V, IX. See also Jeremy Waldron, *Nonsense upon stilts: Bentham, Burke and Marx on the Rights of Man* (London and New York: Methuen, 1987), 7-14.

203 See Thomas Hobbes, *Leviathan*, ed. A. P. Martinich and Brian Battiste, Toronto: Broadview Editions, 2011, XVIII. For both Hobbes and Locke see Martin Loughlin, *Sword and scales: An examination of the relationship between law and politics* (Oxford, Portland, Or.: Hart Publishing, 2000), 161-178. See also Jeremy Waldron, *Nonsense upon stilts: Bentham, Burke and Marx on the Rights of Man* (London and New York: Methuen, 1987), 7-19.

204 Jeremy Bentham, "Anarchical Fallacies; being an examination of the Declaration of Rights issued during the French Revolution," in *Nonsense upon stilts: Bentham, Burke and Marx on the Rights of Man,* ed. Jeremy Waldron, 46-76 (London and New York: Methuen, 1987), 53.

205 Jeremy Waldron, "A Right-Based Critique of Constitutional Rights," *Oxford Journal of Legal Studies* 13, no. 1 (1993), 23.

The publication of Robert Nozick's *Anarchy, State and Utopia* revived the debate about natural rights.[206] In modern philosophy, two of the main natural theories of rights are the deontological approaches articulated by Robert Nozick and Ronald Dworkin. Nozick developed a right-based moral theory. He adopted John Locke's notion of natural rights, sharing the view that the right-based argument justifies a minimal state. Nozikian rights act as ethical "side constraints". For him, the ideal state is a minimal state that acts as a night-watchman.[207] This theory of rights can mainly defends the classical conception of "negative freedom", according to which the state has mainly negative duties.[208] Nozick accepts the Kantian principle that "individuals are ends and not merely means," and claims that "individuals are inviolable."[209] Nozick's rights are anti-utilitarian and anti-consequentialist. He does not accept the view that the rights of one individual can be violated in order to secure the rights of more individuals or to promote the happiness of the greatest number of people. He thus firmly re-

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206 Ellen F. Paul, Fred D. Miller and Jeffrey Paul, eds., *Natural rights liberalism from Locke to Nozick* (Cambridge: Cambridge University Press, 2005), viii.

207 For the ΄minimal state΄ in Nozick΄s approach see Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell Publishers, 1999), ix, 24-25, 26-28, 114, 149, 333.
Some may claim that the "ultraminimal state" could exist before Nozick's minimal state (see *ibid*, 113, 119). The "ultraminimal state" is a social arrangement that has a monopoly on the legitimate use of force (*ibid*, 26, 114). Its aim is to protect rights against violation (*ibid*, 27) and protect individuals from injustice – but not all of them. The ultraminimal state protects only its "clients" – namely, it protects only individuals who have bought a protection contract (*ibid*, 26). The de facto monopoly of force is morally justified, mainly because of the principle of compensation (*ibid*, 115); (for compensation principle, see *ibid*, 57-58, 78-79, 81-87, 114-115). The "minimal state", or the night-watchman state, protects everyone. In other words, it protects both clients and non-clients (*ibid*, 114). The minimal/night-watchman state provides protective services and is financed from tax revenues (*ibid*, 27). It could be said that, in Nozick's approach, there is first the "state of nature", then the "ultraminimal state", and finally a minimal/night-watchman state can be established. For Nozick the "minimal state" is morally legitimate and is the ideal form of state, not least because a more extensive state may violate individual rights. He claims that a "minimal state" "best realizes the utopian aspirations of untold dreamers and visionaries," (*ibid*, 333).

208 Γιώργος Ν. Πολίτης, *Ελευθερία και Εξουσία: Καταστατικές αρχές κοινωνικής φιλοσοφίας*. (Αθήνα: Γιώργος Ν. Πολίτης, 2010), 165.

209 Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell Publishers, 1999), 30-31.

jects a "utilitarianism of rights."[210] In these terms, the purpose of rights is to secure a person himself. In Nozick's thought, rights act as ethical side constraints, in the sense that it is not morally justified to sacrifice the right of an individual in the name of a collective goal, a public interest, or a "greater overall *social* good."[211] One of the criticisms of natural rights is that believing in them is like believing in witches and unicorns:[212] there is simply no way to prove or disprove their existence.

2.3.2 Ronald Dworkin's natural theory of rights

Ronald Dworkin has developed a modern theory of natural rights.[213] However, his natural rights are not metaphysical. They are not conceived of as "spectral attributes worn by primitive men like amulets" and are not grounded in a "hypothetical contract"; rather, they are ontological. Unlike the legal positivists, Dworkin considers rights not to be solely the product of legislation, convention, or social custom.[214] Moreover, his natural rights are independent grounds for judging legislation and social custom.[215] Dworkin sets out a "constructive model of natural rights", which implies that a theory is always present in the application of his rights. The foundations of his natural rights are based on "beliefs of justice" that are retained not because they have been discovered by other beliefs but because "they seem right". At the same time, conclusions about justice are generated when "theories" are tested against individuals' intuitions. These intuitions are not laid down by "independent moral principles that exist 'out there'".

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210 *Ibid*, 28.
For the notion "utilitarianism of rights", see also Michael Freeman, *Human Rights*: *An interdisciplinary approach* (Cambridge: Polity Press, 2004), 69.

211 Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell Publishers, 1999), 33.

212 This is a famous criticism spelled out by the communitarian Alasdair Macintyre, see Alasdair C. MacIntyre, *After virtue: A study in moral theory,* Bloomsbury revelations series (London: Bloomsbury, 2007), 69.

213 Danny Shapiro, "Does Ronald Dworkin Take Rights Seriously?," *Canadian Journal of Philosophy* 12, no. 3 (2013), 417-418. In this article Danny Shapiro develops a criticism against Dworkin´s account of rights.

214 Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), 176.

215 *Ibid*, 177. See also Michael Freeman, "The Philosophical Foundations of Human Rights," *Human Rights Quarterly* 16 (1994), 499-500.

Rather, they are established features "of a general theory to be constructed."[216]

The aspect of Dworkin's rights that is particularly relevant to this study is the distinction between rights and collective goals. Dworkin postulates that individual rights are established by "arguments of principle", and that collective goals are established by "arguments of policy". Unlike collective goals, rights have an individual aim or goal. Dworkin therefore supports the view that rights "trump" collective goals.[217] Moreover, collective goals may be subordinated to an aggregate collective good if benefiting one person can be justified on the basis that it leads to greater overall benefit.[218] On the contrary, an aggregate good is unable to limit a right; Dworkin's rights are strongly anti-utilitarian. People have rights even if they defeat or work against "some collective, non-individuated goal."[219] Thus, for Dworkin, collective goals and rights are separate. Collective goods have mainly a utilitarian shape. From this perspective, rights may conflict with collective goals and aggregate collective goods.

2.3.3 Deontological, rights-based theories and consequentialist accounts of human rights

One more classification of rights approaches distinguishes between deontological theories of rights (e.g. the approaches of Robert Nozick and Ronald Dworkin) as opposed to consequentialist[220] account of rights. Unlike

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216 See Michael Freeman, "The Philosophical Foundations of Human Rights," *Human Rights Quarterly* 16 (1994), 499. See also Anthony J. Langlois, "Human Rights and Modern Liberalism: A Critique," *Political Studies* 51, no. 3 (2016), 515.

217 Michael Freeman, "The Philosophical Foundations of Human Rights," *Human Rights Quarterly* 16 (1994), 508.

218 Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), 90-91.

219 Danny Shapiro, "Does Ronald Dworkin Take Rights Seriously?," *Canadian Journal of Philosophy* 12, no. 3 (2013), 418.

220 For Bernard Williams, "consequentialism" is broader than utilitarianism. "Utilitarianism is *one sort* of consequentialism". Specificlaaly, it focuses on happiness. However, there are several views of the relationship between consequentialism and utilitarianism. Bernard Williams, "A critique of utilitarianism," in *Utilitarianism For and Against*, ed. by J. J. C. Smart and Bernard Williams. 77-150, (New York: Cambridge University Press, 1998), 79.

utilitarian[221] theories, deontological theories of rights give priority to rights over other consequentialist considerations. Deontological theories of rights, such as Robert Nozick's, consider that utilitarianism downplays the difference between people. Moreover, "the punishment of an innocent" could be acceptable from a utilitarian perspective. Nozick's theory of rights is clearly anti-utilitarian.[222] Ronald Dworkin proposes a categorising of right-based, duty-based and goal-based political theories, taking into account the more *basic judgments* that are articulated by these approaches and support derivative judgments. However, Joseph Raz shows that there are basic and derivative rights, but his reasoning is not exclusively directed by a right-based approach.[223]

None of the more significant theories of rights, from deontological theories on the one hand to consequentialism on the other, can effectively solve the problem of the correlation between rights and collective goods. In cases in which individual rights give birth to positive duties (e.g. those involving healthcare), deontological theories (e.g. Nozick's and Dworkin's approaches) lead either to an individualistic account of rights, or to an account that conceives of rights and collective goods as being in competition. Thus, they cannot provide adequate answers to questions about healthcare or other positive duties on states that derive from individual rights. Consequentialism and deontology have both been criticised as individualistic theories, as they reject the idea that collective goods can play a crucial role in the institutionalisation of rights.

By giving strict priority to the individual and their freedom to design and choose their life plans at will, deontology – for example, Nozick's right-based theory – can imply that collective goods can be maginalised in the name of the individual. As Raz (1988) points out, "right-based moral theories are usually individualistic moral theories" and "do not recognize

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221 Waldron (1987) states that democracy was conceived as the political expression of a utilitarian moral theory, in the sense that the greater number of votes expresses the interest of the majority and may reflect the greatest happiness of the greatest number of people. Jeremy Waldron, *Nonsense upon stilts: Bentham, Burke and Marx on the Rights of Man* (London and New York: Methuen, 1987), 161.

222 See *ibid*, 161. For discussion about "the punishment of an innocent", see Smart, who uses the example of H. J. McCloskey, in *Utilitarianism For and Against*, ed. by J. J. C. Smart and Bernard Williams. 77-150, (New York: Cambridge University Press, 1998), 69-70.

223 Jeremy Waldron, "A Right-Based Critique of Constitutional Rights," *Oxford Journal of Legal Studies* 13, no. 1 (1993), 20.

any intrinsic value in any collective good."[224] Deontologist theories lead to political anti-perfectionism.[225] They ignore the notion of community and are deeply individualistic.[226] Thus, the recognition of the moral value of each person who claims rights can lead to an individualism which may offer a sterile reading of rights if it is not connected to other collective ideals.

The consequentialist arguments seem strong, but in fact this theory ignores the notion of right. It could be argued that it is the greatest enemy of rights. It has also been characterised as individualistic. Its goal is to preserve rights as much as possible, and in order to achieve that goal it would be permissible to abolish a person's rights. The theory is individualistic because it chiefly aims to achieve its goal of maximising its quantitative calculations. In fact, consequentialism does not care about the "goodness" of the common good; it only cares about the "goodness" of the consequences.[227]

2.3.4 Contingent/constructed/relative rights and objective rights

One of the many classifications of human rights and their foundations is articulated by Michael Freeman. According to Freeman (1994), there are two basic approaches to rights. In the first, thinkers focus on the contingency, construction and relativity of rights. Versions of this theory have been articulated by Laclau and Mouffe, Dworkin, Rorty, Donnelly, and MacIntyre. These theories are sometimes antithetical, but they share the view that conceptions of rights, moral concepts and the list of rights may be formed in different ways under different conditions. According to Freeman (1994), Dworkin behaves like a cultural relativist when he claims that rights are established "from 'our' habits of thought and political convictions." For Dworkin, rights are "constructed" rights, not natural rights.[228] For Donnelly, human rights are based on human dignity, which is inherent in all humans. However, he notes that the lists of rights and conceptions of

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224 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 198.

225 *Ibid*, 148.

226 *Ibid*, 198-199.

227 George Letsas, *A theory of interpretation of the European Convention on Human* (Oxford: Oxford University Press, 2007), 100.

228 Michael Freeman, "The Philosophical Foundations of Human Rights," *Human Rights Quarterly* 16 (1994), 500.

human rights are "historically specific and contingent".[229] The communitarian Alasdair MacIntyre claims that the doctrine of human rights is not only "contingent" and "relative", but "false" and an "ontological error".[230]

The second approach –i.e. objective rights – maintains that the belief in human rights is universally and objectively correct, and that the foundations of human rights are objective to the extent that they are based on reason and morality. Gewirth is one of the thinkers who developed this approach. He claims that all societies recognise some sort of rights, and that all individuals have equal rights. However, he rejects as tautological the idea that people have moral rights because they have inherent dignity. Moreover, he rejects the idea of "ultimate values". He claims that agents believe that they have rights to freedom and well-being because they are "necessary goods for all agents."[231] As I will discuss in the following chapters, Raz's approach to rights does not belong to these categories.

2.3.5 Charles Taylor's communitarian account of human rights

In Freeman's classification of the accounts of human rights, the only communitarian thinker mentioned is MacIntyre. Thus, Charles Taylor, one of the leading scholars of communitarianism, is not included in the "contingency, construction, and relativity" account of rights. Taylor presents part of his work as a "middle ground" between the extreme approaches in political and cultural disputes.[232] Unlike MacIntyre, who is hostile to the idea that human rights are natural rights, Charles Taylor subscribes to the idea of universal human rights. This can be described as an "alternative position" in the debate about human rights. For Taylor, human rights are not natural rights that derive from a divine law (e.g. Lockean rights), human dignity (Donnelly) or the idea that "individuals are inviolable" (Nozick). They do not give birth to duties, and they are not grounded in wills or interests (will theory/interest theory). The key point of Taylor's account is that rights are inspired by a "social form" of the Christian community (i.e. the Gospel). They are "constructed" by a principle, they are products of so-

229 *Ibid*, 505.
230 *Ibid*, 498.
231 *Ibid*, 506-507, 511-513.
232 Charles Taylor and James Heft, *A Catholic modernity? Charles Taylor's Marianist Award lecture, with responses by William M. Shea, Rosemary Luling Haughton, George Marsden, Jean Bethke Elshtain* (New York: Oxford University Press, 1999), VIII-IX.

cial institutions that reflect "the Christian nature of the society", and they give birth to "freedom".

Taylor's account of human rights therefore appears to combine several different human rights schools of thought. It merges communitarianism, liberalism, (Dworkinian) non-positivism and legal positivism. His rights are communitarian rights, as they arise from the "social form" of a community (the Catholic Church) that promotes "unity-across-difference". This idea merges with non-positivism, because rights are constructed by societies' "Gospel ethic", which extends to "universal solidarity". Taylor's approach also merges with elements of Dworkinian non-positivism to the extent that, for Taylor, rights are created by a "principle" – the "Catholic principle" of human diversity. Taylor's approach to rights also contains aspects of legal positivism, to the extent that he accepts that human rights derive from social institutions. It also echoes liberalism, in that it considers the purpose of human rights and "rights culture" to be liberation and freedom.[233]

Thus, unlike the conventional view, which locates the origin of rights in the Enlightenment, for Taylor the source of rights is the Gospel and the Christian shape of societies. His communitarian theory does not reject rights, which he regards as embodying freedom and unity, not individualistic goals. Taylor insists that, unlike the culture of the Gospel, which calls for both (communitarian) unity and liberation, the culture of the Enlightenment is individualistic and promotes subjective rights. This is the case for three principal reasons: first, because in Anglo-French Enlightenment culture, "autonomy" is considered highly important; secondly, because the culture of the Gospel emphasises "self-exploration" and "feeling"; and, thirdly, because answers about the good life incorporate "personal

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233 Charles Taylor, "A Catholic Modernity?" in *A Catholic Modernity? Charles Taylor´s Marianist Award Lecture*, *with responses by William M. Shea, Rosemary Luling Haughton, George Marsden, Jean Bethke Elshtain*, edited by James L. Heft, 13-37. (New York: Oxford University Press, 1999), 14-21, 26, 30-31. See also William M. Shea, "A Vote of Thanks to Voltaire." In *A Catholic modernity? Charles Taylor's Marianist Award lecture, with responses by William M. Shea, Rosemary Luling Haughton, George Marsden, Jean Bethke Elshtain*. Edited by Charles Taylor and James Heft, 39–64. (New York: Oxford University Press, 1999), 57. See also Rosemary Luling Haughton, "Transcendence and Being Modern," in *A Catholic Modernity? Charles Taylor´s Marianist Award Lecture*, *with responses by William M. Shea, Rosemary Luling Haughton, George Marsden, Jean Bethke Elshtain*, ed. James L. Heft, 65-81. (New York: Oxford University Press, 1999), 66, 69.

commitment".[234] In this respect, there is at least one crucial similarity between Taylor and Raz: both seek to develop an approach to rights based on societies or communities, and they both reject the individualist accounts of rights. The fourth chapter of this study contains a comparison of Raz's and Taylor's accounts of rights.[235]

234 Charles Taylor, *Sources of the Self: The Making of the Modern Identity*, 10th ed. (Cambridge, Massachusetts: Harvard University Press, 2001), 305, 375-376.

235 In particular, see section 4.9.1 Razian rights and Taylor's communitarian rights.

CHAPTER 3: General characteristics of the European Convention on Human Rights and European Court of Human Rights case law

3.1 Interpretation of the ECHR

The ECtHR uses four main interpretative methods: first, classical methods, such as text-based interpretation; secondly, interpretation based on the structure of the ECHR; thirdly, teleological interpretation, which reads the Convention according to its object and purpose; and fourthly, *Travaux Préparatoires*, under which the initial intentions of a treaty are scrutinised. *Travaux Préparatoires* tend to be marginalised, as the ECtHR generally reads the Convention according to the present circumstances and treats it as a "living instrument". In adjudicating Convention rights, the Court uses several principles, including the principle of "evolutive" and dynamic interpretation; the principle of autonomous interpretation; the principle of effectiveness, which relates to the rule of law, democracy, human dignity and personal autonomy; and the principle of the subsidiary role of the ECtHR.[236]

However, it is commonly accepted that the ECHR norms "are relatively open-ended and incomplete". The *Travaux Préparatoires* indicate that there was disagreement among the founding states of the Convention about whether the ECHR should guarantee "minimum common denominator conceptions of basic rights and nothing more" or whether it should secures a "legal foundation for a more expansive evolution of rights."[237] This study argues that this quandary is reflected in the practice of the ECtHR, which has the authority to interpret the Convention rights. The ECtHR's decisions oscillate between these two poles. ECtHR case law sometimes enshrines an evolutive and progressive interpretation of Convention rights, and sometimes secures minimal core rights and obligations.

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236 Janneke Gerards, "The European Court of Human Rights," in *Comparative Constitutional Reasoning*, ed. András Jakab (Cambridge: Cambridge University Press, 2017), 237-276.

237 Alec Stone Sweet, "On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court," Faculty Scholarship Series 1-1 (Yale Law School, 2009), 3.

According to Stone Sweet (2009) the Court has "a precedent-based jurisprudence", which legitimises its law-making and structures applicants' and Contracting States' argumentation. He stresses that the ECtHR recognises its precedents and "will abandon them only in order to correct an earlier error" or if changes in social circumstances call for an interpretation that reflects the conditions and needs of today.[238] However, analysis of the ECtHR's case law shows that the Court's decisions are not as straightforward as Stone Sweet describes, as precedents that were not applied in one case may sometimes be applied in later decisions, and vice versa.

It could be argued that an understanding of the scope of the Convention has been developed mainly, although not exclusively, through the jurisprudence[239] of the former European Commission of Human Rights (the Commission) and the European Court of Human Rights.[240] However, the ECtHR has not spelled out a general theory of the positive obligations that could be incorporated into the Convention.[241] Several scholars have criticised the ECtHR's role in interpreting the Convention. One criticism that has been raised is that the Convention's structure and open-textured language give the ECtHR "significant opportunities for choice in interpretation." It may therefore be able to make new law. "Most substantive provisions of the Convention leave much room for different interpretations" – in other words, the provisions of the Convention are a source of judicial discretion. Judges decide "controversial matters that affect national governments". However, they "are unelected and accountable to nobody", which raises questions about democracy. Moreover, moral sceptics have stressed that "if human rights have no objective moral standing, then the ECtHR merely exercises a power to impose the subjective preferences" of a small group of judges.[242]

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238 *Ibid*, 4.

239 In this context, the term "jurisprudence" is also called the "case-law of the Convention organs", see Aisling Reidy, "The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights," Human rights handbooks, no. 6, (Strasbourg: Council of Europe, 2003), 6.

240 *Ibid*, 6.

241 Laurens Lavrysen, "The scope of rights and the scope of obligations: Positive obligations," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerards (New York: Cambridge University Press, 2013), 163.

242 In this paragraph, the sentences in quotation marks are all verbatim quotes from George Letsas, "The Truth in Autonomous Concepts: How To Interpret the ECHR," *European Journal of International Law* 15, no. 2 (2004), 280.

However, it may be argued that, even if this is a deficiency of the ECHR, it is nevertheless one of its inevitable characteristics. As mentioned above, the Court regards the Convention is a "living instrument"; its interpretations are "evolutive";[243] due to the open-textured language of the Convention. This means not only that "the Court is not bound by its previous decisions," but also that, when it interprets the Convention rights and freedoms, it takes into account the social context and changes in social circumstances.[244] Therefore, in some cases ECtHR judges read new obligations into old rights. The fact that judges sometimes read positive obligations into the "negative" ECHR rights is due to both the language of the Convention, which is open to "evolutive" interpretations, and to the fact that the Court takes into account changes in society. Nevertheless, the deficiency of the ECtHR's manner of interpretation relates to the fact that, in similar cases, it sometimes recognises positive duties in Convention rights and sometimes does not.

Raz's political account of rights accords with the "evolutive" interpretation of rights – in particular, because he states that, given that future circumstances cannot be predicted, the implications of some rights are unpredictable. The dynamic character of rights (the "how-dimension") means they are open to interpretation and may give rise to new duties in the future.[245] According to Raz, legal rights should not be reduced to the legal duties that they justify, because they have a dynamic character that goes beyond the rights and duties that are explicitly secured in the statutory law. He supports the view that rights can be reasons for changing and developing the law. He states: "legal rights can be legal reasons for legal change."[246]

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243 According to Letsas, in practice, the "evolutive" interpretation, or the "living-instrument" approach, can be seen in in the ECtHR case law *Tyrer v UK* (Chamber). See *ibid*, 298. The Court's and Commission's interpretation of the ECHR by has likewise been characterised as "evolutive" in more recent case law, such as the case *Hatton v. UK* (Grand Chamber), Dissenting opinion, para. 2.

244 Council of Europe, "Manual on Human Rights and the Environment," 2nd ed. (Strasbourg: Council of Europe Publishing, 2012), 31.
In *Hatton v. UK* (Grand Chamber), the dissenting opinion referred to the case law that explicitly states that "the Convention is a living instrument, to be interpreted in the light of the present-day conditions". This case law is: *Airey v. Ireland* (Chamber); *Loizidou v. Turkey* (Chamber / preliminary objections); see *Hatton v. UK* (Grand Chamber), Dissenting opinion, para.2.

245 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 185, 171.

246 Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 269.

The Court does not apply a coherent theory when interpreting the ECHR, and the method that it uses has been described as "casuistic" and lacking "principled coherence". Critics argue that it should instead "concentrate its efforts on decisions of 'principle', decisions which create jurisprudence."[247] However, the Commission and the Court have developed principles and guidelines when interpreting the provisions of the Convention rights.[248] According to Greer (2006), the process of interpreting the ECHR is governed by the application of several "interpretive principles". At the same time, he says that debate about the Convention "lacks depth and theoretical rigour." The Convention principles can classified in a variety of ways, but it is commonly accepted that they "fall into no particular order."[249]

Taking societal changes into account, is there a political justification for the Court's interpretation of the ECHR rights? Or does the ECHR merely use open-textured language without any political foundation? I support the view that human rights are the product of social institutions, and thus have a political basis that should be clarified. The aim of this study is *not* to create a coherent positive obligations theory. It is to reveal the political basis in order to avoid the contradictions in judges' reasoning when they make decisions and to set out a theoretical basis for positive obligation cases. To do this:

a) I accept, first, that it is necessary to discover the common legal principles in the ECtHR case law, which comprise jurisprudence in positive obligation cases. Once these legal principles have been identified, I will analyse how they are interpreted.
b) I claim that the "evolutive" interpretation of the legal principles of rights can be used as a basis to indicate the social aspects of the rights under consideration, which lead to positive obligations on states – for example, to provide healthcare.
c) Next, having found the social aspects of rights as they derive from the ECtHR's reasoning, I will analyse whether these legal principles and the

247 Steven C. Greer, *The European Convention on Human Rights: Achievements, problems and prospects,* Cambridge studies in European law and policy (Cambridge: Cambridge University Press, 2006), 193.
248 Aisling Reidy, "The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights," Human rights handbooks, no. 6, (Strasbourg: Council of Europe, 2003), 6.
249 Steven C. Greer, *The European Convention on Human Rights: Achievements, problems and prospects,* Cambridge studies in European law and policy (Cambridge: Cambridge University Press, 2006), 194.

ECtHR's reasoning, like Raz's political theory of rights, imply positive obligations. If there are similarities between these two approaches, then the ECtHR argumentation can be supported by a political justification – a political theory of rights.

d) This study supports the view that the best arguments of the ECtHR case law are those that mirror the Razian political approach to rights. In positive obligation cases, which concern regulated or partly-regulated cases, the similarities between Raz's theory of rights and the ECtHR's argumentation can be used to illustrate the "evolutive" character of rights, which goes far beyond an individualistic reading and gives birth to positive obligations to health assistance. It is thus clear that the open-textured language of the ECHR does not imply that "anything goes". Rather, as this study shows, ECHR rights have a political justification that enshrines their social aspects.

3.1.1 Taking the formal characteristics of the Convention seriously

Steven Greer (2006) argues that there is a basis for a coherent approach to ECHR interpretation, and that, to an extent, it has been employed.[250] He argues that the Convention contains formal characteristics, but the Court does not take them seriously, and this failure negatively affects the coherence of its case law. However, he points out that, there is not a "correct" juridical method that could be applied to discover "'logically necessary' solutions to disputes about Convention rights." The main challenge is more modest: how "a more coherent and authoritative case law could be constructed."[251]

250 *Ibid*, 193.
251 *Ibid*, 232.

According to Greer,[252] there is a distinction between the primary and secondary constitutional principles that are inherent in the ECHR.[253] There are three primary constitutional principles: the "rights" principle, the "democracy" principle, and the "priority to rights" principle. Each incorporates the principle of "legality/rule of law".[254] The secondary constitutional principles are subordinate to the primary ones, although there are overlaps. The secondary principles of subsidiarity, positive obligations, and non-discrimination mediate between the primary principles of rights, democracy, and priority to rights. The secondary principles of proportionality and strict/absolute necessity determine the strength of the priority to rights in various contexts. The secondary principles of review, commonality, and evolutive, dynamic and autonomous interpretation derive from the primary principle of rights. The secondary principle of margin of appreciation derives from the principle of democracy. However, the margin of appreciation is generally referred to as a doctrine, not as a principle.[255]

According to Greer, the principles of interpretation address three distinct constitutional questions. First, the "normative question" relates to *what* a particular ECHR right means. It also relates to the relationship between a particular Convention right and collective interests and/or other rights. Secondly, the "institutional question" relates to *which institutions* (judicial or non-judicial; national or European) should be responsible for answering the normative question. Thirdly, the "adjudicative question" relates to *how* the normative question should be addressed – in other words, which judicial method should be used to answer the normative question.[256]

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252 The distinction between primary and secondary constitutional principles is principally set out by Greer. He is aware that his approach might be characterised as too formalistic, too academic, too theoretical, or too prescriptive, or that it may be detached from the reality of the practice of the ECtHR's adjudication. See *ibid*, 228.
The same criticism might be applied to this study, which adopts this approach. Such a distinction is suitable in this study as a methodological tool for shedding light on the Convention principles that are present in the ECtHR's argumentation. In my analysis, I do not intend to test whether a principle is a primary or a secondary one. I use this approach as a classification that can help me analyse how judges treat these principles when adjudicating expulsion and/or detention cases relating to Articles 3 and 8.

253 *Ibid*, 193.

254 *Ibid*, 196-197.

255 *Ibid*, 213.

256 *Ibid*, 194-195.

3.1.2 Positive obligations and ECtHR case law

Although the Convention rights are negative ones, this does not mean that they give birth only to negative obligations. On the contrary, the ECHR places Contracting States under both negative[257] and positive obligations.[258] The principle of positive obligations means that the ECtHR can interpret the ECHR in a way that requires a Contracting State actively to protect a Convention right.[259] Under the positive obligations, a Contracting State may be required to introduce measures to protect, for example, an individual's life. The scope of such positive obligations is not defined beforehand by the Court; rather, it is determined by the circumstances of the case.[260] At the same time, it is not easy to perceive when a positive obligation arises.[261]

There is no clear definition of the "positive obligations" principle that can be derived from the relevant ECHR case law. The main characteristic of positive obligations is that they require national authorities to introduce measures to safeguard a right (*Hokkanen v. Finland*, Chamber), or to adopt reasonable and suitable measures (e.g. judicial measures in the case of *Vgt Verein Gegen Tierfabriken v. Switzerland*, First Section) to protect an individual's rights (*López-Ostra v. Spain*, Chamber).[262] In positive obligation cases, the inaction of a Contracting State can lead to a violation of Conven-

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257 Under negative obligations – unlike positive ones – a Contracting State is obliged to refrain from an action that might violate a Convention right, "unless there is Convention-compliant justification for so doing". See European Court of Human Rights, "Research Report on health-related issues in the case-law of the European Court of Human Rights," (Council of Europe, 2015), 5.

258 *Ibid*, 5. See also David John Harris et al., *Law of the European Convention on Human Rights*, with the assistance of Paul Harvey, Third edition (Oxford: Oxford University Press, 2014), 21-24.

259 Steven C. Greer, *The European Convention on Human Rights: Achievements, problems and prospects,* Cambridge studies in European law and policy (Cambridge: Cambridge University Press, 2006), 215.

260 European Court of Human Rights, "Research Report on health-related issues in the case-law of the European Court of Human Rights," (Council of Europe, 2015), 5.

261 Steven C. Greer, *The European Convention on Human Rights: Achievements, problems and prospects,* Cambridge studies in European law and policy (Cambridge: Cambridge University Press, 2006), 215.

262 These ECtHR decisions are mentioned in Jean-François Akandji-Kombe, "Positive obligations under the European Convention: A guide to the implementation of the European Convention on Human Rights," Human rights handbooks, no. 7, (Strasbourg: Council of Europe, 2007), 7.

tion rights, because these cases require the Contracting State to make a positive intervention.[263] At the same time, in cases relating to the expulsion of ill non-nationals, a Contracting State may have the positive obligation to act (i.e. to provide medical care) and the duty to refrain from action (i.e. the expulsion).[264]

The abstract presence of positive obligations brings about various problems, which can be divided into three categories. The first category relates to the "justification" of positive obligations, the second relates to their "content", and the third relates to their "structure". The "justification" category includes questions such as whether positive obligations that could be included in a catalogue of rights should be drafted, and how they can be rationally justified. It is unclear whether the incorporation of positive obligations would be managed by "means of express textual requirements" or by "means of judicial creation." The "justification" category also includes the question of whether a state's positive obligations are based on rights, politics or morals.[265]

The problem of "content" relates to the scope of positive obligations and concerns the financial effects that positive obligations may cause, and the effect that they may have on the tension between freedom and security. The "structure" of positive obligations raises several questions about how the Court applies Convention norms that impose positive obligations, but also it challenges the proportionality test and the doctrine of the margin of appreciation in positive obligation cases.[266]

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263 *Ibid*, 11.

264 The ECtHR case law indicates that the Court decided only in *D v. UK* that an expulsion of an ill non-national would violate the right of Article 3 of the ECHR.

265 Matthias Klatt, "Positive Obligations under the European Convention on Human Rights," *Heidelberg Journal of International Law (HJIL)* 71 (2011), 693. Klatt is quoting Mowbray and Fredman: See Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, 1st ed, (Oxford: Oxford University Press, 2008), 9. See also Alistair R. Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights*, Human rights law in perspective v. 2 (Oxford: Hart Publishing, 2004), 2.

266 Matthias Klatt, "Positive Obligations under the European Convention on Human Rights," *Heidelberg Journal of International Law (HJIL)* 71 (2011), 693, 704-718.

3.2 Theoretical disputes

A clarification should be made at this point. The secondary principle of "autonomous interpretation", which was referred to in section 3.1.1, derives from the primary principle of "rights". It relates to terms or concepts of the Convention that the Commission and/or the Court have characterised as autonomous, and to ECHR terms that can be defined by the ECtHR itself. The Court defines these terms either because they are autonomous concepts and have a different meaning in different Contracting States, or in order to limit the discretion[267] of a Contracting State to interpret them in a way that redefines its Convention obligations.[268] "The Court qualified autonomous concepts as those whose 'definition in national law has only relative value and constitutes no more than a starting point' and that 'must be interpreted as having an autonomous meaning in the context of the Convention and not on the basis of their meaning in domestic law.'"[269] One of these autonomous concepts is "civil rights and obligations".[270]

A thorough analysis of the autonomous interpretation principle is beyond the scope of this section. Nevertheless, so long as the concept of "civil rights and obligations" is an autonomous concept, this clarification is needed because it is central to this study. The concepts that the Court has characterised as autonomous are legal concepts, which means that they are "technical terms that are employed in legal sources and are invested with special, non-ordinary, meaning." Therefore, what can be considered "civil rights and obligations" and what cannot "solely depends on how the relevant concept is used in legal sources."[271] However, according to a traditional legal doctrinal approach and methodological pluralism, rights and obligations are not only legal terms with formal characteristics (internal approach); they also contain normative elements (external approach). From this perspective, the analytical and methodological approach of this study is appropriate for assessing the question at hand.

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267 George Letsas, "The Truth in Autonomous Concepts: How To Interpret the ECHR," *European Journal of International Law* 15, no. 2 (2004), 282.

268 Steven C. Greer, *The European Convention on Human Rights: Achievements, problems and prospects*, Cambridge studies in European law and policy (Cambridge: Cambridge University Press, 2006), 213.

269 George Letsas, "The Truth in Autonomous Concepts: How To Interpret the ECHR," *European Journal of International Law* 15, no. 2 (2004), 283.

270 *Ibid*, 282.

271 *Ibid*, 285.

3.3 The two-stage analysis of human rights: a bifurcated approach

The bifurcated approach to human rights is a two-stage model that can be used to analyse human rights. It concerns the structure of rights and is based on a formal theory. Moreover, it is not based on a normative theory that concerns the indispensable level of human rights protection.[272] It was developed by Robert Alexy in *A theory of Constitutional Rights* (2002). According to Alexy, rights have a rule-like and a principle-like character. The rule-like character concerns prima facie rights – this is the form of rights before state (and other) interests and limitations are taken into account. The principle-like character relates to "optimisation requirements" and includes competing interests and principles.[273]

The bifurcated theory of human rights is widely recognised as an approach that can be used to define the practice of human rights in gene-

272 See Laurens Lavrysen, "The scope of rights and the scope of obligations: Positive obligations," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerrards (New York: Cambridge University Press, 2013), 168, 182.

273 Ingrit Leijten, "Defining the scope of economic and social guarantees in the case law of the ECtHR," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerrards (New York: Cambridge University Press, 2013), 123. See also Robert Alexy, *A theory of Constitutional Rights* (Oxford: Oxford University Press, 2002).
The notions of the "first stage" and "second stage" approach are sketched out by Gerhard Van der Schyff, *Limitation of Rights: As study of the European Convention and the South African Bill of Rights*, (Nijmegen: Wolf Legal Publishers, 2005). It is referred to in Laurens Lavrysen, "The scope of rights and the scope of obligations: Positive obligations," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerrards (New York: Cambridge University Press, 2013), 163, 164.

ral[274] and of ECHR rights in particular.[275] Nevertheless, the ECtHR and human rights scholars often fail to apply the model correctly, as they frequently introduce in the first stage elements that belong to the second.[276] More specifically, the two-stage analysis examines both negative and positive obligations.[277] However, although the ECtHR applies the bifurcated method of analysis correctly in cases relating to negative obligations, in positive obligation cases it "often merges the first and second stages into a single, unstructured, test."[278]

The two-stage analysis of positive obligation cases examines the scope of ECHR rights during the first stage and the scope of positive obligations in the second stage.[279] During the first stage of the analysis, the ECtHR must examine whether the complainant's case falls within the scope of an ECHR right.[280] In this stage, the Convention rights are defined.[281] The first stage focuses on "whether an inaction had 'any effect' on the 'protected conduct and interests' of a right"[282] and whether there is a prima facie positive obligation. The second stage relates to justification:[283] the Court scrutinises the

274 Mattias Kumm, "Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement," in *Law, rights and discourse: The legal philosophy of Robert Alexy*, ed. George Pavlakos, Legal Theory Today, No. 11 (Oxford, Portland, Or.: Hart Publishing, 2007); Laurens Lavrysen, "The scope of rights and the scope of obligations: Positive obligations," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerrards (New York: Cambridge University Press, 2013), 164, footnote 14.

275 Steven Greer, ""Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate," *Cambridge Law Journal* 63, no. 2 (1999). It is mentioned in Laurens Lavrysen, "The scope of rights and the scope of obligations: Positive obligations," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerrards (New York: Cambridge University Press, 2013), 164.

276 Laurens Lavrysen, "The scope of rights and the scope of obligations: Positive obligations," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerrards (New York: Cambridge University Press, 2013), 174.

277 *Ibid*, 164.

278 *Ibid*, 165, 174.

279 *Ibid*, 168.

280 *Ibid*, 164.

281 *Ibid*, 175.

282 *Ibid*, 176.

283 *Ibid*, 175.

Contracting State's justification for failing to protect the right.[284] In this stage, the principal question is "whether a protected interest has been violated", or "whether an 'infringement' has occurred."[285] The ECtHR decides whether a state is under a definitive positive obligation[286] and whether the state authorities (or private actors) are responsible for actions[287] or omissions.[288] During this stage, the ECtHR subjects the state's inaction to the "legality test", and then to the "legitimacy test". If the inaction passes both tests, the ECtHR applies a "test of proportionality" to examine whether it was "necessary in a democratic society".[289]

Normative answers about human rights cannot be explicitly derived from the bifurcated analysis, since this approach does not attempt to define the normative context of the scope of human rights. However, they may be implied indirectly. The bifurcated model will not be used in this study, but it will be used as a background methodological framework that will, when necessary allow me to differentiate between the two stages of the analysis when considering the decisions of the ECtHR.

284 *Ibid*, 164.
285 *Ibid*, 166-167.
286 *Ibid*, 167.
287 Since in positive obligations cases the Contracting States have to act, the Court scrutinises whether a Contracting State is responsible for omissions, not for actions.
288 *Ibid*, 165.
289 *Ibid*, 170-174.

CHAPTER 4: Joseph Raz's approach to rights

The purpose of this chapter is to present Joseph Raz's theory of rights. It proposes, first, that Razian rights are not limited to the field of interest theory and do not solely protect individuals' autonomy, but have a double dimension – a "why-dimension", which, among other objectives, protects collective goods, and a "how-dimension", which relates to how human rights operate in practice. The following sections explore terms that are useful for understanding Raz's philosophy of rights. Thus, along with the double dimension of Razian rights, the chapter deals with Raz's jurisprudence and the definition of notions such as the anti-universality of rights, autonomy, common goods and collective goods, and practical reasoning. The chapter concludes by proposing that the Razian theory of rights fits in the middle ground of contemporary theories of rights.

4.1 Joseph Raz and legal positivism

Before discussing Razian rights, it is useful to compare Raz's legal theory with the theories discussed in chapter 2. His account of the law, of the role of the courts and of precedent represent a middle-ground understanding of the practice of the adjudication of cases before the court. Raz criticises as untenable Dworkin's objection to positivism, his account of judicial discretion and his distinction between rules and principles.[290] Raz also criticises philosophers from several other schools of thought, pointing out that a proper general classification of the functions of the law is not spelled out by theorists of American legal realism (e.g. R. Pound and K. N. Llewellyn), of natural law theory (e.g. Lon L. Fuller)[291] or of legal positivism (e.g. J. Bentham and H.L.A. Hart).[292] For example, legal positivists such as Bentham focus mainly on the function of the (criminal) law concerning the

290 Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), 46-47, 72-74. See Joseph Raz, "Legal Principles and the Limits of Law," *The Yale Law Journal* 81, no. 5 (1972), 834-839.

291 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 164.

292 *Ibid*, 177-178.

prohibition of undesirable behaviour, and disregard other functions of the law. Raz also criticises Hart for not differentiating clearly between normative types and social functions of the law.[293]

According to Raz, most legal positivists' accounts of law blend three distinct theses: the "social thesis", which concerns "the identification of the law"; the "moral thesis", which concerns the moral value of the law, and the "semantic thesis", which deals with key legal terms such as "rights" and "duties". All positivist theories share the semantic thesis that the meaning of the terms "rights" and "duties" is not the same in legal and moral contexts.[294]

Raz notes that the social thesis accepted by most legal positivists is that "what is law and what is not is a matter of social fact," and that the main moral thesis of legal positivism is that the moral value or merit of law – whether of the whole legal system or of a particular law – is contingent "on the content of the law and the circumstances of the society to which it applies."[295] Raz accepts the strong version of the social thesis, which indicates that the *legal validity* of a rule depends on social sources, such as legislative (statute rules) and judicial (precedent decisions) sources, and custom, and that the *content* of the law is established by circumstances of human behaviour, which are value-neutral and do not depend on moral reasoning.

Both the strong version of the social thesis and the semantic thesis of rights and duties indicate that the form of the law is shaped by "institutional and social facts" and may provide answers about which social facts are legally valid. However, that does not imply that Raz does not accept that moral values and principles may be present in the law. Raz does not reject the idea that, in adjudicating a case, a judge may develop moral arguments.[296] That is mainly the case for unregulated and partly regulated disputes, which are discussed below.

As indicated above, Joseph Raz is categorised as an exclusive positivist. Exclusive positivism, which is conceived as "the stronger version of positivism", insists that moral arguments are necessarily excluded from the law because the law contains only authoritative reasons and "moral reasons *qua*

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293 *Ibid*, 178.
294 *Ibid*, 37-38.
295 *Ibid*, 37.
296 Raymond A. Belliotti, *Justifying Law: The Debate over Foundations, Goals, and Methods*, (Philadelphia: Temple University Press, 1992), 59-60, 62.
See also Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 167.

moral reasons are necessarily non-authoritative reasons."[297] The social thesis of legal positivism mainly indicates that the law "is posited" and "is made by the activities of human beings,"[298] and considers "the character of law as a social institution."[299] For Raz, although the social thesis reflects the meaning of law and of relative terms in ordinary language, that does not imply that one should become "a slave of words". On the contrary, it is of fundamental importance to the social thesis that understanding law may lead to understanding society. So long as the law is a social institution, scrutinising it as such helps us understand society more deeply: "Finally, we do not want to be slaves of words. Our aim is to understand society and its institutions. We must face the question: is the ordinary sense of 'law' such that it helps identify facts of importance to our understanding of society?"[300]

However, Raz points out that the view that the existence of the law "is purely a matter of social fact" does not mean that the law does not contain moral merits, values or ideals. It principally indicates that something being legal does not automatically imply that it is moral, and vice versa. Whether the social facts endow a law or a legal system with moral ideals is a matter for consideration and debate; law is a "social fact" and considerations of its value are distinct questions.[301] Raz rejects the "definitional method", according to which "every law is morally valid" and "law is defined by explicit reference to morality in a way which guarantees its moral truth," because there may be unjust laws and because the law, like other social institutions, may be used for the wrong ends, not necessarily because of its unjust character but because of other circumstances.[302]

According to Raz, the classical idea of judges making a "mechanical application" of the law is deceptive, because both regulated and unregulated cases may be complex. The role of the courts, and thus of judges, is both

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297 Robert Alexy, "On the concept and the nature of law," *Ratio Juris* 21, no.3 (2008), 283.

298 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 38.

299 The three basic elements that acknowledge the existence of a legal system are a. efficacy, b. institutional character, c. sources. *ibid*, 42.

300 *Ibid*, 41.

301 *Ibid*, 38-39, 158.

302 Joseph Raz, *Practical Reason and Norms*, (New York: Oxford University Press, 1999), 164-165.

"law-applying" and "law-creating."[303] Raz states that "by definition, in an unregulated dispute the law contains a gap, since it fails to provide a solution to the case."[304] He argues that unregulated disputes appear because of the indeterminacy of the language of the law and the intention of the legislature. In those terms, unregulated disputes may arise because of the vagueness of the descriptive concepts of the law, or because of conflicting rules and the absence of clear criteria from the legal system for resolving such conflicts.[305]

Given that some cases are unregulated or partly regulated, the law is not gapless. That raises the question whether judges in such cases find answers outside the text of the law. Dworkin believes that the courts do not make new law, since they always apply principles that already exist in the body of similar cases. However, for Raz, judges do not solely apply pre-existing law; in most cases, they must think carefully about whether to make new law. In those terms, when it comes to decisions concerning unregulated disputes, *the courts exercise moral judgments* and make new law. According to Raz, "the courts carry with them both their functions of applying pre-existing law and of making new ones into almost all cases."[306] For the courts to make new law in regulated cases, existing laws should change, but in unregulated or partly regulated cases the courts can apply existing laws and make new law without changing those existing laws.[307]

The Razian approach presupposes that in unregulated disputes the doctrine of precedent is applied, meaning that the decisions of the courts in unregulated disputes create precedents,[308] but that courts enjoy "judicial flexibility" because "precedents are never binding for the courts are always

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303 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 183.

304 *Ibid*, 182.

305 *Ibid*, 193.

306 *Ibid*, 182.

307 *Ibid*, 182.

308 Raz uses the doctrine of precedent in English law, according to which the House of Lords or the Supreme Court "create binding precedents" in unregulated cases. See *ibid*, 182, footnote 168. The English approach to the doctrine of precedent indicates that courts might follow, or distinguish themselves from, precedent cases. See *ibid*, 185.
Furthermore, in his book *Ethics in the Public Domain*, Raz points out that in his approach the rule of law is not assumed to be a "universal moral imperative". In his thought, the rule of law is a political doctrine that is good or valid for "certain types of society" as long as they fulfill the cultural and institutional conditions required for the rule of law. Although Raz's approach in this book con-

free to change" them.[309] Raz accepts that the role of "distinguishing" is crucial to the functioning of the doctrine of precedent.[310] As described in chapter 1,[311] in Razian thought the doctrine of precedent is affiliated with the rule-based model,[312] which means that precedent cases establish "rules".[313]

If we agree that in some cases one of the court's roles is judicial law-making, what is the difference between judicial law-making and legislation? According to Raz, one the differences is that the legislative action is conscious, whereas the judicial law-making action is not. By exercising legislative power, somebody intentionally changes the law, whereas in the case of judicial law-making – namely when the court de facto makes law – judges may not perceive or be aware of their decisions having such effect.[314] In those terms, exercising legislative power has a normative effect because statutes possess normative power, whereas judges do not. In that context, as long as judges do not always act with the intention of making a relevant normative change – because, unlike legislative law-making, judicial law-making is not intentional – we are led to assume that what is of particular importance is not the *intentions* of those who exercise normative

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cerns the moral justification and political significance of the rule of law in Britain, its conclusions apply to other countries, to the extent that their political culture is similar to Britain's. See Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 370.

309 Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 186.

310 Raz notes that his approach to 'distinguishing' is influenced by A. W. Brian Simpson, "The *Ratio Decidendi* of a Case and the Doctrine of Binding Precedent," in *Oxford Essays in Jurisprudence* 1st series. Edited by A. G. Guest, 148–175 (London: Oxford University Press, 1961). See Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 185, footnote 174.
Raz rejects approaches that conceive of distinguishing merely as a matter of reinterpretation. See Grant Lamond, "Do precedents create rules?" *Legal Theory* 11 (2005), 12, footnote 21.

311 For the rule-based model see above 0 Methodology.

312 Raz accepts a flexible version of the rule model of the doctrine of precedent. Strong versions of the rule model have been developed by Larry Alexander and by Alexander and Emily Sherwin. See John F. Horty, "Rules and reasons in the theory of precedent," *Legal Theory* 17 (2011), 2.

313 Grant Lamond, "Do precedents create rules?" *Legal Theory* 11 (2005), 1-2, 5-15.

314 Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 207.

powers, but the *reasons* for considering their actions "as effecting a normative change."[315]

The Razian approach to the nature of the law is related to the idea in practical reasoning that legal norms[316] operate as reasons for action – both first-order reasons and second-order exclusionary reasons. Saying that legal norms act as first-order reasons for action means they are reasons "which introduce a relevant consideration to be weighed against others", and the fact that they act also as second-order exclusionary reasons means that they exclude several other reasons from consideration. For example, compulsory military service, under which, according to the law, every man has to serve in the army, is a legal norm that produces both the first-order reason "to serve in the military" and a second-order reason excluding from consideration the fact that serving in the military is not enjoyable. In the absence of that second-order exclusionary reason, someone may consider the enjoyment of being in the army.[317] Practical reasoning is also related to the Razian account of rights and will be discussed further in subsequent chapters.

4.2 The notion of human rights in Joseph Raz's approach

As discussed above, one of the main social theses that inspires legal positivism is the thesis that the determination of law is a matter of social fact. Legal positivism also distinguishes legal considerations of the law from

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315 Joseph Raz, *Practical Reason and Norms*, (New York: Oxford University Press, 1999), 104.

316 Raz develops a criticism of the imperative theory of norms and the practice theory of norms. The imperative theory supports the view that norms are imperatives that are established by one or more individuals aiming to guide human behavior. The practice theory affiliates itself with the idea that rules are defined as practices (e.g. H. L. A. Hart develops a practice theory). According to Raz, rules cannot be examined merely as practices. Practice theory fails to explain rules that are not practices; for example, social rules and legal rules are practices, whereas moral rules (e.g. promises should be kept) are not practices. Moreover, practice theory does not differentiate between social rules and reasons that are widely accepted, and overlooks the normative character of rules. See *ibid*, 51-53.
For Raz, there is a distinction between a rule and a reason that is not a rule. He develops the idea that the nature of mandatory norms and the norms issued by authority are both exclusionary reasons. See *ibid*, 55, 59-62, 62-65.

317 Thomas Morawetz, "The Authority of Law. Joseph Raz," *Ethics* 91, no. 3 (1981), 516-517.

moral considerations. Accordingly, most legal positivist theories agree on the semantic thesis that the concepts "rights" and "duties" have different meanings in legal contexts and in moral contexts. It is from such a legal positivist basis that the following views are derived. First, the terms "moral rights" and "moral duties" are either self-contradictory or meaningless. Secondly, the terms "rights" and "duties" may have an evaluative or a non-evaluative meaning: in legal contexts they are used with their non-evaluative meaning, whereas in moral contexts they are used with their evaluative meaning. Thirdly, there is a difference between the meaning of the phrase "legal rights and duties" and the meanings of its component terms: the former is not a function of the latter.[318]

Unlike natural theorists of rights such as John Finnis, Raz focuses on the political account of human rights and supports the view that their existence depends on social, economic and cultural factors.[319] Raz's view of human rights accords with the positivist social thesis he adopts in his legal theory, according to which law is identified by social facts. In his human rights approach, he points out that a successful philosophical definition of rights illuminates a political and moral discourse of many different theories, and that a successful definition of rights can shed light on different moral and political approaches to rights.[320]

Raz attempts to develop a rights approach and definition that might constitute a bridge between many potentially contradictory theories. Despite developing a political concept of rights that rejects the idea of natural rights, Raz adopts the definition of "common good" used by John Finnis,[321] who, contrary to Raz, supports the ideas of natural rights and natural law. Razian rights also have origins in Bentham's beneficiary theory, but they are mainly influenced by K. Campbell's "The Concept of Rights". Moreover, Razian rights have many similarities with D. N. MacCormick's

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318 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 38.

319 Joseph Raz, "Human Rights in the Emerging World Order," *Transnational Legal Theory* 1, no. 1 (2010), 31.

320 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 166.
He also makes a similar claim in one of his articles, see Joseph Raz, "On the Nature of Rights," *Mind* 93, no. 370 (1984), 195.

321 See below the section 4.6.2 "The Common good: Finnis's approach and its relation with Razian collective good".

"Rights in Legislation" and sympathise with some features of R. Dworkin's rights, albeit not with the Dworkinian idea of rights as trumps.[322]

Raz's definition of rights is as follows:

> "Definition: 'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.
> Capacity for possessing rights: An individual is capable of having rights if and only if either his well-being is of ultimate value or he is an 'artificial person' (e.g. a corporation)", Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 166 and Joseph Raz, "On the Nature of Rights," *Mind* 93, no. 370 (1984): 195.

Three key words in the above definition are of central importance and will be discussed further in subsequent chapters: "well-being", "reason" and "duty". Leslie Green states that "according to Raz's general account of rights, someone has a right only if an aspect of his well-being is sufficient reason to warrant holding someone else to be under a duty."[323] Raz himself points out that the gist of his account of rights is that "having a right" implies that an aspect of right-holders' well-being is a ground for binding another with a duty.[324] However, as Raz observes, the above definition is incomplete because the concepts of rights and duties should be determined precisely whenever they are used. Saying just that someone has a right in general means nothing. The question is not whether one has a right generally and vaguely, but upon what specifically one has a right and what corresponding duty derives from it.[325]

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322 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 166, footnote 84.

323 Leslie Green, "Three Themes from Raz," *Oxford Journal of Legal Studies* 25, no. 3 (2005), 517.

324 Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 255.

325 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 167.
Raz provides a similar definition in "Rights and Politics" (1994), pointing out that "This is an abbreviated schematic definition. To make sense it cannot be unpacked or applied mechanically but has to be adapted to individual cases," Joseph Raz, "Rights and Politics," *Indiana Law Journal* 71, no. 27 (1995), 31, footnote 8.

Explanations of rights have two aspects: the linguistic features of the right, and political, legal or moral arguments.[326] From a linguistic point of view, there is a difference between the right *to*… and the right *in*… That implies that rights may refer to acts, objects, services or facilities; one might have a right *to perform* an *act* or a right *in* an *object*. A right to a service or a facility implies a liberty right – a right to have a certain liberty. A right in an object might mean that someone has a right of ownership in that object.[327]

As discussed above, Raz and legal positivists in general agree on the semantic thesis that supports the idea that the term "rights" has different meanings in a legal context and a moral context.[328] Nevertheless, Raz seeks to develop a neutral definition of rights. He supports the view that all rights have a common core, which applies both to questions related to moral, legal and political arguments and to questions concerning rights with different linguistic characteristics. By understanding rights' common core, we might be able "to explain their special role in practical thought."[329] Although the definition of rights above applies to both normative and linguistic questions, this research focuses on the normative dimension of rights, as it aims to establish the scope of specific ECHR rights. In particular, it focuses on the political and moral dimensions of rights as developed by Raz, rather than on their linguistic dimensions.

Raz's approach to rights concerns rights in general; his theory applies to both legal rights and non-legal rights. If one studies Raz's account of rights in depth, one notices that in most cases he uses the term "human rights" to imply "legal rights". That is the case, for example, in his article "Human Rights in the Emerging World Order" (2010). In his article "On the nature of rights" (1984) and his book *The Morality of Freedom* (1988) he proposes "a general account of rights" that "applies to legal rights."[330] In *Ethics in the*

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326 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 167.

327 *Ibid*, 167.

328 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 37-38.

329 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 167.

330 Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 254.
This is the case also for his account of rights in his book *The Morality of Freedom* (1988), since his article "On the nature of rights" (1984) appears almost unchanged in chapter 7, "The nature of rights". See Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 165-192.

public domain (1994), he defends his approach to moral rights as intended to develop the model for a general explanation of the concept of legal rights.[331]

> "I have proposed a general account of rights (in "The Nature of rights", Mind (1984)). … My purpose here is to show that this account applies to legal rights and to defend my approach, which regards moral, rather than legal, rights as the model for a general explanation of the concept. The essay does not attempt a classification of legal rights. Nor does it offer an analysis of special kinds of rights. Its sole concern is the general idea of a legal right." Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 254.

The Razian theory of rights proposes "the moral standards by which the practice of human rights is to be judged."[332] From that perspective, Raz develops a normative basis of rights and of the adjudication of human rights. The notion "normativity" should briefly be defined, since it might be conceived from multiple perspectives. According to Pavlakos (2011), there are two main approaches of normativity, the first concerning an ideal aspect of human beings' lives and the second related to standards of judging, acting and feeling deriving from reflective activities or actions.

More specifically, the first approach attempts to develop the moral basis of individuals' lives and incorporates standards that may lead to the prescription, "How a person should conduct their lives." The second approach concerns human beings' interacting with their social and natural environment in a reflective way. Stating that interaction with the environment entails a reflective activity means that human beings are not merely passive subjects who adopt ethical and emotional standards from their environment. Further, the relationship between a person and their environment is reflective in the sense that a human being both is shaped by and shapes their environment at the moral level. In other words, there is interaction between people and their social and natural environment at the level of the standards of judging, acting and feeling.

If we accept the above division, according to Pavlakos (2011), Joseph Raz's perspective belongs to the second category of normativity. For Raz,

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331 Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 254.

332 Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 16.

normativity guarantees the different facets of a person's cognitive, practical and emotional negotiations in their social and natural environment, and illustrates human beings' position in the world.[333] Thus, Raz's approach to normativity should not be conceived as a bunch of moral standards that reflects the prescription of the first category and seeks to answer the normative question, "How ought someone to live?" Raz does not attempt to answer such a question. In other words, he does not attempt to set general criteria about morality. He aims not to set out the ideal aspects of life, but to develop "an understanding of how we do live, our form of life."[334] Raz develops normative grounds of rights to the extent that he shows how human rights operate and interact with their social environment. From that perspective, his political account of rights is normative to the extent that it indicates the reflective activity of human rights, according to which Razian rights are shaped by and shape their social environment.

The interest theory of Razian rights stresses mainly that a law may create a right when an interest is sufficient reason to hold another to be subject to a duty.[335] The double dimension of Razian rights proposed in this thesis focuses mainly on the relationship between collective goods, well-being, autonomy-based freedom and legal rights. In Razian thought, interests are merely instrumentally valuable, whereas collective goods have an intrinsic value.[336] That is one of the reasons why this study scrutinises Razian rights as double-dimension rights, rather than as an interest theory of rights. Furthermore, although Raz intends to develop a general account of rights that applies to both legal and moral rights, that should not be misconceived as an assumption that human rights are moral rights. On the contrary, in Razian thinking, human rights must always be legal rights rather than "universal" natural rights, which might also be just moral rights. The political account of Razian rights indicates that human rights as legal rights

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333 See George Pavlakos et al., "Three comments on Joseph Raz's Conception on Normativity," *Jurisprudence* 2, no. 2 (2011), 329.

334 See Niko Kolodny, "Raz's Nexus," in George Pavlakos et al., "Three comments on Joseph Raz's Conception on Normativity," *Jurisprudence* 2, no. 2 (2011), 333, see also Raz, Joseph. "Being in the world." *Ratio* 23, no. 4 (2010).

335 Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 268.

336 For the instrumental value of interests see below the section 4.5 Rights and interests.

have strength and are able to realise their potential to lead to legal change.[337]

If Razian rights transform into human rights after their institutional recognition, and if human rights serve and preserve collective goods that are shaped by the character of society, which "society" is it whose character shapes those collective goods? Is it the character of domestic society or of international society that shapes collective goods and thus human rights? If domestic society forms legal rights in domestic law, might that oppose international law? A plausible answer is that collective goods are shaped by the character of domestic societies that share similar values with international society. Equally, some essential characteristics of legal rights are united at the national and international level. Raz supports the view that laws form one legal system, since the science of law is one. He accepts the part of Kelsen's normativity that supports the "epistemological postulate" about the unity of national and international law. Such unity derives from the assumption that norms conceived as valid from one point of view all form one normative system.

Accordingly, national and international law are conceived as valid from the perspective of one legal system, and thus both types of law are part of one system.[338] In those terms, there is unity between domestic and international law because they are part of the same legal system. Raz argues that in the philosophy of law, as opposed to the sociology of law, there are special features of legal systems that are always present in every society and under different circumstances. In Razian thinking, the "importance of municipal law" reveals that different laws share the same essential features; municipal laws are not unique, because they share vital features with international law.[339] The unity of domestic and international laws in Razian thinking is also revealed by the fact that the condition for legitimate authority – the

337 Joseph Raz, "Human Rights in the Emerging World Order," *Transnational Legal Theory* 1, no. 1 (2010), 31. In this article, Raz uses the term 'human rights' to imply legal rights.
Raz notes that "a legal change is commonly interpreted as a change in the rights or duties of the power holder or of others." See Joseph Raz, *Practical Reason and Norms*, (New York: Oxford University Press, 1999), 99.

338 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 140-142, 144-145.

339 *Ibid*, 104-105. See also Leslie Green and Brian Leiter, *Oxford studies in philosophy of law* (Oxford: Oxford University Press, 2013), 150-151.

so-called normal justification condition (NJC) – is used at both domestic and international level.[340]

4.3 The double dimension of rights: the "why-dimension" and the "how-dimension"

Joseph Raz's approach of rights concerns societies where the legal system recognises and protects fundamental rights. He states explicitly that his theory has nothing to do with unjust polities: "In considering the position sketched in this section it is important to remember that its subject is the proper justification of the entrenchment of fundamental rights in societies where the legal system does give them proper weight. Nothing is here implied as to the proper response to a mildly or grossly unjust constitution."[341] I propose that a distinction should be drawn between two dimensions of Razian rights: the "why-dimension" and the "how-dimension". The former might answer the question, "Why are rights adopted?", and the latter the question, "How do rights operate?" Both dimensions are discussed in the following sections.

4.3.1 Joseph Raz, natural rights and institutionalisation of rights

Raz challenges the orthodox approach of rights and the existence of natural rights. According to the orthodox view, human beings hold human rights simply because they are humans. That orthodox account is challenged by the "political conception" of human rights, which supports the view that human rights derive from institutional arrangements.[342] Accordingly, Raz focuses on the political role of human rights and his approach develops their "political concepts".[343] Raz does not support the idea of natural rights and natural law; for him, rights derive from social practices.

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340 John Tasioulas, "Human Rights, Legitimacy, and International Law," *The American Journal of Jurisprudence* 58, no. 1 (2013), 14.

341 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 261, footnote 130.

342 Siegfried van Duffel, "Moral Philosophy," in *The Oxford handbook of International Human Rights Law*, ed. Dinah Shelton, (Oxford: Oxford University Press, 2013), 33-37.

343 The 'political concepts' of human rights have also been developed by: John Rawls, Bernard Williams, Joshua Cohen, Charles Beitz, see *ibid*, 34.

Raz, who is influenced by Jeremy Bentham, belongs to the group of thinkers who reject the existence of natural rights. He points out four features of the traditional approach of human rights, discarding them as inadequate for establishing the normative basis of rights and depicting their importance. The first is the fact that the traditional approach derives human rights from valuable basic features of and for human beings, such as personhood and minimal needs. The second is the traditional approach's conception of human rights as the most basic moral rights. The third is the arbitrary assumption that something being valuable might constitute a reason to guarantee rights. The fourth is the fact that the traditional approach adopts an individualistic perspective of rights, to the extent that it focuses on the benefits of rights for a person's private life and not for the social aspects of life.[344]

Raz does not accept, either, that rights are universal or that the importance of humanity constitutes the foundation of rights. He states that the assumptions of some scholars, according to whom the importance of rights derives from humanity and their universality, are vague and groundless. According to Raz, the traditional approach of rights as products of natural law is remote from the practice of rights:

> "Some theories (I will say that they manifest the traditional approach) offer a way of understanding their nature which is so remote from the practice of human rights as to be irrelevant to it." Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 2.

The practice of rights shows that notions such as universality and humanity – the idea that individuals have rights by virtue of their human nature, for example – cannot constitute the foundations of rights and are not sufficient conditions to generate the necessity of rights. Raz identifies three main demerits of traditional theories of rights: first, "they misconceive the relation between values and rights. Secondly, they overreach, trying to derive rights which they cannot derive, and thirdly, they fail either to illuminate or to criticise the existing human rights practice."[345]

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344 Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 3.

345 *Ibid*, 4.

Values and rights

First, stating that something has value and stating that someone has a right to it are utterly different.[346] In many cases, we may recognise that certain conditions are vital to our lives and make efforts to ensure their availability, but it would be inane of us to claim to be guaranteeing a right to them.[347] Such an argument is likely to be inspired by Dworkin. In his critical review of Dworkin's *Taking rights seriously*, Raz points out that Dworkin identifies that something's being valuable is not sufficient to make us deserve a right to it.[348] Later, in *The Morality of Freedom* (1988), Raz states that the fact that something might be valuable to someone is not sufficient to imply, ipso facto, that they have a right to it. Raz uses the example of the relationship between parents and children. He states that if we accept the claim that rights derive their status from something's value to an individual, it could be argued that the fact that children might be precious to their parents implies that a parent has a right over their children.[349] If that assumption is correct, it may be misguided to demand rights to something solely because it has value.[350]

Overreaching and traditional theories

According to Raz, a second problem with traditional theories is that, due to the criteria they set, they draw on an overly narrow rights theory framework, which is inadequate for supporting and recognising a broader range of human rights. In their attempt to guarantee as many human rights as possible, such theories overreach, since they do not offer an adequate theoretical framework to act as the foundation of a vast variety of human rights. More specifically, the fact that the notions "person" and "personhood" are the foundations and main arguments of most traditional theories of rights leads them to overreach, since they try to guarantee rights that cannot be derived solely from those notions. In other words, traditional theories of

346 *Ibid*, 3.
347 *Ibid*, 5.
348 Joseph Raz, "Professor Dworkin's theory of rights," Review of *Taking Rights Seriously*, by Ronald Dworkin. *Political Studies* XXVI, no. 1 (1983), 125.
349 Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 5.
350 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 165.

rights may offer a weak interpretation of rights, because they may guarantee only rights that protect no more than minimal conditions and are able to secure only minimum protection of bare personhood.

> "James Nickel, for example, thinks human rights are minimal standards for governments, but neither he nor Griffin nor the others identify what is the test of the standards being minimal other than that there are or could be higher standards on the same matters." Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 14.

For example, basic rights to collective goods cannot be secured on the grounds of traditional theories or right-based theories, because from these points of view, interests in collective goods are not among the basic needs for survival.[351] According to Raz, if an argument for the defence of rights is that individuals' lives should meet some minimal conditions or standards, violations of rights cannot be attested. People's lives may fulfil minimal standards at the same time as their rights are entirely violated. For example, a slave's life fulfils minimal standards and conditions, but their rights have been abused outright. Thus, so long as proponents of the traditional theory of rights, such as James Griffin and James Nickel, use the minimal conditions or minimal standards argument to support the defence of rights, they overreach.[352]

> "At very point he (i.e. Griffin) adds 'minimal' –minimal education and information etc. But if minimal means some information, some resources and opportunities, however little, it is a standard easy to meet, and almost impossible to violate. Just by being alive (and non-comatose) we have some knowledge, resources and opportunities. Slaves have them. Griffin, of course, does not mean his minimal standard to be that skimpy. He suggests a generous standard. But then we lack criteria to determine what it should be. My fear is that this lacuna cannot be filled." Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 7.

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351 *Ibid*, 202.

352 Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 7.

Raz states that Griffin overreaches because, so long as he perceives human rights as protecting one's personhood, those rights are weak and narrow, meaning they cannot reach as far as he wants them to reach.[353] Under Griffin's approach, only basic rights such as the right to life can be derived from the conventional list of rights, rather than rights that tend to improve the quality of human beings' lives. Traditional theories of rights attempt to protect *agency*, but they are unable to secure the *conditions* that might lead to a good life.

> "To 'generate' the conventional list he (i.e. Griffin) has to rely not on the protection of agency but on securing conditions which make it likely that agents will have a good life. That leaves him with no principled distinction between what human rights secure and what the conditions for having a good life secure." Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 8.

In other words, from a Razian point of view, Griffin's approach is problematic because he is unable to make a principled distinction between the conditions guaranteed through human rights and the conditions that lead to a good life.[354]

Razian criticism of minimal conditions resembles Jack Donnelly's criticism of the concept of "human needs". Donnelly's approach to rights accepts "universality and paramountcy as central indicators of rights,"[355] but also shows that rights are accepted "almost universally", "in word" or as "ideal standards" and that a conception of human nature grounds human rights. However, he distinguishes between two different notions of human nature. He rejects the first, according to which human needs generate human rights. His objection lies in the fact that the term "human needs", as defined by science, is limited and "obscure". He describes the use of human needs as the source of human rights as "the pseudoscientific dodge of needs."[356] Like Raz, Donnelly supports the view that human rights are established as mechanisms for protecting "a life of dignity" and "a life wor-

353 *Ibid*, 7.
354 *Ibid*, 8.
355 Jack Donnelly, *Universal Human Rights in Theory and Practice*, (Ithaca and London: Cornell University Press, 2013), 41.
356 *Ibid*, 14.

thy of a human being".[357] Accordingly, in Razian thinking, human rights do not solely protect the minimum conditions of life, but may be social tools for securing the good life.

"Universality" as the enemy of human rights

Thirdly, Raz develops the thesis that traditional theories of natural rights are unable to criticise the practice of human rights because they take it for granted that rights are universal. Raz's idea of the non-universality of human rights indicates that human rights need to be secured by institutions. Such institutional recognition realises the potential and the dynamic character of rights. The implication is that non-universal rights act as weapons against the sovereignty of states. In those terms, the abuse of human rights "is a (defensible) reason" for intervention in the territory of the state that committed the abuse.[358]

The Razian idea that human rights set limits to the sovereignty of the state is also adopted by John Rawls, according to whom "outlaw" states that infringe rights should be convicted, and an intervention in their territory is justified.[359] Rawls supports the view that rights are human rights only if an armed intervention could be justified by their serious infringement. However, for Raz, human rights are those "whose violation can justify any international action against violators."[360] Rawls shares the view that the list of human rights should be conceived as universal, in the sense that human rights are intrinsic to the "law of peoples" and because human rights "have a political (moral) effect" irrespective of whether they are lo-

357 *Ibid*, 13-14, 28-29, 32-39, 276-277, 283. For a discussion about human needs in Donnelly's book see also Michael Freeman, "The Philosophical Foundations of Human Rights," *Human Rights Quarterly* 16 (1994), 501-502.

358 Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 9.

359 John Rawls, *The Law of Peoples*. 2nd ed., (Cambridge, Massachusetts: Harvard University Press, 2000), 80-81.

360 Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 9, footnote 14.

cally supported.[361] Nevertheless, Raz rejects the idea that human rights are or should be universal.[362]

More specifically, Raz develops the idea that universality cannot protect several rights that might be abused in practice, and in some cases may become an enemy of such rights, which are not related to universal rights. When using the term "universal rights", one may focus on different aspects of the word "universal". For example, "universal" might imply that rights

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361 John Rawls, *The Law of Peoples*. 2nd ed., (Cambridge, Massachusetts: Harvard University Press, 2000), 80.

362 The rejection of the universality of rights has also been developed by scholars who do not belong to the liberal tradition to denounce the existence of rights in general. A more recent approach that rejects universality and individual rights in general is defended by Fernando Atria (2013). Despite both Raz and Atria rejecting the universality of rights, their starting points and conclusions are different. Atria does not accept the dynamic character of individual rights in general; for him, individual rights have at their core a passive aspect. On the contrary, for Raz, individual rights have an active aspect and, further, a dynamic character, although that dynamic character can be expressed only if rights are not conceived as universal. From that point of view, both Atria and Raz discard "universal" and "natural" rights. Atria rejects individual rights to the extent that they are conceived as "universal" and "natural" rights, which do not require institutions for their protection. In the same way, Raz rejects universal and natural rights, supporting the view that the universality of rights is their biggest enemy. Thus, it seems that both Atria and Raz reject universal and natural rights.
Atria states that individual rights, as negative freedom rights, have a passive aspect that does not impose duties and does not require or presuppose an institution that might protect them. Individual rights, as opposed to social rights, are passive subjects that must be universal, for they are natural rights – rights that do not call on any institution or government, or any kind of artificial relations between persons, to protect them, because they exist a priori and unconditionally.
Razian thinking accepts such an approach, but Raz goes a step further. He agrees that the universality of rights and the concept of "individual rights as natural rights" damages the dynamic character of rights. Raz does not reject the concept of individual rights in general, as Atria does, but attempts to give an alternative account of rights to illuminate the power and strength of rights. He proposes that, instead of rejecting individual rights in general, we need to reject the universality of rights in particular. In that way, the political aspects of rights are scrutinised, because rights must be placed in such a political conception in order to realise their dynamic character. Taking everything into account, I argue that Atria rejects individual rights as negative freedom rights, because it seems that he disregards the idea that individual rights do not justify solely negative freedom, but positive freedom and, as a result, positive duties. See Fernando Atria, "Social Rights, Social Contract, Socialism," *Social & Legal Studies* 24, no. 4 (2015), 1-3, 4-10.

are timeless or not related to specific things. On the one hand, the universality of human rights may indicate that all human beings have such rights at all times all over the world,[363] which also means that such rights are moral rights, not institutional ones. On the other hand, Raz defines a universal right as a right that is not related to specific items and does not identify specific right-holders, but applies to all human beings. For example, the right to enter a private UK university is a specific right, but the right to freedom is not.[364] Raz admits that some human rights might be universal, but he argues that, *in a political conception*, human rights *must not* be conceived as universal and foundational, because in that way they gain more strength and power; so long as human rights are considered a priori as universal, they lose their dynamic character.[365]

Two principal types of universality[366] are distinguished in the literature: conceptual universality, which implies that human beings are equal and inalienable, and substantive universality, which concerns a specific conception or list of human rights.[367] Conceptual universality is related to the idea that someone has universal rights simply because they are a human being. In those terms, people have equal rights because they are all equally human beings. So long as people hold rights because they are human be-

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363 Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 14.
According to Wiktor Osiatynski, the universality of human rights mainly emerged with the United Nations Declaration of Human Rights (1948) during the 20th century. The idea behind the UN Declaration was to incorporate basic values and principles, which have universal nature, into human rights. Osiatynski proposes a "soft universalism" of human rights. See Wiktor Osiatyński, *Human rights and their limits* (Cambridge: Cambridge University Press, 2009), 151-152, and about "soft universalism" see *ibid*, 182.
For a criticism of Raz's anti-universality of human rights see Carl Wellman, *The moral dimensions of human rights* (New York: Oxford University Press, 2010), 8-9.

364 Joseph Raz, "Rights and Politics," *Indiana Law Journal* 71, no. 27 (1995), 28.

365 Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 14.

366 Different forms of universality are defended by different scholars, who avoid either fully supporting or fully rejecting it. For example, as discussed in the previous chapter, Jack Donnelly supports a "relative universality" (almost universal rights), and Andrew Nathan a "tempered universalism". See Andrew J. Nathan, "Universalism: A Particularistic Account," in *Negotiating culture and human rights*, ed. Lynda S. Bell, Andrew J. Nathan and Ilan Peleg (New York: Columbia University Press, 2001); it is quoted in Jack Donnelly, "The Relative Universality of Human Rights," *Human Rights Quarterly* 29, no. 2 (2007), 299.

367 Jack Donnelly, "The Relative Universality of Human Rights," *Human Rights Quarterly* 29, no. 2 (2007), 282.

ings, and so long as the nature of human beings does not change, it is claimed that human rights are inalienable, which means people cannot be deprived of them.[368] Other scholars stress that the universality of human rights relates to the idea that human beings hold rights equally.[369]

Raz uses the term "specific rights"[370] to illustrate the delusion of the universality of rights. From the so-called universalist thesis[371] derives the view that specific rights come from universal rights, or that little rights come from big rights.[372] According to Raz, if one accepts the universalist thesis, any specific right[373] that is not universal or is not derived from universal rights is arbitrary. Such rights are arbitrary because specific rights are not distributed to all people, so there is no explanation of why some people are holders of specific rights and others are not, and because they differ even among right-holders.[374]

It is of particular importance in Raz's approach to rights that specific rights derive from universal principles, not exclusively from other rights, and that such universal principles are not themselves principles of rights.[375] On the contrary, for many defenders of the universalist thesis, universal principles of rights are the moral foundations of rights and, further, rights constitute the foundations of morality.[376] In other cases, "some people

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368 *Ibid*, 282-283.

369 Michael Freeman, *Human Rights*: *An interdisciplinary approach* (Cambridge: Polity Press, 2004), 107.

370 Raz points out that he uses the terminological distinction between 'specific rights' and 'universal rights' by Richard M. Hare, *Freedom and reason* (Oxford: Clarendon Press, 1963), 7-50; and John L. Mackie, *Ethics: Inventing Right and Wrong* (New York: Penguin, 1977), 83-90; see Joseph Raz, "Rights and Politics," *Indiana Law Journal* 71, no. 27 (1995), 28, footnote 3.

371 Tasioulas (2013) calls "universality thesis", the idea that "human rights are moral rights, possessed by all human beings, simply in virtue of their humanity […] human rights, like natural rights, are universal moral rights." see John Tasioulas, "Human Rights, Legitimacy, and International Law," *The American Journal of Jurisprudence* 58, no. 1 (2013), 2.

372 Joseph Raz, "Rights and Politics," *Indiana Law Journal* 71, no. 27 (1995), 28.

373 Specific rights are either legal rights or non-legal rights. See: "many, if not all, legal rights are specific" and "Many nonlegal rights are similarly specific", at *ibid*, 28-29.

374 *Ibid*, 29-30.

375 An argument according to which moral explanations of rights derive exclusively from universal principles of rights ignores the fact that the moral explanations of rights might derive also from other universal principles, such as principles of duty, or other moral considerations related to values. see *ibid*, 30-31.

376 *Ibid*, 30. .

think that… rights are lexically more important than any other matter of moral concern and therefore cannot be derived by other moral principles".[377] Nevertheless, to argue that moral explanations of rights come solely from universal principles of rights is to confound morality with rights and establish too arbitrary an explanation of rights, ignoring the fact that "there is more to morality than rights."[378] As a consequence, that explanation gives a hierarchical priority to the principles of rights rather than to universal moral principles, but to argue that universal principles of rights are more important than universal moral principles[379] is irrational.

Additionally, the universalist thesis leads to an assumption that universal rights are more important than other legal rights that do not derive from universal rights. From the point of view of the universalist thesis, specific rights are less important if they are based on other moral principles[380] rather than on principles of rights, so the universality of human rights may harm various legal rights that are not conceived of as universal.

Raz aims to develop a normativity of rights that can be applied to human rights in practice.[381] Individual rights are transformed into human rights when their violation justifies a state's intervention in another state's territory. The *political conception of human rights* may demolish a state's

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377 Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 31.

378 Joseph Raz, "Rights and Politics," *Indiana Law Journal* 71, no. 27 (1995), 31.

379 Universal moral principles might come from interests or the well-being of an individual; for example, the value of love and the value of friendship might be universal moral principles that derive from individuals' interests. Nevertheless, the fact that someone has an interest to have friends does not imply that they have the right to friendship. See *ibid*, 31.
Alternatively, universal moral principles are also referred by Raz as general moral principles; for example, the content of promises is determined by the general moral principles that govern the conditions that apply to promises. See Joseph Raz, "Is there a reason to keep a promise?" Legal Studies Research Paper Series, no. 2014-5, King's College London Dickson Poon School of Law, 2.
According to Raz, morality and universal (or general) moral principles are not relativistic. He supports the view that many moral arguments are interpretative in part; nevertheless, he rejects the view that all moral arguments are interpretative. From Raz's point of view, morality is not identical to social morality. For a criticism of Michael Walzer's interpretative thesis of morality see Joseph Raz, "Morality as Interpretation," Review of *Interpretation and Social Criticism*, by Michael Walzer, *Ethics* 101, no. 2 (1991), 392-405.

380 Joseph Raz, "Rights and Politics," *Indiana Law Journal* 71, no. 27 (1995), 31.

381 Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 16.

sovereignty and enable human rights to perform against a state in the international arena; human rights may act as weapons against the sovereignty of a state. On the contrary, when only some rights are conceived of as universal, as in the traditional approach, rights shrink for two reasons: because their scope of action is too narrow, given that only the violation of universal rights is sufficient reason to breach the sovereignty of a state; and because their violation cannot justify all measures against their violators. Thus, as conceived of in the traditional approach, rights are unable to provide a satisfactory answer to the question, "Why could rights set limits to the sovereignty of a state?"

> "One immediate consequence of the political conception is that human rights need not be universal or foundational. Individual rights are human rights if they disable a certain argument against interference by outsiders in the affairs of a state. They disable, or deny the legitimacy of the response: I, the state, may have acted wrongly, but you, the outsider are not entitled to interfere. I am protected by my sovereignty. Disabling the defence 'none of your business,' is definitive of the political conception of human rights. They are rights which are morally valid against states in the international arena, and there is no reason to think that such rights must be universal." Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 14.
>
> "[Second,] I do not deny that there may be universal human rights which people have in virtue of their humanity alone. My criticism of that tradition is primarily that it fails to establish why all and only such rights should be recognised as setting limits to sovereignty," *ibid*, 16.

It seems that in the traditional interpretation, which is cut off from the political conception, rights are weakened and cannot be used as weapons against abuses. Therefore, for Raz, rights are not merely a protective cover for the individual. For him, rights are not passive but active, to the extent that they are rights against states. In Razian thought, the active nature of rights can be expressed so long as they are not conceived of a priori as "universal".

4.3.2 Anti-universality: Political conception, social relativism and anti-moral relativism

In rejecting the universality of human rights, Raz acknowledges that social relativism exists, but explicitly rejects the existence of moral relativism.[382] The term "social relativism" relates principally to the idea that societies differ among themselves; "cultural relativism" implies that cultures differ across time and space.[383] For Raz, despite the existence of social relativism, there is a universal morality. The political conception of human rights relates to a universality of morality that may set human rights on solid foundations, for it implies that the morality of human rights is not a private one that concerns only individuals in the private sphere. What gives substance and strength to rights is not the acceptance that there are universal human rights, but the recognition that rights have a political conception. Such a political conception implies that rights acquire the status of human rights only if they are guaranteed through institutions; in other words, rights become human rights only after their institutional recognition, which causes them to extend beyond private morality and become linked to a universal morality.[384]

A defender of the thesis that human rights are universal rights may point out that human rights are moral rights linked to "universal possession" and not always to "universal enforcement,"[385] or that human rights are universal moral rights, like natural rights, which are held by all human beings by virtue of their humanity.[386] However, if universal rights are merely moral rights that are, theoretically, held equally by everyone, why should we take human rights seriously as legal rights? Raz accepts that individuals have moral rights, but those moral rights derive from human beings' interests, not from a universality of rights. More specifically, Raz states that individuals have rights in general (or moral rights) so long as their interest is sufficient reason for holding another to be subject to a duty. Such (moral) rights transform into legal rights if they are recognised by law – if the law

382 *Ibid*,16.

383 Jack Donnelly, "The Relative Universality of Human Rights," *Human Rights Quarterly* 29, no. 2 (2007), 294.

384 Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 17.

385 Jack Donnelly, "The Relative Universality of Human Rights," *Human Rights Quarterly* 29, no. 2 (2007), 283.

386 John Tasioulas, "Human Rights, Legitimacy, and International Law," *The American Journal of Jurisprudence* 58, no. 1 (2013), 2.

holds an individual's interest to be sufficient ground to hold another to be subject to a duty.[387] The crucial aspect of legal rights is their dynamic character: legal rights have the potential to be legal reasons, which may lead to legal change.[388]

The political conception of rights relates to legal rights and encompasses three main features: legal rights come with a power of enforcement;[389] legal rights are turned into sources of power because they come with such a power of enforcement; and the allocation of rights is a distribution of power, because legal rights constitute a way of empowering people and institutions. A distribution of power in favour of people (and institutions) is possible through rights. So long as rights provide individuals with power, rights become sources of power, which is, but is not restricted to, political power. Thus, the political conception of rights concerns the power of enforcement, which benefits individuals by empowering them.[390]

For example, making and keeping promises may constitute a universal unofficial rule. However, promises concern the private sphere of individuals and are not governed by a political conception, since the keeping of promises is not recognised by any institution. Therefore, although the keeping of promises is a universal unofficial rule – every reasonable individual tries to keep their promises – no one could claim that there is a legal right to promises by virtue of their universality, because promises are not recognised as rights by institutions. Similarly, a right may be universal, in the sense that it is respected by reasonable individuals,[391] but becomes a human right only if it is recognised by institutions – or, in other words, only if it becomes a legal right. In that way, a right is a human right only when it is placed into the political conception, where human rights must be located.

The political conception gives great weight to human rights since, as political rights, they are no longer just ethical imperatives that should be respected by individuals by virtue of their ethical substance, as in the case of promises, or by virtue of being a sufficient interest of an individual. Further, human rights must be respected because they have been enacted as human rights – that is, legal rights – by specific institutions. Because of

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387 Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 268.

388 *Ibid*, 269. For the dynamic aspect of rights see below section 4.8.2.

389 Joseph Raz, "Rights and Politics," *Indiana Law Journal* 71, no. 27 (1995), 40.

390 *Ibid*, 42.

391 I assume that Raz means that the *value/good* that is protected by a right may be universal and is respected by reasonable individuals.

their political conception, human rights are related to a universal[392] morality, because they have escaped the private sphere. Raz states explicitly that "the political conception of human rights can and should accept universality of morality."[393] It important to clarify that human rights are conceived of politically rather than ethically. They are empowered when they are conceived of as political credentials that always demand institutional recognition.

The institutional recognition of human rights is criticised by many theories, including those that belong to Marxian and Marxist traditions. The more contemporary of those theories have a poststructuralist perspective. For example, Giorgio Agamben claims that declarations of rights trap human beings' lives within the juridical order. From his point of view, the great revolutions of history, such as the French revolution, effected two contradictory outcomes. On the one hand, people rebelled to secure rights and freedoms, but on the other they prepared the trapping of their lives within the juridical order and therefore "offered a new and even more terrifying foothold in sovereign power from which they were trying to be released."[394]

Agamben points out that, although life is nowadays presented as sacred and as comprising a fundamental human right, which can be asserted against "sovereign power", the sanctity of life in its original form was capturing the allegiance of life "in a death power and its irreparable exposure to an abandonment relationship."[395] Since life has not always been considered sacred, declarations of human rights cannot constitute statements that secure eternal moral values; on the contrary, declarations name life as sacred and give it sanctity through life's subscription to the legal and judicial framework. Thus, for the poststructuralist scholar Agamben, the institutional recognition of rights – for example, the right to life – traps individuals within judicial power. Such institutional recognition causes negative effects, because it causes individuals to lose part of their liberty.

For Raz, on the contrary, rights realise their potential only through their recognition in statute. The institutional recognition of rights in particular protects individual freedom, because it limits the sovereignty of states.

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392 Here Raz uses the notion Universality qua publicity.

393 Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 17.

394 Giorgio Agamben, *Homo sacer: Κυρίαρχη εξουσία και γυμνή ζωή*, μτφρ. Παναγιώτης Τσιαμούρας, (Αθήνα: Scripta, 2005), 193.

395 *Ibid*, 136.

When Raz places human rights in the political conception, he seeks to draw a distinction between the goods that are secured from rights on the one hand, and the statute dimension of rights on the other. For example, life, health and other such notions perceived as goods are protected by virtue of an ethical imperative. No one could intervene in the territory of a state that did not respect the ethical dimension of such bare goods. However, when it comes to the right to life or the right to health, the situation is totally different. The rights to life and to health are weapons against a state that tries to abuse such rights, because they are secured through statute law and are legally justified. Despite life and health constituting ethical goods that all states and human beings have a moral obligation to respect, as goods they cannot act as a weapon that permits intervention in a state's territory to remedy their abuse.

By placing human rights in the political conception, Raz also seeks to argue that one can talk about rights only if such rights *are adequately protected* by the institutions put in place to protect them. He points out the dynamic dimension of rights as weapons against the arbitrariness of a state. Further, through his approach of rights, he seeks to extend human rights to include more rights, thereby extending the jurisdiction of external actors to intervene in a state where there is a breach of human rights. According to Raz, international institutions, regional organisations such as the EU, functional organisations such as the WTO and many more multinational regimes[396] can intervene in a state, not only when so-called fundamental rights are affected but whenever a single human right is violated. In Raz's approach, human rights are not restricted to the right to life and so on; every right is a human right when it is enacted by a state and its institutions.

> "So understood human rights enjoy rational justification. They lack a foundation in not being grounded in a fundamental moral concern but depending on the contingencies of the current system of international relations." Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 19.

In that sense, as legal rights, human rights not only do not reduce the freedom of the right-holder, but extend individual freedom, since they have the power to diminish state sovereignty.

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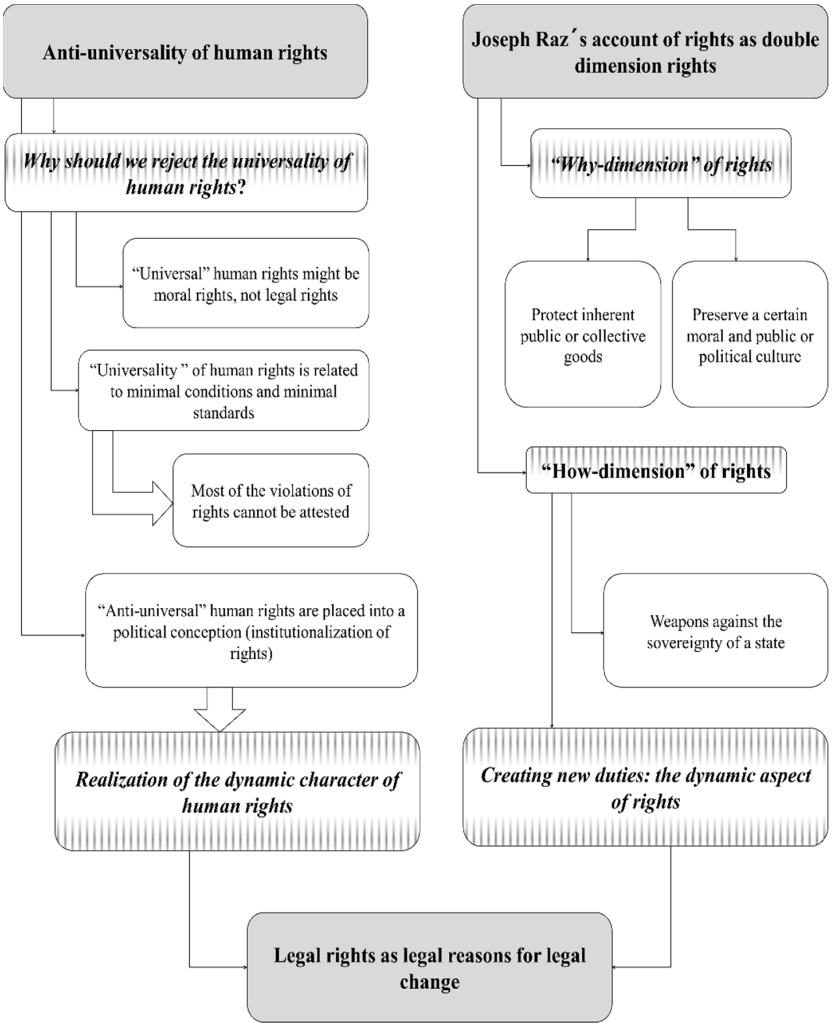
396 Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 22.

> "…the political conception does point towards a normalisation of the politics of human rights. That is an inevitable consequence of the success of human rights practice. It is part of processes which saw the development of regional organisations, like the EU, of functional organisations like the WTO, and a myriad of multinational regimes, like that regarding the utilisation of deep sea resources, all of which eroded the scope of state sovereignty." *ibid*, 19.

Unlike several natural rights theories, according to which the status of human rights can be conferred mainly on civil and political rights,[397] the Razian theory of rights accepts that social rights may be human rights. For Raz, rights such as the right to education and the right to health, which traditionally are classified as social rights (second generation rights) and are related to distributive justice, should be conceived as human rights in as much as health and education have been recognised as rights by a state. Thus, in the case of a breach of such rights, international intervention to protect them is not only proper but imperative; such intervention confirms in practice that such rights exist.

397 Dina Shelton (ed.), *The Oxford handbook of International Human Rights Law*, (Oxford: Oxford University Press, 2013), 37.

Figure 2: Anti-universality of human rights and the double dimension of rights



Source: Author's compilation. This figure was presented as an academic poster, after a peer review, at King's College London, the Dickson Poon School of Law, at the 10th Annual International Graduate Legal Research Conference, on the 4th of April 2016.

4.4 The "why-dimension" of rights

As mentioned above, I distinguish between two distinctive attributes of the Razian account of rights: the "why-dimension" and the "how-dimension". According to the "why-dimension", rights are adopted first *in order to* preserve a certain moral and public or political culture,[398] and secondly *in order to* protect inherent public or collective goods[399] serving the communal peace. The significance of rights is not restricted to the limits that might be set to protect a person (or personal autonomy) from potential demands in the name of "collective goals" or "communal peace"; Razian rights are related to autonomy but are not restricted to it. The main contribution of rights is not to protect the person as an individual, as if they were isolated from the community, but to enable people to live harmoniously within society, preserving collective goods and securing the communal peace.[400] The Razian approach is not individualistic, as the well-being of the community is also a matter of rights.

According to Raz, most liberal writings accord to rights an individualistic moral outlook. Raz criticises the fact that, in liberal thought, individual freedom is the basis of many rights, since such interpretations of rights tend to ignore the fact that rights have a social background that concerns the preservation of collective goods. Individual rights would not have the significance they do if their mission were not the protection of collective goods.

> "Many rights were advocated and fought for in the name of individual freedom. But this was done against a social background which secured collective goods without which those individual rights would not have served their avowed purpose. Unfortunately the existence of these collective goods was such a natural background that its contribution to securing the very ends which were supposed to be served by the rights was obscured, and all too often went unnoticed." Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 251.

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398 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 245, 261.

399 *Ibid*, 251-252, 255-256, 261-262; and Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics*, (New York: Oxford University Press, 1996), 52-53, 57, 59.

400 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 251.

For example, Ronald Dworkin claims that an anthropological theory that supports the view that rights are determined by cultural goals cannot be tested and thus is not plausible. Dworkin argues that there is no evidence to prove that the principles[401] conceived of as convincing by members of a community are defined by the collective goals[402] of that community.[403] Such an anthropological thesis overlooks and eventually destroys the distinction between principles and policies;[404] for Dworkin, such a distinction is clear-cut, because principles are related to individual rights and policies are related to collective goals.[405]

Raz rejects what he calls the individualist thesis, or the individualist view of rights, which was developed mainly by Ronald Dworkin and Robert Nozick.[406] According to the individualist thesis, rights by their very nature protect individual interests, even if they go against the interests of the collective or the public.[407] Through rights, individuals become sovereign over themselves and their relations, and can be protected from the public domain and the public interest. Because of their individual rights, people's demands gain strength against demands that contribute to the public good. The individualist thesis distorts our understanding of rights, as it conceives of rights and the demands of public goods as having a mainly conflictual relationship.

> "The individualist view of rights is confrontational: Rights set the limits of the private sphere, in which each individual is sovereign over his or her own affairs, as against the public domain, where the public interest, as determined by political action, prevails. [...] Is not the indi-

401 As discussed in section 2.3 of this book, 'Background question and human rights,' according to Dworkin, there is a distinction between goals and principles and arguments of principle intend to establish an individual right, see Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), 90.

402 I do not claim that Dworkin's collective goal has the same meaning as Raz's collective good. One of the main differences between Dworkin and Raz is that, for Dworkin, rights are detached from cultural or collective goals. For Dworkin's rights and collective goals see section 2.3 above, 'Background question and human rights.'

403 Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), 94.

404 *Ibid*, 95.

405 *Ibid*, 90.

406 Joseph Raz, "Rights and Politics," *Indiana Law Journal* 71, no. 27 (1995), 32, footnote 9.

407 *Ibid*, 31.

> vidualist thesis, with its confrontational outlook, a logical implication of the fact that by definition only interests are protected by rights? The answer is a clear negative. To be sure, some rights do or can function in this way, and in some political cultures this function is prominent. But this does not warrant the individualist thesis, which is a thesis about the nature of rights in general. [...] the individualist's understanding of rights is narrow and, as a result, distorted." Joseph Raz, "Rights and Politics," *Indiana Law Journal* 71, no. 27 (1995), 32.

Additionally, as mentioned above, "natural rights" do not exist in Razian thought. Individual rights arise from the community, since communities need to secure their continued free enjoyment of the exercise of certain social institutions. Thus, the formation and implications of individual rights are determined by social institutions. Some social institutions in a community, such as religion, have their own practices and form a style of life; such communities need rights to secure their continued ability to pursue that style of life. In practice, a Razian individual right might be "a right of communities to pursue their style of life or aspects of it" or "a right of individuals to belong to respected communities."[408] For example, the right to religious freedom secures the practices – the rituals and common worships – of a religion. The (religious) interest of individuals is based on "the secure existence of a public good: the existence of religious communities within which people pursued the freedom that the right guaranteed them."[409]

Raz acknowledges the potential for conflicts between rights and collective goods, or between rights themselves. Nevertheless, he emphasises that rights do not have, a priori, a competitive relationship with collective goods, and that rights are not inherently irrespective of collective goods. Consequently, to the extent that rights depend on and serve collective goods, neither rights nor collective goods have priority in cases of conflict.[410] There is no general rule that resolves potential conflicts either among rights, or among rights and collective goods. Accordingly, every case should be examined ad hoc.

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408 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 251.
409 *Ibid*, 251.
410 *Ibid*, 255.

4.5 Rights and interests

The relationship between rights, interests and duties is central to Razian thinking, although Raz's theory of rights should not be read as being concerned mainly with interests. As mentioned above, in the Razian account of rights, collective goods are found because rights mainly preserve and protect collective goods, whereas interests have solely instrumental value. Thus, the Razian approach of rights should not be read exclusively as an interest theory.

Although Thomas Scanlon writes that "it appears that in Raz's view […] what is special about the duties that define rights is that they are justified by certain interests of individuals,"[411] collective goods are at the core of the Razian approach of rights; interests have merely an instrumental value for rights, because rights mainly preserve and protect collective goods. Scanlon supports the view that individual interests are the basis for the justification of Razian rights; even if rights are secured with the aim of preserving collective goods, that implies that rights are justified by *individual interests* in preserving certain public goods. For example, Scanlon argues that in Razian thought, the right of freedom of expression is related to individual interests in the preservation of public goods that guide society to operate in a certain way: "What justifies this right is not simply the individual interest that is interfered with when this right is violated […] But the values that justify the right of freedom of expression, and make it so important, include other interests [...] These are all, at base, individual interests, but they are interests in having a system that functions in a certain way—interests in the maintenance of certain public goods."[412] It seems that, for Scanlon, Razian rights cannot escape individualism.

If, as Scanlon claims, Razian rights are justified because individuals have an interest in the maintenance of public goods, the interests of individuals are more important than the public goods themselves. However, for Raz, collective goods have intrinsic value. As a result, rights are justified on the basis that they preserve intrinsically valuable collective goods, rather than on the basis of individuals' interests.

However, the fact that, according to Raz, collective goods have intrinsic value and in a sense are fundamental to Razian rights does not mean that

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411 Thomas M. Scanlon, "Rights and Interests," in *Arguments for a better world: Essays in honor of Amartya Sen*, ed. Kaushik Basu and Amartya Sen (Oxford: Oxford University Press, 2009), 71.

412 *Ibid*, 72.

individuals' interests are totally marginalised in Razian thinking. In the Razian approach, the "why-dimension" explains that rights are secured to serve and preserve collective goods. However, the preservation of collective goods is not totally detached from people's interests, and from that perspective the Razian account of rights cannot be categorised as teleological in the sense that Will Kymlicka uses the term. In the Razian approach, the preservation of collective goods does not imply that people can be sacrificed if that is necessary to achieve a collective goal.

> "…teleological theories take concern for the good (e.g. freedom or utility) as fundamental, and concern for people as derivative, promoting the good becomes detached from promoting people's interests. […] Indeed, it may be possible to promote the good by sacrificing people." Will Kymlicka, *Contemporary political philosophy: An introduction*, 2nd ed. (New York: Oxford University Press, 2002), 140.

As described by Kymlicka, teleological theories presuppose a tension between people's interests and the preservation of goods such as freedom. In Razian thinking, individual interests, collective goods and rights coexist without having a priori a competitive relationship. On the contrary, interests, collective goods and rights have a mutual relationship. Sacrificing an individual for the sake of the collective good would contradict the structure of Razian rights, because people's interests shape the character of a society, "making" collective goods, which are served and preserved through rights. Moreover, interests not only shape the character of the society but are one of the conditions for someone's becoming a right-holder.

According to Raz, potential right-holders are those with the capacity to have rights. He does not specify who has such a capacity, but describes right-holders as "creators who have interests."[413] The "capacity to have rights" is consistent[414] with the "reciprocity thesis", according to which those who can have rights are those who are members of the "same moral community".[415] It seems that, for Raz, the "same moral community" has a broader meaning, concerning all moral agents, not merely a community that derives from a kind of social contract. From this perspective, the beneficiary of a duty must have an interest in it if they are to have rights. For

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413 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 176.

414 Raz points out that the "capacity to have rights" is "not committed to" the reciprocity thesis, but "it is consistent" with it. *ibid*, 176.

415 *Ibid*, 176.

example, animals do not have rights, because individuals' duties towards animals derive from individuals' good will in taking care of them, not from the interests of the animals.[416]

Moreover, "only those whose well-being is intrinsically valuable can have rights; but that rights can be based on the instrumental value of the interests of such people."[417] As mentioned above, in Razian rights, common goods and individual well-being are intrinsically valuable, whereas interests[418] are merely instrumentally valuable. Both the well-being of individuals and the collective goods of the society that promotes such well-being are preserved through rights. A right is based on an interest, but such an interest is solely the *instrumental*[419] reason why a state is held[420] to certain duties.[421] In that way, a *right* connotes a ground for a requirement of action; it allows someone to claim that a state has a duty of action.[422]

Consequently, one would expect interests to constitute the grounds of duties, but that assumption is not correct; rights themselves are the grounds of duties.[423] In other words, "the right is a sufficient reason for a

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416 *Ibid,* 176-177.

417 *Ibid,* 179-180.

418 Raz draws a distinction between core and derivative rights. This distinction is related to interests and is useful in some cases for the justification of the order of rights. When a right is related directly to an interest, then this is a core right, but when an interest is related indirectly to a right, in this case there is a derivative right. For example, the right to personal liberty is a core right from which the right to walk on my hands derives; thus, the right to walk on my hands is a derivative right which is based on someone's interest in being free to do as they wish. In this thesis the distinction between core and derivative rights is not relevant. See *ibid*, 169.

419 The protection of the interest is merely an instrumental reason of rights, because rights mainly aim to protect collective goods and a certain political culture.
"*The rights of journalists (however qualified) to protect their sources are normally justified by the interest of journalists in being able to collect information. But that interest is deemed to be worth protecting because it serves the public. That is, the journalists' interest is valued because of its usefulness to members of the public at large. The rights of priests, doctors and lawyers to preserve the confidentiality of their professional contacts are likewise justified ultimately by their value to members of the community at large*." *ibid*, 179.

420 Raz also describes the duties of a person deriving from a right-holder interest. Nevertheless, my research focuses on a state's duties.

421 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 180-181.

422 *Ibid*, 180.

423 *Ibid,* 181.

duty."[424] That is the case because rights act as a mediator between interests, the character of a society/collective goods, and duties. More specifically, a person has an interest, and that interest orients the character of the society, which shapes collective goods and constitutes a reason for action through a duty. Therefore, a right should be enacted to generate such a duty, which will preserve collective goods and the character of the society, which were shaped by interests. Thus, an interest by itself does not constitute a sufficient reason to generate a duty.

> "Sometimes the fact that an action will serve someone's interest, while being a reason for doing it, is not sufficient to establish a duty to do it." Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 182.

The most important factor in securing rights and duties is not individuals' interests, but the character of the society, which consists of several collective goods. If somebody were to describe an ideal society, it is likely that its characteristics would be those that most people find desirable. Raz therefore states that an ideal society would be not oppressive, poor and poorly educated, but tolerant, cultivated and wealthy. It is in individuals' interests to live in societies whose characteristics they find optimal. However, although most individuals have an interest in living in societies that are tolerant, cultured and economically prosperous, this does not imply that they have the right to do so. According to Raz, individuals do not have the right to live in wealthy or tolerant societies; they merely have an interest in doing so.

Simply being a human being does not give an individual rights; it only gives them interests. Therefore, they may have an interest in living in an ideal society, but they do not have the right to do so. For Raz, the fact that a person has an interest in something is not sufficient to give them a right to it. He states explicitly that "the interest of individuals does not translate itself into principles of rights."[425] Accordingly, societies do not automatically protect and promote individual interests. People may establish societies that are in accordance with their interests – in other words, a society's character may be shaped by individuals' interests, and rights may be needed and adopted to protect that character. If rights are adopted, then duties will also be developed.

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424 *Ibid*, 183-184.
425 Joseph Raz, "Rights and Politics," *Indiana Law Journal* 71, no. 27 (1995), 31.

> "Living in such an environment is in the interest of each of its inhabitants. It is more agreeable to live in such a society, whatever one's personal circumstances, than to live in one which lacks these attributes. But the fact that it is in my interest to live in such a society is not normally considered sufficient to establish that I have a right to live in such a society. The common view is that my interest that my society shall be of this character is a reason to develop it in such a direction, but that the existence of such a reason is not enough to show that I have a right that my society shall have this character. This is explicable on the definition of rights offered above, according to which a right is a sufficient ground for holding another to have a duty." Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 202.

It follows that rights are not identical to interests. Rights have interests at their core, because interests partly shape the direct objects of rights – namely, the character of the society and collective goods – but they are not restricted to individual interests. In other words, there are several justifications for rights, only one of which is individual interests.[426] The existence and validity of rights is not confined only to interests and is not based only on the interests of right holders; an interest is only one component of a larger whole.[427]

> "But [government's] duty is not grounded in my interest alone. It is based on my interest and on the interests of everyone else, together with the fact that governments are special institutions whose proper functions and (normative) powers are limited." Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 202.

Raz's approach to rights should not be restricted to the interest theory of rights, because he considers the most important factor in securing rights to be the society's collective goods, not individual interests. Societies adopt rights principally to protect collective goods, the society's political culture and individual wellbeing, not interests.

> "But the interest of the right-holder in itself, in the case of many of the rights which were used as examples above, is insufficient to justify that

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426 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 181.

427 Unlike other interest theory thinkers (e.g. Scanlon), Raz does not consider rights to be identical with interests. For example, according to Scanlon, in conflicts of rights, it is actually, interests, not rights, that are in conflict. Therefore, for him there are never conflicts of rights, but only of interests.

> degree of protection. It gets it because it is instrumentally useful to the preservation of a certain political culture, to the protection of various public or even collective goods." Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 261.

Nevertheless, common goods must somehow be linked to the interests of the right-holder. Raz uses the term "dual harmony" to describe fact that common goods and the interests of right-holders both benefit from the protection of rights.

> "To the extent that the rightholder's interest is given extra weight for reasons of the common good, these reasons are not altogether detachable from considerations of the rightholder's own interest. The common good is the good of all, including the good of the rightholder. By serving the common good, the right also serves the interest of the rightholder in that common good. There is here what I have called elsewhere a dual harmony between the interest of the rightholder and the interest of other people which is served by his right." Joseph Raz, "Rights and Politics," *Indiana Law Journal* 71, no. 27 (1995), 39.

From a Razian point of view, there are four elements to the justification of human rights:

1. Human rights come from individual interests + the interests of everyone else + social conditions => moral duty/individual moral right.
2. Moral duty/individual moral right => the character of the society is shaped => collective goods => institutional recognition of rights => legal rights/human rights.
3. States[428] have legal duties and moral duties that derive from human rights/legal rights.

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428 States and individuals should respect the rights of others, and they have an "agent-neutral" reason to do so. The reasons of action are classified into four categories. First, there are "outcome reasons" of action, which are based on the value of the outcome of those actions. Secondly, there are "action reasons", which are based on the value of the agent who performs the actions. Thirdly, there are "agent-relative reasons", which are reasons for some people but not for others. Last, there are "agent-neutral reasons", which are reasons for everyone. Rights belong to this category since, according to Raz, "everyone has reason to respect the rights of others." Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 145-146.

4. States do not enjoy immunity if they violate a human right. If all parts of the argument are true (i.e. 1+2+3) => a human right exists.[429]

4.6 The constituent elements of "the common good"

Raz uses the terms "common good", "general good", "inherent public good" and "collective good" interchangeably. These notions are connected to the nature and the role of rights. In *The Morality of Freedom* (1988), he describes the notions of "inherent public good" and the "collective good" as sub-categories of the broader category "public goods", which is more relevant to rights. However, in some of his articles he uses the term "the common good". For example, in "Rights and Individual Well-being" (1992) he does not use the terms "inherent public good" and "collective good", but refers to "the general good" and "the common good". He states explicitly that has adopted John Finnis's definition of "the common good" from *Natural Law and Natural Rights* (1988). I will use only the terms "common good" and "collective good" unless I am quoting Raz himself.

Raz makes a distinction between the common good, or the common interest, and the economic notion of the public good, or the public interest. Although some common goods are public goods, the two notions are not connected.

> "…many common goods are public goods in the sense that term has in economic writings; that is, they are goods whose distribution is not subject to deliberate control, goods which no one has the power to deny to any individual (other than himself) without denying them to everyone in that society. However, I see no logical connection between the two notions." Joseph Raz, "Rights and Politics," *Indiana Law Journal* 71, no. 27 (1995), 35, footnote 12.

The common good is in everybody's interest in a given society, but the public interest might only be in the interest of some members of the society. In other words, the public interest or public good might benefit some individuals and negatively affect others. Therefore, the conflicting interests must be balanced to serve the public interest.

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429 Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 18.

> "The public interest is, and is generally taken to be, a function of individual interests. So is the common good or the common interest. The common good differs, however, from the public one. […] Here is an example. There is a public interest in the existence of a network of railway tracks in good repair. The interest is not merely that of railway users; many other members of the public, for example, consumers of goods transported by rail, share this interest. Yet some people may derive no benefit from this good, and quite possibly there are people whose interests are adversely affected by the maintenance of the railway networks. They may be affected by noise or air pollution, by decline in the value of their property, or in other ways, while not using the railway nor benefiting indirectly from its existence. So the judgment that the public interest is served by the existence of a railway network is based on the balance of good and evil, on a resolution of the conflicting interests of different people." Joseph Raz, "Rights and Politics," *Indiana Law Journal* 71, no. 27 (1995), 35.

Moreover, some common goods are interrelated. This is the case when the availability of one common good is the precondition for the availability of another.[430] Goods that are the precondition for the existence of other goods are called "framing goods": these are also common goods.[431] In this section, I will first define inherent public goods and collective goods as they are set out in *The Morality of Freedom*, and then I will examine John Finnis's understanding of the notion of "the common good", thus reconstructing Raz's notion of the collective good.

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430 Joseph Raz, "Rights and Politics," *Indiana Law Journal* 71, no. 27 (1995), p 37.

431 Raz gives the example of property. In a society with a property-respecting culture, property is conceived of as common good. It is a "framing good" for other goods, such economic activities and pursuing a specific lifestyle. See *ibid*, 37, 40.

4.6.1 Contingent goods, inherent public goods or collective goods

Raz writes that economists[432] consider collective goods[433] to have an instrumental value. In other words, collective goods possess value because they enable individuals to advance various interests. Raz, on the contrary, suggests that collective goods possess inherent value.[434] He regards social forms to be inherently valuable collective goods, because "they are constitutive of the possibility of autonomously pursuing modes of life that are themselves intrinsically valuable."[435] For him, a good is a public good in a given society when each potential beneficiary controls its distribution and takes their share of its benefits.

> "A good is a public good in a certain society if and only if the distribution of its benefits in that society is not subject to voluntary control by anyone other than each potential beneficiary controlling his share of the benefits." Joseph Raz, *The Morality of Freedom*, (New York: Oxford University Press, 1988), 198.

Raz divides public goods into contingent public goods and inherent public goods. Contingent public goods are those whose distribution cannot be controlled by individuals (i.e. potential beneficiaries), either because they are controlled by the state or a town's private companies, or because the necessary technology is lacking. For example, a water supply is a contingent public good if access to it is controlled by the state or a company and not by each potential beneficiary. Clean air is also a contingent public good because the potential beneficiaries cannot control their share of its

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432 For an account of public goods by economists see for example Mancur Olson, *The Logic of collective action: Public goods and the theory of groups*, 2. Aufl. (Cambridge, Mass.: Harvard University Press, 1971) and Elinor Ostrom, *Governing the commons: The evolution of institutions for collective action* (Cambridge: Cambridge University Press, 1990).

433 Raz's argument that economists support an instrumental value of "collective goods" is quite blurred. I assume that the Razian collective good has a different meaning from economists' collective good. Therefore, Raz can argue that economists mainly focus on contingent public goods, whereas his rights are related to inherent public goods.

434 "Raz identifies collective goods whose value is not merely instrumental but rather inherent." Loren E. Lomasky, "But is it liberalism?," *Critical Review* 4, 1-2 (1990), 93.

435 *Ibid*, 93.

benefits, as there is no technology that would allow them to do so.[436] Moreover, the value of contingent public goods is instrumental, because it depends on the good's consequences. For example, clean air is important because it has health consequences.[437]

Inherent public goods, or collective goods, are attributes of a society that benefit the members of the society. Such beneficial features derive from "the general character of the society to which one belongs." For example, a society that is tolerant, educated or respects human beings is an inherent public or collective good. Inherent public goods are features of a society that are generally beneficial. The degree to which individuals benefit depends on their interests and personality; nobody but the beneficiaries themselves can directly control the benefits of a collective good. In other words, collective goods or inherent public goods are characteristics of societies that benefit the members of that society.[438]

A society's inherent public goods or collective goods have two principal characteristics. First, the members of the society cannot be excluded from enjoying them. A person can be prevented from enjoying them only if they are excluded from the society. Secondly, some collective goods are intrinsically valuable.

It is necessary to clarify the meaning of the phrase "intrinsically valuable". Raz distinguishes between two categories of intrinsically valuable things. First, some things are valuable in themselves. They have their own value and do not need to be justified by contributing to other values. Secondly, there are constituent goods that are elements of something that is good in itself. For example, although works of art are not collective goods, Raz states that they belong to the category of constituent goods and are intrinsically valuable if they contribute to the enrichment of life, which is intrinsically good. Thus, not only is life intrinsically valuable, but so are some things that can enrich it.[439]

Accordingly, if some collective goods or inherent public goods are intrinsically valuable, they are not instrumentally good because they are valuable independently of their consequences. The intrinsic value of some collective goods implies that intrinsically valuable collective goods are not good and valuable because of their consequences for the quality of human

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436 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 198.
437 *Ibid*, 199.
438 *Ibid*, 199.
439 *Ibid*, 200-201.

life.[440] In other words, from a Razian point of view, a collective good is intrinsically valuable when it "is considered to be desirable for its own sake and not merely as something sought after under some such description as 'what will enable me to…' or 'what will contribute to my survival."[441] An intrinsically valuable collective good does not have a particular objective or project that will be achieved at a certain point in time.[442] It might be argued that the relationship between human beings and intrinsically valuable collective goods is a "participation-in-a-value" relationship, or a "commitment" whose purpose is not the attainment of a particular objective or goal. Thus, the "participation-in-a-value" relationship can be finished only when the participants abandon the "commitment",[443] not when they reach a destination.

The non-exclusivity of collective goods (or inherent public goods) has two interrelated dimensions. On the one hand, a member of a society can enjoy the benefits of a collective good and is not excluded from inherent public goods unless they are excluded from the society. For example, if a person lives in a tolerant society, they should not experience prejudicial treatment because of their religion, race, sexual orientation or for any other reason. As a member of a tolerant society, they benefit from that collective good. Thus, the members of tolerant societies decide whether and to what degree they will enjoy such tolerance. However, the protection of a collective good profoundly affects all members of the society, as limitations are imposed on their activities. Thus, collective goods not only benefit everyone, but constrain them. The preservation of a collective good serves the interests of the whole population, not just those of particular individuals. All members of a society benefit from and are constrained by collective goods.

> "My interest in living in a prosperous, cultured, tolerant and beautiful environment is among my most important interests. It is more important than many aspects of my bodily integrity that others are duty bound to respect. The difference is that the maintenance of a collective good affects the life and imposes constraints on the activities of the bulk of the population, in matters which deeply affect them. It is diffi-

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440 *Ibid,* 200.

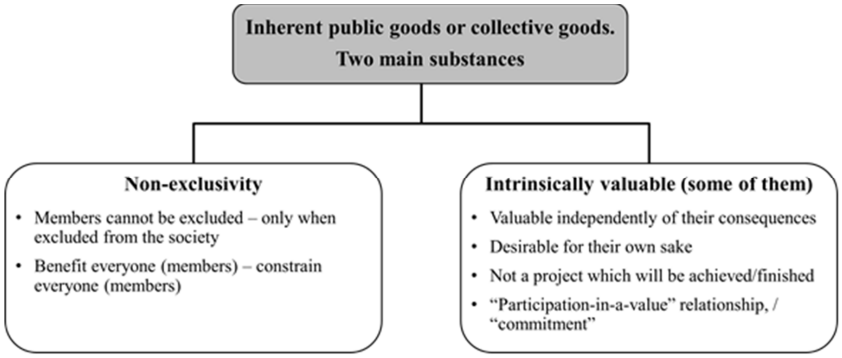
441 John Finnis, *Natural Law and Natural Rights*. 5th ed. (New York: Oxford University Press, 1988), 62.

442 *Ibid*, 64. In this chapter, Finnis describes the value "knowledge" as something good to have.

443 *Ibid*, 64.

cult to imagine a successful argument imposing a duty to provide a collective good on the ground that it will serve the interests of one individual." Joseph Raz, *The Morality of Freedom*, (New York: Oxford University Press, 1988), 203.

Figure 3: Two main substances of Razian collective goods



Source: Author's compilation.

Given that legal rights preserve the common good, and the common good concerns collaboration or co-ordination, this model of how common goods function mirrors one of the two basic roles of the law, or so-called legal techniques, that are sketched out by Raz. The first basic role of the law relates to sanctions as reasons for conformity *(mala per se)*, and the second relates to the verifiable publicity of standards, which are needed in an organised society *(mala prohibita)*.[444] The second role of the law "concerns participation in schemes of social co-operation (these duties are *mala prohibita*)". People have reasons to act in a certain manner because it contributes "to an ongoing scheme of social co-operation."[445] In these terms, the role of the law mirrors the role of common goods in that both contribute to collaboration in society. The relationship between common goods and collaboration is discussed in the next section.

444 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 246.
445 *Ibid*, 247.

4.6.2 The common good: Finnis's approach and its relationship with Razian collective goods

In Razian thinking, the notions of "the common good" and "the general good" are substantially the same as "collective good" and "inherent public goods", which were described in the previous section. Raz writes that one of the characteristics of collective goods, or inherent public goods, is that a member of the community cannot be excluded from enjoying them. The notion of "the common good" contains the idea of non-exclusivity, as it refers to goods that serve interests in a non-exclusive and non-excludable way. In "Rights and Individual Well-Being" (1992), Raz states explicitly that he has adopted Finnis's notion of the general or common good.[446]

Nevertheless, there are some differences between Finnis's and Raz's notions of common good, given that their accounts of practical reasoning are different. They also conceive of the relationship between rights and common goods differently. For Raz, human rights are secured in order to preserve common goods. In contrast, for Finnis, human rights are not subject to the common good. For him, human rights can be limited by "*aspects* of the common good," whereas it would be paradoxical for Raz to claim that human rights can be limited in the name of common goods. In Finnis's thinking, a fundamental component of the common good is the preservation of human rights,[447] whereas for Raz the main purpose of human rights is to preserve common goods.

In this section, I discuss Finnis's account of the common good and its relationship with Raz's notion of collective goods. How does Finnis define "the common good"? For him, a theory of justice describes what is necessary for the common good of a community.[448] Justice is one of the preconditions of the proper functioning of an association; the principle of justice contains the notion of "subsidiarity", which means "assistance" or "help".[449] His theory of justice[450] is not restricted to "the basic instituti-

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446 Joseph Raz, "Rights and Individual Well-being," *Ratio Juris* 5, no. 2 (1992), 135, footnote 5.

447 John Finnis, *Natural Law and Natural Rights*. 5th ed. (New York: Oxford University Press, 1988), 218.

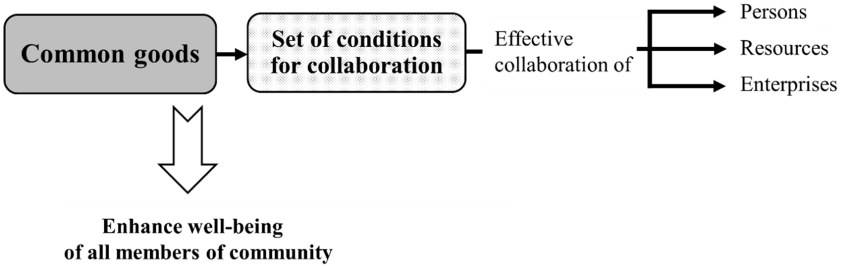
448 *Ibid*, 165.

449 *Ibid*, 146-147.

450 Raz's approach to justice depends on values of consensus-based stability and unity and the contrast between such values and a comprehensive conception of the good. See Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 70, 78, 81-82.

ons of society" or, like Rawls's theory, to the ideal conditions of a society.[451] For Finnis, the effective collaboration of persons and the co-ordination of resources and enterprises are essential to secure prosperity and enhance the well-being of members of the community. Such a set of conditions of collaboration is called the common good and enhances the well-being of all members of the community.[452]

Figure 4: Finnis's common good



Source: Author's compilation.

Finnis[453] divides "the common good" of a political community into three senses. The first sense concerns its evaluative dimension and relates to practical reasoning – in other words, some values are "common goods" because they are good for everyone according to practical reasoning.[454] The second

451 John Finnis, *Natural Law and Natural Rights*. 5th ed. (New York: Oxford University Press, 1988), 163-164.
Furthermore, for a critical analysis of Rawls's theory of justice by Joseph Raz, see Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 80-84.

452 John Finnis, *Natural Law and Natural Rights*. 5th ed. (New York: Oxford University Press, 1988), 165.

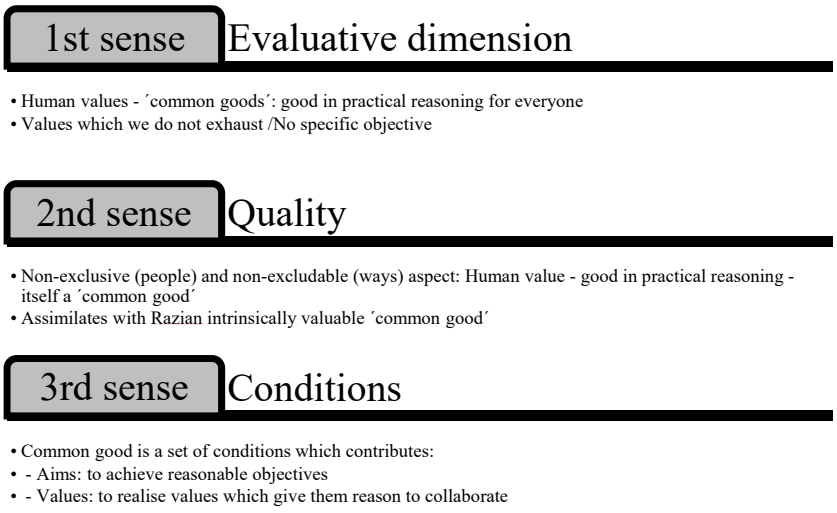
453 For a criticism of Finnis's philosophical arguments, see Russell Hittinger, *A critique of the new natural law theory*, (Notre Dame, Ind: University of Notre Dame Press, 1987) and Lloyd Weinreb, *Natural Law and Justice*, (Cambridge: Harvard University Press, 1987); and also Robert P. George, Lloyd L. Weinreb, and Russell Hittinger, "Recent Criticism of Natural Law Theory," *The University of Chicago Law Review* 55, no. 4 (1988), for a reply to Hittinger and Weinreb." They are quoted at Leora Batnitzky, "A Seamless Web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law," *Oxford Journal of Legal Studies* 15, no. 2 (1995): 153-175.

454 John Finnis, *Natural Law and Natural Rights*. 5th ed. (New York: Oxford University Press, 1988), 155.

sense of "the common good" concerns its quality. It could be claimed that this relates to what Raz calls the "non-exclusive and non-excludable" character of "the common good" and to his notion of "intrinsically valuable collective goods", which were described in the previous chapter. For Finnis, every value that, according to practical reasoning, is good for every human being is a "common good" because it can be enjoyed by a limitless number of people (i.e. it is non-exclusive), in a limitless number of ways and a limitless number of times (i.e. it is non-excludable).

Finnis's third sense is distinct from the first and second, although it is not radically different. It views "the common good" as a set of conditions that contribute to people's aims and values. In other words, they enable members of the community to achieve their own reasonable objectives, and to realise for themselves the values that give them reason to collaborate with others in the political community.[455]

Figure 5: Finnis's three senses of the "common good" of a political community.



Source: Author's compilation.

Thus, "the common good" can refer to values, concrete operational objectives or conditions – specifically, conditions that contribute to the realisa-

455 *Ibid*, 155.

tion of a value and the success of an objective.[456] These factors benefit every single member of the community and sustain collaboration. "The common good" therefore refers to values, operational objectives and conditions that give people reasons to continue collaborating with each other as members of a political community. In other words, "the common good" is "a whole ensemble of material and other conditions" that enables the personal development of each individual in the community.[457]

Although a "common good" exists, and "the common good" of a political community excludes some types of political arrangements and laws, this does not imply that "the common good" relates to specific goals that must be achieved by either the community or its members. Finnis distinguishes between "values which we do not exhaust" and projects and goals that will be achieved at a certain point of time. A political community does not have to set specific aims or goals. It does not have a determinable mission, destination or objective that it will achieve at a certain point of time. Similarly, the members of the political community do not have definite and completely attainable aims that the community ought to support. There is not only one reasonable way of life that should be promoted by the community and pursued by its members.[458]

The third sense of "the common good" does not relate to ideal objectives that should be attained or projects that should be fully realised. The existence of a "common good" does not imply that all members of a political community share the same values and aims, [459] but it does imply that there is a "set of conditions" or a "set of sets of conditions" that should be secured to enable each member of the community to achieve their objectives. The existence of such a "set of conditions" or "set of sets of conditions" is possible because people have a "common good" in the first sense.[460] In other words, each member of a political community can set their own goals and objectives, but the community should have a "set of conditions" that enables them to attain their goals. A "set of conditions" is possible not because all human beings share the same objectives and values, but because there are some "goods" that, according to practical reason, are good for each and every person. These "goods" are called "common goods".

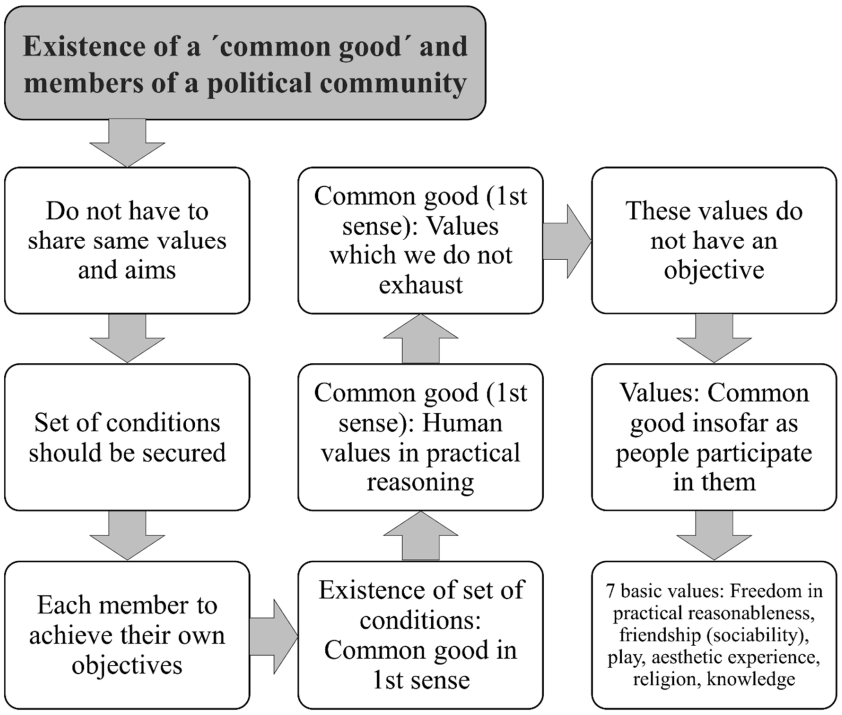
456 *Ibid*, 154, 155, 156.
457 *Ibid*, 154.
458 *Ibid*, 155.
459 *Ibid*, 156.
460 *Ibid*, 156.

> "The common good in the first sense thus explains the availability and relevance of a common good in the third sense. In this respect we can speak of the common good on different explanatory levels." John Finnis, *Natural Law and Natural Rights*. 5th ed. (New York: Oxford University Press, 1988), 156.

It could be claimed that "the common good", in the first sense, relates to "values which we do not exhaust",[461] which means that they do not have a specific destination to reach or objective to attain. Such values are "good" according to practical reasoning, and so constitute a "common good". People "participate" in them but do not reach a destination, because there is no destination to reach. As mentioned in the previous chapter, the common good relates to a "commitment" or a "participation-in-a-value" relationship.[462] As long as these values are good for every single person, according to practical reason, they constitute a "common good".[463] For Finnis, seven such values constitute the basic forms of human good: life, knowledge, play, aesthetic experience, friendship (sociability), (freedom in) practical reasonableness and religion.[464]

461 "values which we do not exhaust" is a phrase used by Finnis. See *ibid*, 155.
462 *Ibid*, 64.
463 *Ibid*, 155.
464 *Ibid*, 86-90, 155.

Figure 6: Finnis's common good and members of a political community



Source: Author's compilation.

There are innumerable other goods that are means of pursuing and realising these seven basic human goods. Finnis states that each of these seven human values is a "common good" in the second sense, as long as "it can be participated in by an inexhaustible number of persons in an inexhaustible variety of ways or on an inexhaustible variety of occasions."[465] There are thus many different types of friendship, religion and lifestyle that could be called "common goods", although there are no definite types that could be characterised as a "common good". However, the absence of defining criteria does not mean that "anything goes". For example, not every relationship can be characterised as friendship and, therefore, as a "common

465 *Ibid*, 90-91, 100, 155.

good". For a value to be classified as a common good, it should be good, according to practical reason, for everyone.[466]

4.6.3 Practical reason for Finnis and Raz

If Finnis's seven basic human values are good according to practical reason, what is practical reason and how does it function? Although Raz adopts Finnis's notion of "common good", the two scholars have different definitions of "practical reason". For Finnis, practical principles and human values extend beyond time and individual communities. Practical principles, which are intrinsic values, are grasped by human beings' practical reason, and enable people to participate in pursuits that they believe are good and valuable. The good of these basic human values and practical principles is a self-evident good; the self-evident aspect of the good implies that these seven basic human goods are not subjective and arbitrary. For Finnis, practical reason grasps human goods that are intrinsically valuable; afterwards, practical reasonableness becomes one of the seven human goods that are acknowledged by practical reason.[467] In other words, practical reason enables people to understand the basic forms of human good that already exist. Such goods are neither products of society nor the creation of human beings. Although Finnis and Raz agree that "a proper understanding of practical reasoning will lead to a proper understanding of morality," they develop different conceptions of practical reason.

> "Both Finnis and Raz want to claim that people reason according to what they find valuable. While Raz draws on Williams and Nagel, and not Aristotle and Aquinas, and while, indeed, Raz sees The Morality of Freedom as a contribution to the philosophy of liberalism both Finnis and Raz utilize a very similar notion of practical reason precisely in order to draw out its implications for morality. [...] Should we conclude then that the difference between Finnis and Raz is simply the fact that they each want to affiliate with different camps? No. The crucial difference between Finnis and Raz is their respective understandings of practical reason." Leora Batnitzky, "A Seamless Web? John Finnis and

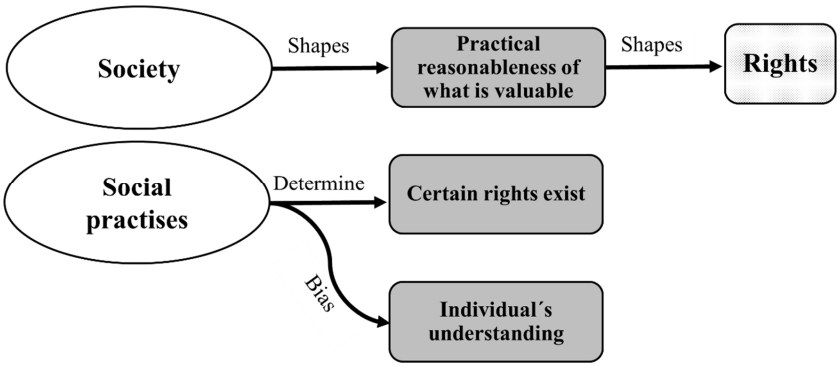
466 *Ibid*, 155.

467 Leora Batnitzky, "A Seamless Web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law," *Oxford Journal of Legal Studies* 15, no. 2 (1995), 162, 167.

Joseph Raz on Practical Reason and the Obligation to Obey the Law," *Oxford Journal of Legal Studies* 15, no. 2 (1995),167.

Unlike Finnis, Raz considers practical reason and goods to be bound to social forms. He does not associate practical reason with a specific good or goods; Finnis, on the contrary, argues that practical reason relates to particular goods. In Razian thinking, social forms are what make goods – including Finnis's seven basic goods – and morality possible. Goods do not exist a priori before society; they exist only within society. For example, life is not an intrinsic good; rather, it is a precondition of the good. Conceiving of life as an intrinsic good prior to society implies that particular social and personal conditions are not required to grasp it. However, "for Raz, all values, including the value of life, can only be grasped within a social context" and "any notion of the good, for Raz, is necessarily rooted in social forms."[468] Social forms are necessary for every possible conception of human good social forms. Therefore, "nothing, including Finnis's seven basic human goods, can be a substantive good without society." The concept of the good and the good itself *are made* available through culture.[469]

Figure 7: Raz's rights and practical reasonableness



Source: Author's compilation.

468 *Ibid*, 167, 171-172.

469 Joseph Raz, 26 March 1993, in the third out of four lectures titled "The Practice of Value" at Princeton University. For the relation between goods and culture, see Raz, 26 March 1993, in the second out of four lectures titled "The Practice of Value" at Princeton University. They are quoted in Leora Batnitzky, "A Seamless Web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law," *Oxford Journal of Legal Studies* 15, no. 2 (1995), 169.

For Raz,[470] practical reason can grasp only values that are already constituted or implied by existing social forms; it is necessarily related to existing social forms. Given that Raz does not share the idea that values and morality exist as self-evident goods and does not support the view that practical reason grasps timeless values and goods that are independent of society, the notion of liberal perfectionism is needed. This is because liberal perfectionism promotes and supports institutions "that create the social forms necessary for morality."[471]

In summary, Raz supports the idea of the creation of values, whereas Finnis supports the idea of the realisation of values. For Finnis, practical reason grasps goods that can be realised by all human societies, whereas for Raz, practical reason changes and modifies goods that have been created by existing social forms. Both agree that the law is not just instrumental and is not restricted to sanctioning; its positive role is to enable social co-ordination, which makes a variety of goods possible. For the natural theorist Finnis, individuals are obliged to obey the law. For the legal positivist Raz, people are not obliged to obey the law, as obligations relate to moral duties, not legal duties. Raz and Finnis disagree about the definition of morality, but they share the view that morality is a cognitivist conception. Their conception of morality is based on an idea of practical reason that enables social co-ordination. Finally, they both agree that individuals co-ordinate their activities and use the law to secure their common good(s).[472]

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470 For Raz's forms of practical reason, which are not instrumental in nature, see Joseph Raz, "The Myth of Instrumental Rationality," *Journal of Ethics and Social Philosophy* 1, no. 1 (2005).

471 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 110-164. In Leora Batnitzky, "A Seamless Web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law," *Oxford Journal of Legal Studies* 15, no. 2 (1995), 169.

472 Joseph Raz, *Practical Reason and Norms*, (New York: Oxford University Press, 1999); Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979); John Finnis, *Natural Law and Natural Rights*. 5th ed. (New York: Oxford University Press, 1988); Leora Batnitzky, "A Seamless Web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law," *Oxford Journal of Legal Studies* 15, no. 2 (1995).

Figure 8: Differences between Raz's and Finnis's conceptions of practical reason

Joseph Raz	John Finnis
Human Rights serve common goods.	Human Rights can be limited by aspects of the common good.
Human Rights preserve common goods.	Common good preserves Human Rights.
Practical reason, goods : are bounded to social forms.	Practical reason: allows people to understand the basic forms of human good which already exist. Practical reason: grasps practical principles, human values. Practical principles are intrinsic values, self-evident good. Practical reasonableness becomes one of the seven human goods.
Creation of values.	Realization of values.
Practical reason: is not associated with any specific good(s). It grasps only values already constituted/implied by existing social forms.	Practical reason: brings particular goods.
Specific goods and Finnis´s seven basic goods and morality: are feasible because of specific social forms.	
Goods exist: within the society. Particular social and personal conditions are required.	

Source: Author's compilation.

4.6.4 Common good, solidarity and utilitarianism

I have argued that Finnis's and Raz's notions of "the common good" do not relate to utilitarianism and do not support "solidaristic value commitments". As long as the notion of "the general, or common good or interest" is not conceived of as the sum of the good of individuals, as Raz writes,[473] it is not related to utilitarianism or to calculating consequentialist goals. Raz's approach differs from the economic utilitarianism of Bentham's ruling rule of law. Anthropologically, Raz adopts an Aristotelian, rather than a utilitarian, point of view, as he shares the belief that humans are by nature social animals.[474] They will therefore naturally desire to live in society and not be marginalised from it. This is why "commonly accepted views" and "common views about which options are worthwhile in life"[475] are central to people's lives. As "social animals", people seek to make choices that are socially acceptable and are viewed as valuable by their society. Consequent-

473 Joseph Raz, "Rights and Individual Well-being," *Ratio Juris* 5, no. 2 (1992), 135.
474 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 206.
475 *Ibid*, 206.

ly, individuals can experience an (ideal) autonomous life only if the opportunities available to them in their society have value for their community, there are worthy opportunities and options, and they can realise the available options.

It is therefore not enough for there to be plenty of options in a society. Razian conditions are neither calculative nor quantitative. His parameters for the ideal autonomous life are not consequentialist, and he does not deal with utilitarian considerations. On the contrary, his conditions are qualitative:[476] the mechanism that enables people to live an (ideal) autonomous life is their capacity to choose worthy opportunities and acceptable options, because humans are social animals and wish to live in a society in an officially accepted manner. Options are not intrinsically acceptable, valuable and worthy; it is the social context that gives them these characteristics. Given that the acceptability of options and collective goods relates to social institutions and has nothing to do with morality, then worthy, valuable and acceptable options are a social creation.[477]

Moreover, the Razian notion of the general or common good is not utilitarian[478] because it does not reflect an aggregation of self-interests. At the same time, the Razian conception of the common good is not compatible with the idea that people can be excluded to ensure "the greatest happiness for the greatest number". On the contrary, for Raz "the common good" (or the general good, or common interest) of a community refers to goods that serve people's interests in a conflict-free, non-exclusive and non-excludable way.[479]

Similarly, "the common good", as defined by Finnis, is not related to utilitarianism and is not about ensuring "the greatest good for the greatest number".[480] He characterises such an approach as "practically unworkable and intrinsically incoherent and senseless."[481] He states explicitly that the notion of an "aggregate collective good" is incoherent and can be used on-

476 *Ibid*, 155, 375.

477 My assumption derives from social relativism, which is predominant in Raz's thought. For example, see Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 16.

478 For a classical approach to utilitarianism, see John Stuart Mill, *Utilitarianism*, (Cambridge: Cambridge University Press, 2014), Chapter 2.

479 Joseph Raz, "Rights and Individual Well-being," *Ratio Juris* 5, no. 2 (1992), 135.

480 John Finnis, *Natural Law and Natural Rights*. 5th ed. (New York: Oxford University Press, 1988), 154.

481 *Ibid*, 154, 111-118.

ly in a limited technical context. He states that the common good of a community cannot be measured as an aggregate, because the life of a community is not a "limited technical context".[482]

Additionally, as mentioned above, Raz's and Finnis's notion of common good is not bound to "solidaristic value commitments": it is rational, and leads to individual self-realisation and collaboration or co-ordination. The public or collective in "solidaristic value commitments" has a reciprocal character, as it relates to solidarity and co-operation. I follow Christodoulidis's (2015) use of the term "solidaristic value commitments" to describe values and conditions that target not *individual* human self-realisation, but *reciprocal* human self-realisation. The term is strongly linked to the *public* or *collective*. Christodoulidis's use of the terms "public" and "collective" differs from Raz's notion of the collective, public or common good. For Christodoulidis, the public or collective, which are related to "solidaristic value commitments", are reciprocal and not individualistic. From this perspective, as long as *solidarity* is incorporated into the so-called public (or collective), then that public or collective cannot be related to "rationality" and is not "rationalised". On the contrary, such a public or collective might be conceived as an *irreducible* category, which is related to solidarity, not to rationality.[483]

Finnis's and Raz's notion of common good differs from this approach in two key ways. First, Finnis's common good is based on rationality, rather than solidarity. Secondly, it relates to individual self-realisation and collaboration or co-ordination,[484] not "solidaristic value commitments".[485] For

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482 *Ibid*, 213.

483 Emilios Christodoulidis, "Social Rights and Markets," *Social & Legal Studies* 24, no. 4 (2015), 596.

484 John Finnis, *Natural Law and Natural Rights*. 5th ed. (New York: Oxford University Press, 1988), 210.
According to Leora Batnitzky, "co-ordination" is sometimes called "co-operation" by Raz and Finnis, see Leora Batnitzky, "A Seamless Web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law," *Oxford Journal of Legal Studies* 15, no. 2 (1995), 160.

485 I use Fernando Atria's notion of co-operation from "Social Rights, Social Contract, Socialism," *Social & Legal Studies* 24, no. 4 (2015). According to Leora Batnitzky, the term co-ordination sometimes is called co-operation by Raz and Finnis, see Leora Batnitzky, "A Seamless Web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law," *Oxford Journal of Legal Studies* 15, no. 2 (1995), 160. Nevertheless, Raz and Finnis' use of the term co-ordination/co-operation is different from Atria's. Thus, a comparison is crucial in order to show their deeper meaning.

Finnis, the common good derives from rational considerations, first, because common goods "are good in practical reasoning" and, secondly, because a common good gives human beings *reasons* to realise the value of collaboration for themselves. This is the basis for my second argument that, in the final analysis, the common good concerns individual self-realisation. There is clearly a collective character to Finnis's notion of common good, as it "can be participated in by a limitless number of persons" and because it contributes to collaboration among the members of a community. However, this collaboration derives from "rational considerations": people have reasons to collaborate with other members of the community, which relate to them as individuals (i.e. they have reasons for themselves), not to the community. In other words, these are individual reasons, not "solidaristic values". It could be claimed that Finnis uses the term "collaboration" and not "co-operation" because "co-operation" has "communitarian" associations and could be related to solidarity, whereas the notion "collaboration" is more neutral and could be related to the market.

A clarification should be made here. It would be wrong to assume that Raz's notion of common good relates is morally relativistic, and that people's "reasons", which are important in determining how the common good is perceived, concern individual and relativistic judgments about the "good". The Razian notion of common good cannot be derived from the "belief view"[486] – in other words, what an individual believes to be the common good. Moreover, the common good might be defined by individuals' views, following practical reason, about what *is valuable.*[487]

4.6.5 Traditional liberal rights and the common good

Raz discusses some examples of traditional liberal rights, such as the right to freedom of speech, and modern rights, such as anti-discrimination rights. The right to freedom of speech serves the collective good of democracy. The interest in living in an open and democratic society is not restricted to individuals who exercise their right to freedom of speech by publicly expressing their opinion, or to those whose profession is to distribute information – for example, journalists. The right has a positive impact on every

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486 For Raz's "belief view" objection, see Niko Kolodny, "Raz's Nexus," in George Pavlakos et al., "Three comments on Joseph Raz's Conception on Normativity," *Jurisprudence* 2, no. 2 (2011), 349.

487 For the notions "value" and "valuable", see above the section 4.3.1.

single member of the community, because even individuals who do not exercise the right to freedom of speech benefit from the free distribution of information and opinions. For Raz, the purpose of the right is to preserve and protect not the individual right-holder, but the collective good of democracy.[488]

Anti-discrimination rights seek to prevent discrimination based on religion, race, nationality, sex and so forth. They enable people not only to have opportunities as members of the group that they belong to – men, women, Christians, Muslims, atheists, Greeks, Belgians, etc – but to secede from their group and join a different one. For Raz, this ability to escape does not imply that the right perpetuates "the separateness of the group."[489] On the contrary, it preserves the public culture that forms part of people's identities and enables them to take pride in being members of their groups. If there were no anti-discrimination rights, or if people had access to these rights but were nevertheless subject to discrimination on the grounds of race, religion, etc, they would not be able to take pride in their membership of their group. The absence of an anti-discrimination right therefore has a negative impact on people's lives. In Razian thought, such groups and the pride that people take in them are vital to people's well-being.

When Raz states that fundamental rights constitute "either an element in the protection of certain collective goods, or their value is found to depend on the existence of certain collective goods,"[490] he is advancing the idea that collective goods are of crucial importance for the existence of rights. For example, the right not to be discriminated against on the grounds of religion is a vehicle for the preservation of the collective good of religion. The importance of this right depends on the existence of the collective good of religion. If religions were not important to communities and people did not take pride in them, such a right would not be so significant.

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488 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 253-254.
489 *Ibid*, 254.
490 *Ibid*, 254.

4.7 Autonomy and the Razian perfectionist liberal state

Although liberal theories frequently promote the notion of *neutrality*, Raz does not support the idea of an anti-perfectionist neutral state. For him, state neutrality is neither possible nor desirable.[491] It is commonly argued that a neutral liberal state should refrain from developing specific moral ideals, and that liberal states should create a neutral framework that respects everyone's interests and allows individuals to pursue any good they wish.[492] Unlike this anti-perfectionist model of the state, in Raz's liberal approach a "morally sound political order" cannot be neutral about what constitutes a good life and what constitutes a hideous one. At the same time, however, perfectionism does not exclude moral pluralism and lets many morally valuable[493] ways of life flourish, even if some are incompatible.[494]

The perfectionist liberal state described by Raz does not presuppose the existence of "moral experts", a "moral science" or any secret "moral evidence" that must be discovered. Instead, he develops "a partially societal-based account of morality." For him, "values are, at least partly, constituted by social practices," and "practices play a constitutive role in establishing values." However, his "societal account of morality" is far from relativistic. On the contrary, he believes that there are "basic moral factors" and a morality that is available to everyone. For him, "the moral facts [which are] necessary to establish moral principles are available for all to see."[495]

The Razian perfectionist state imposes restrictions to improve the quality and range of options available. Raz endorses the idea that the more valuable options should replace the less valuable ones, and that the support of the state is needed to enable people to achieve their aims. State policies are not derived from "the de facto preferences of its citizens". In practice, state policies should "redirect individuals away from modes of life that are ini-

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491 For example, murders are restricted by liberal states; this implies that states develop moral ideals and thus are not neutral. Loren E. Lomasky, "But is it liberalism?," *Critical Review* 4, 1-2 (1990), 87, 89.

492 Loren E. Lomasky, "But is it liberalism?," *Critical Review* 4, 1-2 (1990), 89.

493 As discussed in the previous sections, something is valuable when it contributes to people's well-being. Additionally, there are intrinsically valuable and instrumentally valuable things.

494 Robert P. George, "The Unorthodox Liberalism of Joseph Raz," *The Review of Politics* 53, no. 4 (1991), 653-654.

495 Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 108-109.

mical to their well-being." However, the Razian perfectionist state is still liberal, because he shares the view that the maintenance of autonomy is fundamental to the well-being of individuals[496] and thus should be among the state's objectives. He does not develop a classical liberal theory, but articulates the "political morality of freedom", which is non-utilitarian, non-neutral and pre-liberal.[497]

Nevertheless, Raz's perfectionist state is not coercive because its main purpose is to set a framework within which people are autonomous and free to choose among different (valuable) options and objective values.[498] One of its chief concerns is the realisation of autonomy. Raz supports the idea of a perfectionist liberal state that promotes autonomy, value pluralism and social practices. In political theory, it is sometimes thought that there is tension between these three elements, and many liberal theories endorse only one of them. Nevertheless, they are merged in Raz's perfectionist liberal state. They act as "mutual reinforcing concerns" and do not compete with each other.[499] It is also true that, as Norman (1989) maintains, Razian autonomy requires a combination of capacity and relational properties. Of particular importance to this thesis is the fact that, for Raz, autonomy implies positive obligations.

Norman (1989) outlines six necessary properties of autonomy: non-coercion by others; mental capacities (for example, being capable of rational choices); moral capacities (for example, the capacity to develop commitments or evaluate goals); physical abilities; the existence of worthwhile and varied options, and the shaping of a life through the selection of options. The first property – non-coercion – relates to the classical idea of negative freedom and the state's negative duty not to act, whereas the other five mainly relate to positive freedom.[500] For Raz, positive freedom is a component of autonomy, and is morally equivalent to negative freedom.[501] In particular, the fifth constituent property of autonomy – the existence of

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496 Will Kymlicka, "Liberal Individualism and Liberal Neutrality," *Ethics* 99, no. 4 (1989), 883-884.

497 Robert P. George, "The Unorthodox Liberalism of Joseph Raz," *The Review of Politics* 53, no. 4 (1991), 653.

498 Margarete Moore, "Liberalism and the Ideal of the Good Life," *The Review of Politics* 53, no. 4 (1991), 677.

499 David McCabe, "Joseph Raz and the Contextual Argument for Liberal Perfectionism," *Ethics* 111, no. 3 (2001), 493.

500 Wayne J. Norman, "The Autonomy-Based Liberalism of Joseph Raz," *Canadian Journal of Law and Jurisprudence* 2, no. 2 (1989), 152, 161.

501 Loren E. Lomasky, "But is it liberalism?," *Critical Review* 4, 1-2 (1990), 102-103.

worthwhile and varied options – places a positive duty on the state to secure such options. This idea will be discussed further in the following chapters.

The literature indicates that there are several obstacles to assessing and understanding Razian autonomy. Several scholars criticise Raz for not clarifying whether he considers autonomy to be a "transcendent value" or a "contextual value". If it is a transcendent value, this means that an entirely good life cannot be realised without autonomy. If, however, it is a contextual value, then it is important for the good life in only some situations.[502] The following discussion of Razian autonomy can shed light on these objections only indirectly, as the main objective of this chapter is to scrutinise the relationship between autonomy, options and collective goods, not to assess whether autonomy is a transcendent or a contextual value. The next chapter aims to assess whether Razian autonomy implies that the state only has a negative obligation not to interfere, or whether it also has positive obligations.

4.7.1 The criticism of liberalism by communitarians

Communitarian thinkers tend to criticise liberal theories as being individualistic accounts that are detached from communal values. Moore (1991) writes that communitarians characterise liberal arguments as "implausible individualist metaphysics." For Taylor and Sandel, even the concept of neutrality presupposes an ideal of the good life, and thus liberalism cannot promote the idea of justificatory neutrality. Raz accepts this claim. His liberalism is grounded in a conception of the good life, and he claims that this is an advantage of his liberal approach. Razian liberalism is based on "a non-neutral conception of the good life."[503]

Moore (1991) points out that Taylor and Sandel criticise liberal neutrality by claiming that liberalism has an "inadequate" conception of the person and the good, despite the fact that these are important notions in liberal theories. Moreover, such communitarian thinkers maintain that liberal theories downplay communal values and the community. For Raz, as one would expect from a liberal theorist, the good life depends on the value of

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502 David McCabe, "Joseph Raz and the Contextual Argument for Liberal Perfectionism," *Ethics* 111, no. 3 (2001), 493-494.

503 Margaret Moore, "Liberalism and the Ideal of the Good Life," *The Review of Politics* 53, no. 4 (1991), 673-675.

autonomy. He takes a step beyond liberalism, however, in that he considers both "individual subjective freedom" and "objective values" to be of central importance.[504]

Raz goes further than the classical liberal theorists, in that he considers both autonomy and community to be crucial for the realisation of the good life. The value of community is a key element in his thinking.[505] As discussed earlier, communal values and the community are at the core of Razian rights. Therefore, the communitarians' criticism does not apply to Razian liberalism.

4.7.2 Rights: Autonomy, options and collective goods

Raz does not downplay personal autonomy in the name of the well-being of the community. He belongs to the tradition of perfectionist liberalism, which analyses the elements and dimensions of rights. He examines the role that rights play in protecting freedom and liberty,[506] but does not attempt to develop a list of rights to certain basic liberties. On the contrary, he focuses on political freedom and aims to establish the ideal of the autonomous or free person. He thinks that freedom should be scrutinised through the notion of autonomy[507] so that its full potential can be realised.

Raz's autonomy-based doctrine of freedom has three main characteristics. First, it relates to the protection of *positive freedom*, which relates to the *capacity for autonomy.* An autonomous life requires an *adequate range of options* and sufficient *mental abilities.* Secondly, the state has a *positive obligation* to promote freedom "by creating the conditions of autonomy". Thirdly, autonomy may be infringed only in the name of autonomy.[508]

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504 *Ibid*, 673-674, 676. In Charles Taylor, *Human Agency and Language: Philosophical Papers 1*, (New York: Cambridge University Press, 1985), 5, 29-33; Michael J. Sandel, *Liberalism and the limits of justice*, 2nd edition (Cambridge: Cambridge University Press, 1998), 49-53.

505 Margaret Moore, "Liberalism and the Ideal of the Good Life," *The Review of Politics* 53, no. 4 (1991), 680.

506 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 245.
Studying the contribution of rights to the protection of freedom, Raz uses the terms liberty, freedom, political liberty and political freedom interchangeably. They all indicate the notion of freedom.

507 *Ibid*, 246.

508 *Ibid*, 425. On the autonomy-based doctrine of freedom, see section 1.5.1.

Raz conceives of autonomy as a kind of achievement and a capacity.[509] It is an ideal of self-creation[510] and is morally valuable.[511] It is possible for a person to achieve projects through coercion. A person who experiences coercion and is subjected to the will of another may change their goals and expectations; this may lead them to achieve other goals. Nevertheless, the success of a person's life is evaluated by the path that they followed in order to achieve it. Therefore, if a person has been coerced, their life cannot be considered to be successful. As Raz points out, "the success of a person's life is judged not only by the success of his projects but also by how he came to have them. The contribution of autonomy to a person's life explains why coercion is the evil it is, and why it provides an excuse to those who yield to it."[512]

Although there are always constraints on autonomy, and absolute autonomy is not possible, pursuing autonomy in life is important. For Raz, autonomy does not simply mean a life lived without coercion. To be autonomous, an individual needs much more than simply to satisfy the minimum conditions of a worthwhile life. As mentioned earlier, autonomy also depends on the quality of the available options.[513] If people's choices are mainly restricted to their biological needs, they have little autonomy.[514] For Raz, personal needs are not merely the needs that must be met for a person to survive; they are the needs that lead to a worthwhile life.[515]

The notion of autonomy has a primary and a secondary sense. In its primary sense, autonomy is a life freely chosen, as opposed to a life of coerced choices:[516] "the autonomous person is part author of his life."[517] The secondary sense concerns the "capacity for autonomy" or the "conditions of autonomy".[518] There are three component conditions of autonomy: a) sufficient mental ability, b) an adequate range of options, and c) independence. People need sufficient mental ability to pursue an autonomous life, which

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509 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 204.
510 *Ibid,* 370.
511 *Ibid,* 407.
512 *Ibid,* 377.
513 *Ibid*, 155.
514 *Ibid*, 155.
515 *Ibid,* 153.
516 *Ibid,* 371.
517 *Ibid,* 370.
518 Raz uses the terms "capacity for autonomy" and "conditions of autonomy" interchangably.

means that they should possess a minimum of rationality and should be able to make plans and set goals, assimilating the means required for their realisation. It is not enough that people can make choices; an adequate range of options must be available. Raz sets out a test of variety for the available options, which, when released from its cultural associations, could be used as a guide to social policy. It could be used to evaluate and compare the available options in different cultures.

> "This formulation, far too abstract to serve as a direct guide to social policy, needs further elaboration. It needs, for example, to be cashed in terms of the options available in a particular society. It is however a virtue of the formulated test that it is not culture-bound. It points to the way in which the options available in different cultures can be evaluated and compared. The test of variety helps draw the line between autonomy and another ideal it is often confused with: self-realization." Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 375.

First, Raz's test of variety distinguishes between self-realisation and autonomy. He states that a person achieves self-realisation when all or some of their valuable capacities have been developed fully. The ideal of self-realisation is much broader than autonomy: autonomy is just one of several elements that leads to self-realisation. A person is autonomous when they can choose a life of self-realisation. Equally importantly, an autonomous person can reject the ideal of self-realisation if they wish.[519]

Autonomy is not a precondition of self-realisation, because self-realisation is determined and achieved subjectively. If a person wishes to pursue a life that is incompatible with autonomy, they may nevertheless, from their perspective, achieve self-realisation.[520] It is therefore not a contradiction to say that someone has achieved self-realisation but is not autonomous, and vice versa. A person can be autonomous even if their goals do not include the ideal of self-realisation.[521] However, autonomy is not a subjective notion. Specific conditions, which will be described below, must be met for a person to be described as autonomous.

A person who has rejected the ideal of self-realisation can be said to be autonomous only if they have the opportunity to choose from an adequate

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519 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 375, 376.
520 *Ibid*, 375.
521 *Ibid*, 376.

range of options. For example, if the only available options are choices between survival and death, they have no true options.

> "…a choice between survival and death is no choice from our perspective (and we need not deny that she may be very grateful that at least she was left this choice). An adequate range of options must therefore meet an additional separate condition. For most of the time the choice should not be dominated by the need to protect the life one has. A choice is dominated by that need if all options except one will make the continuation of the life one has rather unlikely." Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 376.

However, it is not enough for the choices available to autonomous persons not to relate to survival. Even more importantly, "the autonomous person must have options which will enable him to develop all his abilities, as well as to concentrate on some of them".[522] Even if a person has options to choose from, the range of options may not be sufficient for the person to be autonomous. This is the case when the only options available are trivial or have imperceptible consequences. In addition, the options are inadequate when the consequences of the available choices are all terrible.[523]

The Razian test of variety sets out criteria to determine whether an adequate range of options is available. First, there must be options with long-term consequences. For example, a person should be able to choose long-term engagements – such as their job, activities, projects and lasting relationships. At the same time, they should be able to choose whether or not to continue these activities. Secondly, they should have short-term options, which may relate to trivial matters. For example, everybody should be able to decide when to comb their hair. This ensures that "our control extends to all aspects of our lives."[524]

Thirdly, the adequacy of the options available relates not to their number but to their variety. Variety relates to their diversity, or to different and distinct options being available. If the options available are identical, a person has no real choice. It is essential that a variety of options are available in a society to develop people's capacities. Raz acknowledges that the natural capacities of human beings are greatly influenced by culture and civilization. Societies therefore either give people adequate options to exercise

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522 *Ibid*, 376.
523 *Ibid*, 373-374.
524 *Ibid*, 374.

and develop their natural capacities, or prevent them from developing their capacities.

> "…the variety of options available. Clearly not number but variety matters.[…]To a considerable degree culture and civilization consist in training and channelling these innate drives. To be autonomous and to have an autonomous life, a person must have options which enable him to sustain throughout his life activities which, taken together, exercise all the capacities human beings have an innate drive to exercise, as well as to decline to develop any of them." Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 375.

Nevertheless, Raz is conscious that problems arise from the adequacy of options. One relates to the relationship between the decisions people make, the options left after such decisions, and autonomy. He points out that people's decisions may indirectly limit their autonomy. People generally cannot make choices about the same option continually – for example, they cannot change occupations every year – so making a decision may limit their autonomy. For example, if someone has chosen to become an actor, after a certain point they cannot change their mind and decide to be a political scientist, a philosopher, a doctor or a mechanical engineer. Taking a decision is an action that someone performs as an autonomous person, but it may limit the options subsequently open to them. For Raz, although the availability of adequate options increases autonomy, as it enables people to express their will, their decisions may create obstacles to other decisions and available options. Therefore, "the question arises, to what extent does autonomy require the continuous possibility of choice throughout one's life. Given that every decision, at least once implemented, closes options previously open to one (it may also open up new options) the question of whether, and when, one's own decisions may limit one's autonomy raises tricky issues."[525]

Autonomy may be breached by non-coercive interventions, such as the accidental conditions affecting a person's life, or by coercive interventions directed by a state or resulting from harsh natural conditions. Raz acknowledges that the development of an autonomous life is related to social conditions. He states explicitly that "inasmuch as the liberal concern to limit coercion is a concern for the autonomy of persons, the liberal will

525 *Ibid*, 374, footnote 183.

also be anxious to secure natural and social conditions which enable individuals to develop an autonomous life."[526]

Given that Raz link rights not only to collective goods, but to the notions of autonomy and available options, it may plausibly be asked what difference there is between Raz's approach, classical liberal approaches to (natural) rights such as Locke's, and libertarian approaches such as Nozick's. If Locke and Nozick defend the significance of rights in the name of autonomy, how does Raz's theory of rights to differ?

For example, the libertarian Nozick stresses that societies must be *pluralistic,* in the sense that they must leave the individual free to pursue "its own utopian visions".[527] He emphasises that each individual meaning of one's life is important and should not be displaced by consequentialist calculations[528] or the "utilitarianism of rights";[529] rights should enable individuals to pursue any lifestyle they wish. Although options are of central importance in both the classical liberal and libertarian traditions, which assume that the availability of more options gives people a greater capacity to experience an ideal autonomous life, Raz's approach, while focusing on the notion of options, highlights the importance of *collective goods*. Raz's approach differs from classical liberal and libertarian approaches, in that it focuses on *options* and upgrades them to collective goods.

For Nozick, individuals are responsible for their choices[530] and should pay for their mistakes, but he does not focus on how the available *options*, which are related to *choices,* are created. Unlike Rawls, Nozick does not think that natural talents or social characteristics (e.g. family, social circumstances) are "external factors" that may unjustly benefit some individuals and put obstacles in the way of the autonomous choices and options of others. For Nozick, the crucial issue is "how persons have chosen to develop their own natural assets".[531] This implies that people are responsible for their own development. For him, the decisive question is what people do with their natural characteristics, which is matter of choice.

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526 *Ibid*, 156.

527 Ralf M. Bader, *Robert Nozick,* Major conservative and libertarian thinkers v. 11 (New York: Continuum, 2010), 107.

528 Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell Publishers, 1999), 32.

529 *Ibid*, 28.

530 Ralf M. Bader, *Robert Nozick,* Major conservative and libertarian thinkers v. 11 (New York: Continuum, 2010), 107.

531 Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell Publishers, 1999), 214.

Nozick shares the view that individual rights enhance freedom and enable people to make choices without obstacles. Paraphrasing Nozick, I would say that, following Raz's perfectionist liberalism on the one hand and his legal positivist "social thesis" on the other, *society or the community (rather than individuals) are responsible for the options and choices available. They must therefore be ready to protect individuals through rights*. Although Raz recognises that *options* are important for autonomy, he does not believe that individuals are masters of the game of choice, as the options are narrowly defined within social contexts. He thus highlights a vital dimension of choice: the social creation of options.

Raz's conception of autonomy is particularly interesting because it is not individualistic. It escapes from liberal and libertarian definitions of freedom, as it does not imply that the state should leave individuals free to pursue any kind of lifestyle they wish, even evil ones. Raz's notion of autonomy does not imply "moral privatisation", "moral scepticism", or the weak idea of non-interference – the order, "Mind your own business!"[532] As discussed above, in Raz's perfectionist liberal state, individuals have an autonomous choice among valuable options, but it is the perfectionist state, not the individuals themselves, that shapes these options. Raz's perfectionist state promotes the ideals, values and *valuable* options that lead to a good life. For him, "one is more likely to have a good life if guided by some conception of the good than by none."[533]

Moreover, Raz avoids the individualism that is often found in liberal theories. In his approach, the ideal of personal autonomy is protected not by a right to autonomy, but by various collective goods. Therefore, autonomy implies that states have positive obligations, because they must act to secure the collective goods that enable autonomy.

> "But that ideal [of personal autonomy] is not protected by a right to autonomy… It rests on the fact that autonomy is possible only if various collective goods are available. The opportunity to form a family of one kind or another, to forge friendships, to pursue many of the skills, professions and occupations, to enjoy fiction, poetry, and the arts, to engage in many of the common leisure activities: these and others require an appropriate common culture to make them possible and valu-

532 Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 98, 108.

533 *Ibid*, 106.

able." Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 247.

For Raz, it is not just individuals' choices that depend on societies' common cultures. He states that some of the social conditions that constitute the options that are considered acceptable, valuable and worthy are collective goods of these societies.[534] The options available in a society must be acceptable, valuable and worthy. Although the availability of an adequate range of options is essential for autonomy, this does not imply that every single option is needed. A state may limit a bad option if it does not enable people to experience autonomy. There is therefore no reason for a state to protect and preserve evil options.[535]

However, it would be wrong to assume that the reason for restricting an option is that the state does not consider it worthy. The judgment about whether an option should be restricted or promoted should be based only on whether it is valuable or not.[536] Consequently, only social conditions that constitute valuable options are collective goods. Societies protect and preserve collective goods through rights. Raz claims that a common culture makes options valuable. Finally, the available options are those that a society has deemed worthy, valuable and acceptable through certain social conditions and forms.[537]

For Raz, the ideal of autonomy is protected not by the right to autonomy but by various collective goods. Moreover, the right to autonomy and other fundamental rights are preserved in the name not of individual freedom, but of collective (or inherent public) goods. In other words, rights and collective goods are of central importance to Raz because collective goods create the conditions in which a person can experience an ideal autonomous life.

Therefore, following a Razian liberal approach[538], to increase the chances that people will experience an ideal autonomous life, rights should be adopted to ensure that people have access to many collective goods. Rights

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534 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 205, 206.

535 *Ibid,* 410-412.

536 *Ibid,* 412.

537 *Ibid*, 310, 204, 205.

538 It is worth stating that Raz's "liberal" political views are blurred, given that he emphasizes that "social forms" and "sociability" are necessary components of morality. See Leora Batnitzky, "A Seamless Web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law," *Oxford Journal of Legal Studies* 15, no. 2 (1995), 158-159.

are weapons that can be used to safeguard collective goods.[539] They should be adopted to serve and preserve the collective goods that create the conditions for an ideal autonomous life. Nevertheless, even before the existence of rights,[540] co-operation is needed to preserve common goods. This co-operation is both the "cooperative behaviour of many individuals"[541] and the active role of governments, which have a duty to protect common goods.

This duty on governments and other public authorities exists independently of rights and derives from the natural purpose of governments, which is "to serve their subjects".[542] Governments are duty-bound to protect common material goods – for example, historic buildings – and common goods that relate to patterns of human activity – for example, tolerance. This duty is independent of rights, and derives from the government's purpose, which is to serve its subjects. It concerns the community as a whole, not individual right-holders.[543]

Raz's view of the state's duties relating to collective goods is therefore not only descriptive, but prescriptive. It is prescriptive to assert that a government is duty-bound to secure a common good, even if it is not protected by a legal right. The state has duties that derive from the collective goods and predate the legal formulation of rights. After the institutional recognition of rights, the government has a duty to secure conditions that enable all members of the society to enjoy the common goods, and to protect them through rights. Raz states that no member of society should be prevented from enjoying the common goods and related rights.

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539 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 251.

540 Joseph Raz, "Liberating duties," *Law and Philosophy* 8, no. 1 (1989), 10.
Raz, in his article "Liberating duties", points out that "typically individuals do not have rights to common goods." This article was published in March 1988 – shortly after his book *The Morality of Freedom* (first published 1986, first issued in paperback 1988). He proposes that we need rights because they serve and preserve common goods. Nevertheless, rights often also preserve the common goods in a broader sense, which means that the common good cannot belong to an individual. This is more obvious in cases where common goods are material – for example, public parks. In this case, individuals have the right to enter the park which derives from their right to freely enter public spaces, but there is no individual right to the public park in the sense that the park is not the property of individuals.

541 *Ibid*, 10.

542 *Ibid*, 10.

543 *Ibid*, 10.

In practice, of course, members of the society are often prevented from enjoying common goods and rights. For example, some categories of migrants cannot fully enjoy the common good of democracy, because they do not have the right to vote. They do not have the same rights as citizens, even though they are both members of the same society – in legal terms, they are both within the jurisdiction of the same state. Some might argue that excluding them from some common goods and rights is a natural consequence of the conflict between their personal autonomy and the needs of other members of the community who have the status of "citizen". However, according to Raz, there is no *inherent* general conflict between individual freedom and the needs of others. Such a conflict is illusory, because personal autonomy is not separated by collective goods -it depends on collective goods.[544] Although personal autonomy sometimes conflicts with the interests of others, it depends on those interests. The only plausible way for personal autonomy to be realised is through collective goods. In this way, either everybody or nobody in the society benefits. Raz states explicitly that:

> "[personal autonomy]… can be obtained only through collective goods which do not benefit anyone unless they benefit everyone. This fact, rather than any definition, undermines the individualist emphasis on the importance of rights." Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 250.

However, Raz's conception of autonomy leads neither to anarchy, nor to chaos, as it is separate from his notion of individual well-being. The content of Razian individual well-being is not rampant, since it is not related to irrational and contemptible endeavours. Such a restriction is secured because of the perfectionist character of individual well-being: namely, it is not just a bunch of individual desires and wants,[545] for this kind of individual well-being which is merely related to uncontrolled desires is external. On the contrary, Razian individual well-being has a perfectionist orientation. In other words, it either "makes an individual into a better person" or makes a person's life better.[546] Raz writes that an inside perspective on in-

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544 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 250.
545 Joseph Raz, "Liberating duties," *Law and Philosophy* 8, no. 1 (1989), 8, 9, 12, 15.
546 *Ibid*, 12.

dividual well-being is needed. Individuals judge their desires, and ultimately there is a difference between worthwhile desires and bad ones.[547]

Raz distinguishes between individual well-being and the satisfaction of personal desires. Razian well-being has a perfectionist dimension, as it relates not to the fulfilment of individual wants, but to the achievement of worthwhile desires or wishes. Human beings are "conscious agents" who "are aware" of themselves "as people". This is one of the reasons why individual well-being is related to "the successful pursuit of worthwhile activities."[548] Razian individual well-being relates to "right desires", "appropriate goals", "reasonable wants",[549] and is therefore strongly bound to perfectionism. There are "natural limits" to autonomous persons' desires and wants. These restrictions shape the character of the society and the collective goods that are protected and promoted through rights. Such "natural limits" are set by the existence of a perfectionist state, as described in the previous chapter.

4.8 "How-dimension"

For Raz, rights have two main functions. On the one hand, they are part of the checks and balances mechanism[550], and act as weapons against the sovereignty of a state[551]. On the other, their dynamic character means that they create new duties. The Razian relationship between human rights and state sovereignty has been described as problematic for two main reasons. First, as Tasioulas (2013) points out, in practice it is not possible for all human rights contained in international human rights law to limit state

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547 The so-called inside perspective of individuals' lives relates the idea that individuals themselves are the "judges" of their own well-being. Individual well-being is evaluated from the inside, which means that its success depends on how things appear "to the people whose desire these are" from inside, and not on the evaluation of external observers. *ibid*, 13.

548 *Ibid*, 12.

549 *Ibid*, 13-12.

550 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 259.

551 For the Razian human rights as "sovereignty-limiting measures", see Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 9-14.
Nevertheless, for Raz, human rights do not act only against the sovereignty of states. They also act against international organisations, international agents, domestic institutions and against other individuals, see *ibid*, 9.

sovereignty. Secondly, Raz adopts "an eccentrically broad understanding of sovereignty", which does not contain a formal criticism of states.[552] I do not intend to discuss the relationship between state sovereignty and Razian human rights further. This section focuses on the second function of rights – their capacity to create new duties. ECtHR decisions derive new (prima facie positive) duties from old rights, and Raz's approach to rights can be used to develop a theoretical framework for the ECtHR's arguments about the positive obligations of Contracting States in unregulated or partly-regulated cases.

4.8.1 Rights and duties

In the analytical tradition, there are two main theories of rights: the so-called will theory and the interest theory. One of the main characteristics of the will theory of rights is the view that right-holders can waive their rights. Animals, people with severe mental disabilities and children cannot be right-holders, as they are not capable of making decisions, such as waiving their rights.[553] Unlike the will theory, some forms of the interest theory of legal rights can be applied to beings that are not adults of sound mind.[554]

Thinkers in the tradition of the interest theory of rights frequently point to the correlation between rights and duties. In general, the interest theory supports the view that a duty is owed to a right-holder as long as fulfilling that duty more or less serves their interests.[555] However, there are many different approaches to interest theory.[556] Interest theory scholars like Neil MacCormick do not require there to be a correlation between rights and duties.[557]

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552 John Tasioulas, "Human Rights, Legitimacy, and International Law," *The American Journal of Jurisprudence* 58, no. 1 (2013), 22.

553 Herbert L. A. Hart, "Are There Any Natural Rights?," *The Philosophical Review* 64, no. 2 (1955): 181; see also Leonard W. Sumner, *The moral foundation of rights* (Oxford: Oxford University Press, 1987), 204-205.

554 Matthew H. Kramer, "Refining the Interest Theory of Rights," *The American Journal of Jurisprudence* 55, no. 1 (2010), 34.

555 Rowan Cruft, "Rights: Beyond Interest Theory and Will Theory?," *Law and Philosophy* 23, no. 4 (2004), 370.

556 Matthew H. Kramer, "Refining the Interest Theory of Rights," *The American Journal of Jurisprudence* 55, no. 1 (2010), 31.

557 Nigel E. Simmonds, *Central issues in jurisprudence: Justice, law and rights*, 3rd ed. (London: Sweet & Maxwell, 2008), 135.

Joseph Raz is considered to be an interest theory scholar.[558] His approach to rights is foundational to interest theory,[559] at least in moral philosophy[560] or political philosophy: "a certain position within political philosophy developed most notably by Joseph Raz has often been classified as an Interest Theory of rights. However, many versions of the Interest Theory […] are primarily in the domain of legal philosophy rather than primarily in the domain of political philosophy."[561]

For Raz, rights are among the foundations of duties, although some duties do not arise from rights.[562] According to Cruft (2004), Razian theory "applies only to claims", because in Raz's approach a right exists only when a duty is justified.[563] For Raz, the uniqueness of rights is based on the existence of two elements, both of which relate to duties. First and foremost, rights derive their force from the fact that they ground duties. Secondly, rights express what is owed to the right-holder by virtue of their own interests or the benefits that will accrue to other individuals (i.e. non right-holders) when the right-holder's interest is respected.[564] The interests of the right-holder and the benefits that non right-holders will enjoy therefore lead to duties corresponding to each right. This implies that, whenever there is a right, there is also a duty. For Raz, duties are the "consequences" of legal rights.

> "An individual has a right, if an interest of his is sufficient, to hold another to be subject of a duty. His right is a legal right if it is recognised by law, that is, if the law holds his interest to be sufficient ground to hold another to be subject to a duty. This is the core of the account here proposed. […] to be a rule conferring a right it has to be motivated by a belief in the fact that someone´s (the right-holder´s) interest

558 Although most scholars focus on Raz's interest theory, the main ideas relating to Razian rights are found not in his interest theory, but in the double dimension of Razian rights that this thesis proposes.

559 See Eleanor Curran, "Hobbes's Theory of Rights – A Modern Interest Theory," *The Journal of Ethics* 6, no. 1 (2002), 85.

560 Matthew H. Kramer, "Some Doubts about Alternatives to the Interest Theory of Rights," *Ethics* 123, no. 2 (2013), 245.

561 Matthew H. Kramer, "Refining the Interest Theory of Rights," *The American Journal of Jurisprudence* 55, no. 1 (2010), 31.

562 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 186.

563 Rowan Cruft, "Rights: Beyond Interest Theory and Will Theory?," *Law and Philosophy* 23, no. 4 (2004), 371.

564 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 249.

> should be protected by the imposition of duties on others. […] Such duties are the consequences of a right in the sense that it legally justifies those duties." Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 268.

For Raz, rights have the same importance as duties in moral and political thinking. This does not mean that rights are not important, but only that they do not dominate duties. In other words, duties are no less important than rights.[565] Additionally, the relationship between rights and duties is not adversarial. According to orthodox thought, the purpose of duties is to protect the right-holder's interests. Rights and duties conflict because there is no harmony between the interest of the right-holder and that of the duty-bearer. Therefore, duties are manacles, which are harmful for the duty-bearers, and rights are conflictual. In orthodox thought, "since rights justify duties, and duties are to the disadvantage of their bearers, rights are confrontational."[566] For Raz, the relationship between rights and duties is not conflictual. Duties do not depend on harmony between the interests of the right-holder and those of the duty-bearer; on the contrary, they exist irrespective of such harmony.[567]

The example of common goods shows that duties are independent of rights. As mentioned previously, governments have a duty to protect common goods, even though individuals do not have individual rights to common goods. Raz proposes a new "reading" of rights and duties, redefining their role and status. For Raz, conceiving of rights as "conflictual" reduces their status. The relationship between rights and duties should be understood "within a wider theory of individual well-being", which conceives individuals' life from the inside.[568] In such an approach to well-being, duties are "independent of the support of rights."[569] As explained in the previous section, for Raz individual well-being does not include general desires in general, but it partly depends on right desires and appropriate goals.[570] It relates only to the achievement of the worthwhile ones.[571]

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565 Joseph Raz, "Liberating duties," *Law and Philosophy* 8, no. 1 (1989), 4-5.
566 *Ibid*, 9.
567 *Ibid*, 8.
568 *Ibid*, 13.
569 *Ibid*, 9.
570 *Ibid*, 13, 14.
571 For Razian individual well-being, see section 4.7.2, Rights: Autonomy, options and collective goods.

> "I will suggest that individual well-being should not be regarded as a function of one's desires. This mistaken view of individual well-being is among the main contributors to the orthodox view of duties; its corrections is the major step towards their liberation from that blinkered view of their role and nature. Once one is equipped with a sound view of individual well-being the way is open to admitting the importance of duties towards oneself." Joseph Raz, "Liberating duties," *Law and Philosophy* 8, no. 1 (1989): 8.

As conscious agents,[572] individuals can guide their desires. Individuals' desires are guided by reasons, which means that people desire something when there is a reason to do so.[573] Individual well-being is "sufficiently independent"[574] of individuals' wants and desires: people can reject, and sometimes even hate, their desires.[575] In these circumstances, they not only do not want to satisfy their desires, but are conscious that their desires may be harmful to their well-being, because individual well-being is related to reasonable wants.

Individual well-being is linked to the successful pursuit of worthwhile goals. People achieve self-respect by pursuing such goals. Self-respect is one of the conditions of individual well-being, and enables people to lead to a successful life. Therefore, as long as people wish to live successful lives, they will have a reason to pursue self-respect. To gain self-respect, "they have duties to treat themselves in the way appropriate to reasonable agents." These duties are clearly not related to rights. They are self-regarding duties that mainly derive from the well-being of their own subjects. Self-regarding duties protect and respect the conditions for their own self-respect and the self-respect of others; they are "a special kind of categorical reasons."[576] In addition to self-regarding duties, there are also intrinsically good duties, which are likewise not related to rights.

Duties are intrinsically good when they create valuable opportunities and options or are essential to support valuable activities and relationships. The existence of self-respect and intrinsically good duties illustrates that duties are not merely chains that are harmful to the duty-bearers, and that individuals are concerned not only with their own interests, but with interests of others. From this derives the view that, although rights always give

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572 Joseph Raz, "Liberating duties," *Law and Philosophy* 8, no. 1 (1989), 12.
573 *Ibid*, 14.
574 *Ibid*, 15.
575 *Ibid*, 13.
576 *Ibid*, 17.

birth to duties, they are not burdens that are hostile to the duty-bearers. For Raz, "if duties are not essentially fetters detrimental to their subject, then rights need not be considered as essentially confrontational."[577]

There is an impersonal side to rights: it is necessary to evaluate the well-being not only of the right-holders but of the non-right-holders who benefit indirectly from the rights and of the duty-bearers. For Raz, "rights are based on evaluating the interests not only of their beneficiaries, but also of others who may be affected by respect for them."[578] In evaluating rights, we should consider whether they work from the perspective of the considerations that are of ultimate concern. However, rights themselves are not considerations of ultimate concern.[579]

Raz poses a thorny question: who has these duties? A person, mankind as a whole or a state? There is no one answer, since the duties that rights give birth to may concern only a state or specific individuals (e.g. children rights, contractual rights), or mankind as a whole (e.g. the right to personal security).[580]

For Raz, the duties that derive from a right depend on further premises, which are incomplete. However, the fact that they are incomplete does not imply that rights are unable to protect individuals' interests. On the contrary, because they are incomplete, they have a dynamic character, which is

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577 *Ibid*, 9, 12, 21.

578 *Ibid*, 11.

579 *Ibid*, 12.

580 For example, the right to personal security clearly gives rise to a negative duty on every person not to rape or kill the right-holder. However, might it be claimed that the right to personal security gives rise not only to negative duties, but also to positive duties on states? For instance, does a state have a positive obligation to post police security guards in neighbourhoods in order to protect the right to personal security? Does a state have a duty to take measures against terrorism? If so, then the positive duties of a state could clash with the negative side of other rights. Therefore, how much can the state's duties be extended without violating other individual rights (e.g. the right to personal autonomy)? Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 182.
Raz also discusses the example of the right to education. He points out that it is not clear who is subject to the duties generated by the right to education. Who is principally responsible? The parents or the community? If these duties apply to the community, not to parents, this means that the community is responsible for providing free education to everyone. If this is the case, which level of the community is responsible in providing free education? The local level or the national level? Which stage of education (i.e. primary, secondary or university) should be provided for free? *ibid*, 185.

capable of extending the duties that derive from them.[581] A change in circumstances can lead to a proliferation of duties. Consequently, many new duties can arise from a right that previously had a fairly limited application.

4.8.2 Creating new duties: the dynamic aspect of rights

As mentioned in the first chapter, the traditional approach to rights has been contested. "Classical rights" – namely civil and political rights – have traditionally given birth to negative duties, but the ECHR rights have, in practice, given birth to mainly positive duties. The ECtHR can read new positive duties into the "first generation" (negative) Convention rights, although this cannot be an arbitrary decision. This shows that the Convention rights can play the role of legal reasons to justify new (positive) duties, which lead indirectly to a legal change. In this way, Convention rights can be used as grounds to develop the law.

Thus, in practice, legal rights give birth to new legal duties, and not only to duties that directly derive from the rights. According to Raz, this is an inevitable result of the existence of rights. In other words, the logical consequence of legal rights is that "they legally justify other rights and duties."[582] For Raz, legal rights should not be reduced to the legal duties that they justify, because legal rights have a dynamic aspect that goes beyond the rights and duties explicitly secured in statutory law. Legal rights are dynamic, and can function as reasons to change and develop the law – "legal rights can be legal reasons for legal change."

> "An important part of our understanding of legal rights consists in grasping their logical consequences. These are, […] that they legally justified other rights and duties. Some of these derive legal force from this justification. Others will be legal rights and duties established by independent legal sources. Others (i.e. rights and duties) still are not legally binding. These last consequences of legal rights deserve special attention, since they show legal rights to constitute legal reasons for giving the justified rights and duties legal force. They establish the dynamic aspect of rights. Legal rights can be legal reasons for legal

581 *Ibid*, 185, 186.

582 Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 269.

> change. They are grounds for developing the law in certain directions. Because of their dynamic aspect legal rights cannot be reduced, as has often been suggested, to the legal duties which they justify. To do so is to overlook their role as reasons for changing and developing the law." Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 269.

The implications of rights are unpredictable. The dynamic character of legal rights means that they are open to interpretation and may give rise to new duties in the future.[583]

> "[Rights] are not merely the grounds of existing duties. With changing circumstances they can generate new duties." Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 186.

Legal rights can create new duties. As Raz writes, "a change of circumstances may lead to the creation of new duties based on old rights."[584] The dynamic aspect of legal rights "is fundamental to any understanding and of their nature and function in practical thought."[585] The duties that are generated by rights are *legal* duties if a new law is created, although they may have been moral duties first.

> "[Human rights] are by their nature moral rights that call for legal-political protection. Needless to say mechanisms for their protection should be efficient, reliable and fair, or they may cause more harm than good. Moral rights that cannot be fairly and effectively protected through legal processes are not human rights."[586] Joseph Raz, "Human Rights in the Emerging World Order," *Transnational Legal Theory* 1, no. 1 (2010), 31.

When Raz states that human rights are by their nature moral rights, he means that human rights before becoming *human* rights (through their legal recognition) were solely moral rights. If individuals have interests that are sufficient to subject another person to a duty, then they have moral

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583 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 185, 171.

584 *Ibid*, 171.

585 *Ibid*, 171. .

586 In this article "Human Rights in the Emerging World Order", as it is mentioned above, Raz uses the term Human Rights implying legal rights.

rights that derive from their interests.[587] These moral rights form the character of the society that establishes common goods. They are turned into legal rights when they are institutionally recognised to protect the common goods, and finally they are transformed into human rights.

Although Raz claims that human rights are moral rights, which give birth to moral duties, moral rights have nothing to do with natural rights, as explained previously. It is clear that Raz views human rights as not only legal but moral rights for two reasons that relate to two stages of the rights' existence. The first stage is before the institutional recognition of rights and the second is after their legal recognition. In the first stage, when individuals' interests are sufficient for duties to be imposed, there are only moral rights and moral duties, and their grounds are mainly interests, not statutory law. In my reading of Raz, at this stage a moral right exists because it appears as a kind of moral recognition that an interest might be a sufficient reason to hold others to duties (moral obligations).

In the second stage – namely, after the institutional recognition of a right – a legal right may exist in parallel with the moral right. These moral rights exist principally through repetition, and they become established in the society's customs. The legal right gives birth to a new moral right and moral duty, which are not part of the legislation. Although the moral right and moral duty are grounded in the legal right, they are recognised not institutionally but through practice and custom. Finally, given that human rights are not only legal rights, but moral rights, a legal right can generate not only legal duties, which are articulated in statutory law, but moral duties. If institutions impose such a moral duty, "they will be making new law."[588]

> "The right to political participation is a legal right in English law. But though in contemporary societies this right justifies holding the government to be under a duty to publicize its plans and the reasons for its decisions, there is no such legal duty on the government in English law. The duty is purely a moral duty. Nevertheless, the existence of a moral right to political participation, i.e. the fact that this right is given legal recognition and is already defended by some legal duties, is a ground for the authorized institutions (Parliament or the courts) to impose such a duty on government officials. If and when they do so,

587 Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 268.

588 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 172.

> they will be making new law. But they will do so on the ground that this is justified and required by existing law. By the same token the legal right to political participation is a reason for investing people with a legal right to free information. It cannot be used to establish that they already have such a right." Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 172.

For example, in ECtHR practice, Article 8 of the ECHR – the right to respect for one's family and private life and home – has guaranteed the right to a healthy environment and the right to health as moral rights. In Raz's approach, legal rights are reasons for changing and developing the law. As mentioned above, legal rights should relate not only to legal duties, but to moral duties. Legal rights are like a living organism that can adapt to new challenges in its environment. In some cases, legal rights justify placing governments under moral duties, even though they are not legal duties that derive from statutory law. Raz observes that, in practice, all legal systems contain unprotected rights and duties.[589] Unprotected moral duties are not arbitrary as long as they are justified by existing legal rights. Thus, a court can impose new duties as long as it relies on specific grounds. The grounds for imposing a new duty are the legal rights that have been secured in legislation. A new moral duty creates a new moral right.

For example, the legal right in Article 3 of the ECHR places a legal duty on the state not to torture or inflict degrading treatment. It might be claimed that Article 3 is a negative right that implies a negative duty: it obliges states to refrain from actions relating to torture and degrading treatment. Nevertheless, according to the Court, it is not just a negative duty. Some Court decisions have recognised new positive duties – principally moral duties – arising from it. The Court has decided that the legal right prohibiting torture gives birth to a positive duty for the state to provide healthcare, even though this duty does not directly derive from Article 3. When the Court does this, it creates new law that goes a step beyond the negative duty of the state to refrain from action. It reads into Article 3 a new positive duty relating to healthcare. This consequently gives individuals an indirect moral right to enjoy the healthcare services of the Contracting State.

It could therefore be argued that the legal rights of the European Convention on Human Rights give birth not only to legal duties, which direct-

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589 Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 256.

ly derive from the statutory law, but to moral duties. ECtHR case law indicates that ECHR rights are dynamic and can generate additional duties for governments. This may be why the rights are articulated in an abstract form, and why there is only a convention of rights, not a convention of duties. When the ECtHR interprets, for example, Article 3, it may consider similar precedent case law, which may have given rise to different or new duties on the grounds of the Article 3 right. For example, in *D v UK*, Article 3 indirectly places a positive duty on the UK government to provide healthcare services to D. The ECtHR ruled that deporting a non-national to St Kitts constituted inhuman and degrading treatment, and proposed instead that he stay in the UK. Equally importantly for the purpose of this analysis, it read into Article 3 a positive duty to continue D's medical treatment. In this way, through Article 3, the ECtHR set the grounds for the indirect protection of a positive right – D's social right to healthcare.

Raz points out that the division of labour in institutions like states means that some officials have the executive power to apply rules and policies that already exist, whereas others are responsible for making and changing those policies and rules. Rights are principally the grounds for imposing duties; they not only judge whether certain duties exist.[590] Therefore, the following analogy might be made. In a constitutional state, there is a separation of powers: a division between legislative, executive and judicial power. The representatives of the executive power (e.g. the organs of the administration) have certain duties that have been arranged in advance. The representatives of the judiciary (e.g. judges) check whether laws and rules have been properly applied and impose penalties if necessary. The legislative power (e.g. a parliament) enacts and amends laws, which sometimes generate new duties.

However, the division is not always so strict. For example, although a court exercises judicial power, it may also exercise legislative power indirectly by interpreting laws. If we accept a Razian approach, in unregulated or partly regulated cases, a court, by interpreting the law, can create a new law and produce new rules. For example, a court decision may recognise the existence of new duties on a state.

If we apply this analogy to rights, what kind of power would they have? It might be argued that they exercise legislative power because, according to Raz, they impose new duties mainly on states. It may therefore be as-

590 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 172.

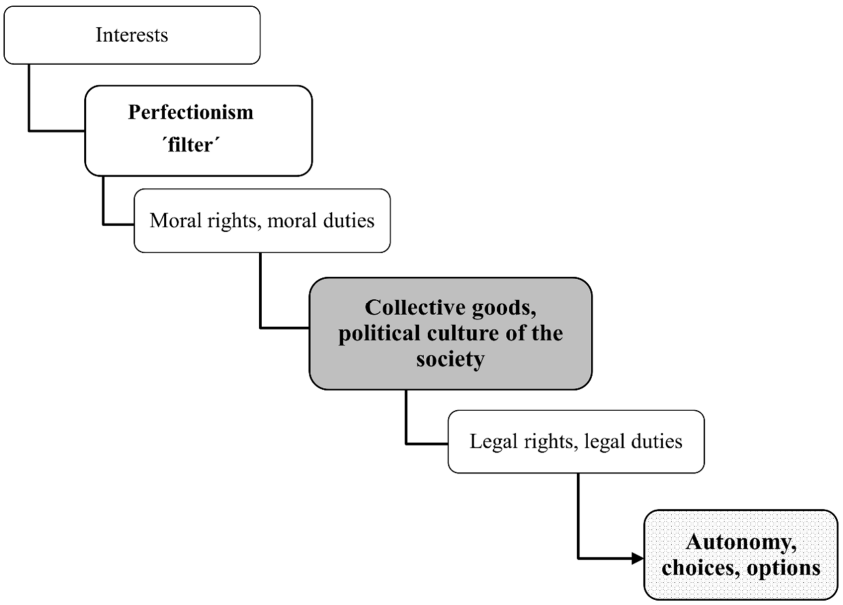
sumed that rights are a kind of legislator, not a judge or a watchman. The dynamic character of rights means that they can impose new duties.

> "Within certain institutional settings there are weighty reasons not so much against allowing rights to generate new duties as against allowing official action on the basis of new duties unless they are recognized by the appropriate institutions. Institutions such as […] states […] are based on a concentration of power in certain bodies and a division of labour between officials whose duties are the execution of the institutions' policies and rules, and those who make and change those policies and rules. In such an institution it may be proper to say that rights are grounds not so much for judging that certain duties exist as for imposing them." Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 172.

In summary, a legal right – Raz gives the example of political participation – imposes not only legal duties, but moral duties, which may be founded on the existence of moral rights and interests. A moral right can be the foundation on which authorised institutions recognise moral duties, which may then be imposed on governmental officials, creating new law. Therefore, a legal right can generate a moral duty that becomes statutory law, generating a new legal right. Accordingly, a legal right may give birth to a new legal right.[591] Finally, as mentioned above, legal rights preserve collective goods, autonomy, choices, and options.

591 *Ibid*, 172.

Figure 9: The emergence and function of Razian rights



Source: Author's compilation.

ECtHR decisions have derived positive duties from the old ECHR rights. From the perspective of a traditional account of rights, these positive duties are new by definition because ECHR rights have traditionally been seen as negative rights that give birth to negative duties. However, in some cases, these negative rights not only lead to new positive duties, but imply new positive rights. As described above, from a Razian perspective, this is a natural consequence of the dynamic nature of rights. However, in practice the dynamic character of rights is not reflected in all ECtHR decisions dealing with similar ECHR rights. In some cases, the ECtHR has been reluctant to find prima facie positive obligations in ECHR rights, for two reasons. First, because for the ECtHR the concepts of "minimum core obligations" and the "minimally good life" have prevailed over the Razian notions of autonomy, worthwhile life and common goods. Secondly, because the Court has mixed the two stages of the bifurcated model of human rights and made swift decisions about the definitive positive obligations before scrutinising in depth the prima facie positive obligations. These issues will be addressed in the next chapter.

4.9 A "middle ground" position of the "why-dimension" of Razian rights

Raz's "why-dimension" places his account of rights in the "middle ground" the theories of rights. Freeman (1994) distinguishes between theories of contingent, constructed and relative rights and theories that assert the objectivity of rights based on reasons or morality. Raz's approach to rights is located between these two categories.

At one extreme, there are communitarian approaches that focus on the contingency and relativity of rights. There are several communitarian approaches to rights, but the most well-known are either hostile to the doctrine of universal human rights, or link human rights to communitarian goods. There are also several liberal theories in the category of contingent or constructed rights theories. These liberal approaches consider collective goods to always have utilitarian purposes, and thus treat human rights is if they were always in tension with collective goods. At the other extreme are approaches that support the objectivity of rights. These include libertarian thinkers who accept the idea of universal natural rights on the objective moral basis of the inviolability of individuals. For them, human rights are in conflict with collective goods or social interests, and thus are completely detached from collective goods.

For example, Robert Nozick's libertarian theory conceives of rights as universally and objectively true, and gives priority to individual rights over social interests or the "greater social good."[592] For the liberal Dworkin, rights are contingent and constructed. His account of rights is less radical than Nozick's, but he still distinguishes between human rights and collective goals. He claims that human rights derive from principles, whereas collective goals derive from policies, and that utilitarian considerations may be taken into account when shaping policies. Dworkin's "rights thesis" makes a clear distinction between individual rights and collective goals. As described in the second chapter, for Dworkin, collective goals may have a utilitarian shape if they seek to achieve an aggregate collective good that is in competition with the deontological aspects of individual rights. Therefore, when cases are adjudicated, individual rights have a priority over collective goals – Dworkinian "individual rights 'trump' collective

592 Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell Publishers, 1999), 32-33.

goals."[593] Communitarianism belongs in the same category – namely, the broader classification of contingency, construction and relativity of rights.

Alasdair MacIntyre is an extreme example of a communitarian thinker who rejects the idea of universal human rights, whereas Charles Taylor gives an alternative articulation of rights – Freeman does not include him in this category. Freeman does not include Joseph Raz in the second category, but only mentions him at the end of the article. He thus suggests, without articulating it explicitly, that Razian rights are in a category between contingent, constructed rights on the one hand and the objective account of rights on the other. He maintains that, in Raz's thought, "the specific role of rights is to ground duties in the interests of others." Statements about rights "are typically intermediate conclusions that exist between ultimate values and duties." However, for Raz, "a consensus on intermediate conclusions about rights" is not objective and transhistorical, but he shares the same view with Dworkin that such a consensus "is constituted by particular cultures." On the other hand, Raz also adopts some aspects of the second category, in that he relates rights to reasons. However, Raz's approach is differentiated from the objectivity account of rights articulated by Gewirth. Unlike Gewirth, Raz states that "ultimate values are not arbitrary" because "they are presupposed by a wide range of cultures."[594] For example, in Razian thinking, well-being and freedom are ultimate values, but so are some other collective goods.

4.9.1 Raz's rights and Taylor's communitarian rights

The "why-dimension" of Razian rights indicates that rights are adopted in order to serve and preserve a collective or common good, and therefore a collective good is strongly related to practical reasoning. From this perspective, the "why-dimension" of rights encompasses aspects of Taylor's communitarian rights[595] and falls both in contingent, constructed rights and in

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593 Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), xi-xii. See also Michael Freeman, "The Philosophical Foundations of Human Rights," *Human Rights Quarterly* 16 (1994), 499, 508. See also Danny Shapiro, "Does Ronald Dworkin Take Rights Seriously?," *Canadian Journal of Philosophy* 12, no. 3 (2013), 418-419.

594 Michael Freeman, "The Philosophical Foundations of Human Rights," *Human Rights Quarterly* 16 (1994), 512-513.

595 This Chapter relies on the writing of Charles Taylor. For Charles Taylor's account of rights, see "A Catholic Modernity?" in *A Catholic Modernity? Charles*

category of objective rights. Razian rights fall in the former category because they are adopted to preserve communities' collective goods, not to preserve a collective good that exists "out there". They fall into latter category because collective goods derive from practical reasoning.

Despite Raz's similarities with Taylor's approach, Razian rights are not communitarian. Raz adopts the legal positivist view that rights are legal rights that are established by social institutions. He goes a step beyond legal positivism, because he considers that, although rights derive from a community's social forms, these social forms have been shaped by the community's collective goods. In this respect, Raz's approach echoes Taylor's account of rights. However, for Taylor, the social form that inspires the doctrine of rights is the Gospel, and the community that shapes society is the Catholic Church.

In contrast, for Raz, social forms are shaped by the collective goods of a liberal-perfectionist community, not by the Catholic community in particular. Although the Catholic community may fall within the broader category of a perfectionist community, it must be distinguished from Razian perfectionism. Clearly, the fact that the Catholic community may be a sort of perfectionism does not imply that Razian perfectionism relates to the Catholic community in particular. Moreover, both thinkers share the idea that rights may be reasons for freedom. All in all, both Raz and Taylor develop an account of rights that has as a starting point a community, and both their theories escape from individualistic theories of rights.

Raz's approach to rights can be described as a "middle ground" that combines aspects of communitarian rights as articulated by Taylor, Dworkin's constructed rights (which do not "trump" collective goals), and accounts that focus on objective rights, to the extent that they relate to practical reasoning. This is one of the reasons why I have analysed Razian rights. In the following chapters, I will apply them to ECtHR decisions that relate to health issues in general and to states' positive obligations to protect health or provide healthcare. However, in ECtHR practice, such positive obligations do not derive either by invoking aspects of distributive justice, or by principles of a social welfare system. On the contrary, the EC-

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Taylor´s Marianist Award Lecture, with responses by William M. Shea, Rosemary Luling Haughton, George Marsden, Jean Bethke Elshtain, ed. Charles Taylor, and James Heft, 13-37. (New York: Oxford University Press, 1999); and Charles Taylor, *Sources of the Self: The Making of the Modern Identity*, 10th ed. (Cambridge, Massachusetts: Harvard University Press, 2001), 305, 375-376. See section 2.3.5 for Charles Taylor's communitarian account of human rights.

tHR grounds these positive obligations in individual rights. In this respect, I claim that Raz's theory is a liberal theory of rights that recognises the social aspects of rights and holds a "middle ground" position between the extremes of the theories of rights that conceive of human rights as provisions which primarily protect individuals, and those that posit the idea that rights mainly serve the community. For Raz, human rights serve collective goods, autonomy and well-being, and states have positive obligations to preserve them.

CHAPTER 5: European Court of Human Rights decisions

5.1 Introduction

The aims of this chapter are threefold: to understand the general legal principles in positive obligation case law; to establish how such principles are defined by the legal reasoning of the ECtHR; and to test my claim that the Court does not apply a coherent theory of positive obligations but, in most cases, follows the "minimally good life" principle. To achieve those aims, I will examine positive obligations cases related in a broad sense to health, and to the ECHR rights not to be tortured (Article 3[596]) and to respect for private and family life and home (Article 8[597]), in which the issues at stake are expulsion, detention, medical care and environment. The chapter addresses merely analytical questions.

Such a methodological approach to interpreting the ECHR by focusing on particular Convention rights on one hand and a particular subject area on the other is justified by the considerable textual and normative differences between human rights – differences that are also embodied in the ECHR.[598] The Convention contains three general types of rights: "absolute rights", which cannot be limited by the Contracting States even in times of war, such as the right not to be tortured under Article 3; "limited rights", which in some cases can be restricted, such as the right to liberty under Article 5; and "qualified rights", which require a balance to be struck between individual rights and the interests of the community. Qualified rights, such as those in Articles 8 to 11 of the Convention, contain a general limitation

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596 Article 3 of the ECHR, "Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.".

597 Article 8 of the ECHR, "Right to respect for private and family life: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.".

598 George Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer," *European Journal of International Law* 21, no. 3 (2010), 509.

clause in their second paragraph, listing legitimate aims for which the right may be interfered with.[599]

This study focuses in a broad sense on the subject of health. The ECtHR most often adjudicates health-related cases under Articles 2, 3, 8 and 14 of the ECHR.[600] The study is also concerned with the positive obligations that Contracting States derive from the provisions of the Convention. Articles 2 (the right to life), 3 and 8 of the ECHR form a platform supporting "procedural" and "substantive" positive obligations.[601] Therefore, in scrutinising health-related ECtHR case law and the interrelated positive obligations of the Contracting States, this chapter will discuss the absolute right of Article 3 and the qualified right of Article 8.

As mentioned above, in scrutinising the absolute right not to be tortured of Article 3 as it relates to health, the chapter will consider issues of expulsion and detention. In examining the qualified right to private and family life of Article 8 and the same subject area, it will consider issues related to the expulsion of ill people, medical care in a broader sense and environment. The following sections discuss the ECtHR's argumentation in detail, with the aim of scrutinising the Court's reasoning in positive obligation cases related to health.

The chapter adopts an *internal* approach to *analytical* questions, with the aim of focusing on the legal principles of ECtHR case law. Those principles were selected ad hoc, directed by the argumentation of the Court, relevant legal literature and an academic analysis of the ECtHR case law in question. In as much as ECtHR case law is not binding because it "does not establish 'authorities' for 'propositions of law' in anything like the same sense as judicial decisions in common law systems,"[602] the selected case law meets two main criteria.

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599 Hélène Lambert, *The position of aliens in relation to the European Convention on Human Rights*, 3rd ed., Migration Collection (Strasbourg: Council of Europe Publishing, 2006), 9, 27, 38-39.

600 European Court of Human Rights, "Research Report on health-related issues in the case-law of the European Court of Human Rights," (Council of Europe, 2015), 5.

601 Jean-François Akandji-Kombe, "Positive obligations under the European Convention: A guide to the implementation of the European Convention on Human Rights," Human rights handbooks, no. 7, (Strasbourg: Council of Europe, 2007), 21.

602 Steven C. Greer, *The European Convention on Human Rights: Achievements, problems and prospects,* Cambridge studies in European law and policy (Cambridge: Cambridge University Press, 2006), 231.

The first criterion is *feasibility*, which means the selected cases illustrate the contradictions in ECtHR argumentation and the problems that emerge from the absence of a coherent theory of positive obligations. Secondly, the cases discussed in this chapter can be conceived as *representative* of those related to detainees and to the expulsion of ill non-nationals. Two web search tools were employed to collect the case law, both of which are available on the official ECtHR website: "HUDOC", the online database of ECtHR cases, from which the original text of case law is available; and "Factsheets", an online database containing "key points" summaries of ECtHR case law organised by thematic topics.

5.2 Expulsion, detention and healthcare: Positive obligations and Article 3 of the ECHR (an overview)

The following sections examine ECtHR case law to assess the extent to which the Court applies a theory of positive obligations in adjudicating cases related to detainees on the one hand, and to ill non-nationals illegally residing in a Contracting State on the other. As mentioned above, the abstract presence of positive obligations in ECtHR case law causes problems with the "justification", "content" and "structure" of positive obligations,[603] which are blurred and, in some cases, cause contradictory ECtHR arguments to be developed during the adjudication of cases of the same type. The following sections will consider the legal principle of positive obligations in parallel with some of the principles incorporated in Article 3: the legal principle of "intentional acts and omissions" and the legal terms "minimum level of severity" and "threefold condition for exception circumstances/humanitarian reasons". The relationship between Article 3 and "implied restrictions" will also be discussed, and the social aspects of the ECHR will be presented, with a focus on expulsion cases.

603 Matthias Klatt, "Positive Obligations under the European Convention on Human Rights," *Heidelberg Journal of International Law (HJIL)* 71 (2011), 693.

5.3 Article 3 of the ECHR: its general characteristics and its relationship to healthcare

The Article 3 right is absolute, which means that it must be secured without restriction and cannot be suspended even in cases of public emergency or during war; in that sense, the priority-to-rights principle applies to it.[604] The articulation of Article 3 is absolute and unqualified, as it does not incorporate exceptional circumstances in which torture, inhuman or degrading treatment or punishment might be permitted.[605] The expulsion of a non-national might violate Article 3 if there is evidence that they face a real risk of ill-treatment in the receiving country, and such ill-treatment is therefore conceived as a direct consequence of the Contracting State's action – its decision to expel them.[606] However, expulsion is more complicated in cases concerning medical asylum applications, where a non-national with a medical problem resides illegally in a country without official authorisation and is about to be expelled to a country with an insufficient or private healthcare system. In such cases, is the Contracting State under a duty to refrain from action – expulsion – and at the same time under a positive obligation to provide healthcare to a non-national illegally resident in the country?

In legal literature and ECtHR jurisprudence, health-related cases may fall within the scope of Article 3. Contracting States have a duty to refrain from action that may causes a person health problems, and they may also have a positive obligation to act to protect the physical, mental or psychological health of individuals such as prisoners.[607] Article 3 can be violated by the intentional enforcement of ill-treatment and "by negligence or failure to take specific action, or provide adequate standards of care."[608] Article 3 therefore imposes not only negative but positive obligations to take posi-

604 *Ibid*, 209.

605 Aisling Reidy, "The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights," Human rights handbooks, no. 6, (Strasbourg: Council of Europe, 2003), 19-20.

606 *Ibid*, 32.

607 European Court of Human Rights, "Research Report on health-related issues in the case-law of the European Court of Human Rights," (Council of Europe, 2015), 5.

608 Aisling Reidy, "The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights," Human rights handbooks, no. 6, (Strasbourg: Council of Europe, 2003), 9.

tive action to protect individuals from prohibited treatment.[609] According to the ECtHR, there is scope for Article 3 protection when an application concerns medical asylum, but in such cases "the Court must subject all circumstances surrounding the case to a rigorous scrutiny" (*D v. UK*, (Chamber), Application no. 30240/96, judgment of 2 May 1997, para. 49).[610]

5.4 Expulsion and Article 3 of the ECHR

5.4.1 Expulsion and intentional acts or omissions

An issue of fundamental importance that draws a line between medical asylum applications and other expulsion cases is whether the applicant's ill-treatment is a consequence of intentional acts or omissions of a Contracting State.[611] For example, in *N v. UK*[612], the majority of the Grand Chamber of the Court decided that, in the case of N's expulsion, the UK was not directly responsible for the deterioration of N's health since his health prospects would deteriorate dramatically in any case due to his illness, rather than due to an act or omission of the Contracting State. As a result, according to the majority, N's expulsion would not entail a Contracting State's act or omission in violation of the Article 3 right.

N v. UK, (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, *para. 37: "The Court considers that the suffering associated with such a relapse could, in principle, fall within the scope of Article 3. […] The Court observes, however, that the applicant faces the risk of relapse even if he stays in the United Kingdom as his illness is long term and requires constant management.*"

N v. UK, (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, *para. 38: "Having regard, however, to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State[613] for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3.*"

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609 *Ibid*, 9.
610 Virginia Mantouvalou, "*N v UK*: No Duty to Rescue the Nearby Needy?," *The Modern Law Review Limited* 72 (2009), 818.
611 *Ibid*, 819.
612 *N v. UK* (Grand Chamber), Application no. 26565/05, judgment: 27 May 2008.
613 Emphasis added.

N v. UK, (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, *para. 43: "given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.*"

However, in his dissent in the case of *S.J. v. Belgium*,[614] Judge Pinto de Albuquerque criticises as circular the reasoning in paragraph 43 of the *N v. UK* (Grand Chamber) judgment that no positive obligations derive from Article 3 in cases concerning seriously ill foreign nationals. He characterises the ground of that claim as "purely axiomatic", and argues that to claim that seriously ill non-nationals deserve less protection and that no positive obligations are derived from Article 3 in relation to seriously ill non-nationals lacks "any rational justification."[615]

In the precedent case of *D v. UK*,[616] the Chamber of the Court asserted that the Court should address the application of Article 3 with sufficient flexibility. In particular, it should scrutinise carefully whether an expulsion would violate Article 3, including in cases where ill-treatment in the receiving country would not be the direct responsibility of the receiving country. Article 3 is not limited to cases in which expulsion causes ill-treatment because of "the intentional acts or omissions of public authorities or non-State bodies." Such a limitation would undermine the absolute character of Article 3.

D v. UK, (Chamber), Application no. 30240/96, judgment 2 May 1997, para. 49: *"Aside from these situations and given the fundamental importance of Article 3 (art. 3) in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article (art. 3) in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 (art. 3) where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article (art. 3). To limit the application of Article 3 (art. 3) in this manner would be to undermine the absolute character of its protection.*"[617]

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614 *S.J. v. Belgium* (Grand Chamber), Application no. 70055/10, judgment 19 March 2015.

615 See *S.J. v. Belgium* (Grand Chamber), Application no. 70055/10, judgment 19 March 2015, Dissenting opinion of judge Pinto de Albuquerque, para. 7.

616 *D v. UK*, (Chamber), Application no. 30240/96, judgment 2 May 1997.

617 Emphasis added.

In the light of its assertion that Article 3 is not limited to the narrow field of direct or indirect responsibilities, the Chamber of the ECtHR in *D v. UK* took into consideration, among other factors, D's medical condition, pointing out that his expulsion would expedite his death.

D v. UK, (Chamber), Application no. 30240/96, judgment 2 May 1997, para. 50: *"Against this background the Court will determine whether there is a real risk that the applicant's removal would be contrary to the standards of Article 3 (art. 3) in view of his present medical condition.*"

D v. UK, (Chamber), Application no. 30240/96, judgment 2 May 1997, para. 52: "*It is not disputed that his removal will hasten his death.*"

In a similar vein to the argumentation in *D v. UK*, the dissenting opinion in *N v. UK* (Grand Chamber) did not accept the majority view that N's expulsion would not breach Article 3. It stressed that the Contracting State has a responsibility that flows from the condition of expulsion. In that sense, N's future harm related to an act or omission of the Contracting State – namely, the UK's decision about N's expulsion. Crucially, it was argued that, although N's suffering was not irrelevant to his physical and mental illness, it would have been exacerbated by his expulsion, not merely because of the illness itself. From the dissenting's opinion point of view, N's expulsion from the UK might be characterised as "ill-treatment" and "degrading treatment." In *N v. UK* (Grand Chamber), paragraph 16, the dissenting opinion adopts the Commission's argumentation,[618] according to which a lack of medical care and services can engage the responsibility of the State that intends to expel a person when that person is exposed to a real health risk in violation of Article 3.

5.4.2 Expulsion and "minimum level of severity"

To clarify the notions "ill-treatment" and "degrading treatment", the dissenting opinion in *N v. UK* (Grand Chamber) used the case of *Pretty v. UK*,[619] according to which, as part of the established case law of the ECtHR, to fall within the scope of Article 3 of the ECHR, "ill-treatment" must attain "a minimum level of severity" and involve factual bodily injury or serious physical and mental hardship (*N v. UK* (Grand Chamber), Joint dissenting opinion, para. 5).

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618 In *B.B. v. France*, (Chamber), Application no. 47/1998/950/1165, judgment of 7 September 1998, Reports of Judgments and Decisions 1998-VI.

619 *Pretty v. UK*, (Chamber), Application no. 2346/02, judgment of 29 April 2002.

According to the Court, the Article 3 right may be violated if ill-treatment surpasses a minimum level of severity. However, the definition of the term "minimum level of severity" cannot easily be determined because, as the Court points out, the distinction between "harsh treatment" and "ill-treatment" is hazy.[620] Until recently, *D v. UK* (Chamber) was the only medical asylum application that reached the threshold of severity.[621] *Paposhvili v. Belgium*[622], which the Grand Chamber of the Court decided in December 2016, is another case concerning an asylum application for medical reasons that, in a broader sense, met the threshold of severity in the reasoning of the Grand Chamber.

Mantouvalou (2009), relying on *D v. UK* (Chamber), claims that an application may be considered to have reached the minimum level of severity when: a) the applicant is physically present in the territory; b) their illness is terminal and incurable; c) medical treatment and support is available in the Contracting State; and d) the applicant's expulsion would lead to a dramatic deterioration in their circumstances – death, for example – because of a lack of medical treatment or the unaffordability of the medical treatment in the receiving country.[623] Moreover, the majority opinion of the Grand Chamber in *N v. UK* argued that the minimum level of severity is a relative factor, the analysis of which takes into account circumstances such as the duration of the treatment, the physical and mental effects of the treatment, and the applicant's sex, age and state of health (*N v. UK*, (Grand Chamber), para. 29).

Under the above definition, the "minimum level of severity" principle applies to individuals who are physically present in the territory, which means that non-nationals residing either legally or illegally in the territory may reach the threshold of severity. So long as an individual is physically present in the Contracting State, it has a legal obligation to secure their

620 *McCallum v. the United Kingdom*, Report of 4 May 1989, Series A no. 183, p. 29, quoted in Aisling Reidy, "The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights," Human rights handbooks, no. 6, (Strasbourg: Council of Europe, 2003), 10.

621 Virginia Mantouvalou, Virginia Mantouvalou, "*N v UK*: No Duty to Rescue the Nearby Needy?" *The Modern Law Review Limited* 72 (2009), 818. However, the ECtHR case law shows that in other contexts that do not concern asylum for medical reasons, there are several cases in which the minimum threshold of severity was found to have been reached.

622 *Paposhvili v. Belgium*, (Grand Chamber), Application no. 41738/10, judgment of 13 December 2016.

623 Virginia Mantouvalou, "*N v UK*: No Duty to Rescue the Nearby Needy?," *The Modern Law Review Limited* 72 (2009): 824.

rights guaranteed Article 3. That obligation derives from Article 1, according to which "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". In *D v. UK*, the Chamber of the Court took into consideration the fact that D was physically present in UK territory.

In *D v UK* (Chamber), the Court drew a distinction between the semantic (technical) and pragmatic (physical) dimensions of the "entrance" and accorded primacy to the pragmatic dimension. In analysing D's case, the most important issue was the fact that D had physically entered and was present in the UK (the pragmatic dimension). As a result, the UK had an obligation to protect him as someone who was lawfully within the UK's jurisdiction. Consequently, Article 1 was applicable to the case and, in the reasoning of the Chamber of the ECtHR, the UK must accord D the rights guaranteed under Article 3, regardless of the seriousness of the infringement he committed.

D v. UK, (Chamber), Application no. 30240/96, judgment of 2 May 1997, para. 48: *"The Court observes that the above principle is applicable to the applicant's removal under the Immigration Act 1971. Regardless of whether or not he ever entered the United Kingdom in the technical sense (see paragraph 25 above) it is to be noted that he has been physically present there and thus within the jurisdiction of the respondent State within the meaning of Article 1 of the Convention (art. 1) since 21 January 1993. It is for the respondent State therefore to secure to the applicant the rights guaranteed under Article 3 (art. 3) irrespective of the gravity of the offence which he committed."*

The applicant, D, reached the minimum level of severity. Although he was a non-national residing illegally in the territory of the Contracting State, the Chamber of the ECtHR decided that, since he had physically entered the UK, he was part of the UK community, and the UK must accord him the rights guaranteed under Article 3 irrespective of the offences he had committed. The Chamber of the Court applied the "priority-to-rights" principle to the case. At the same time, the absolute character of Article 3 was enshrined; the Chamber of the Court does not use a proportionality test, so in considering the scope of Article 3 it does not consider the gravity of the offence that D committed.

On the contrary, in the case of *Paposhvili v. Belgium,*[624] which the Chamber of the Court determined in April 2014, the majority argued that in cases that do not engage the direct responsibility of the Contracting State, the

624 *Paposhvili v. Belgium*, (Chamber), Application no. 41738/10, judgment of 17 April 2014, Referral to the Grand Chamber 20/04/2015.

threshold of severity is high. Despite the fact that Paposhvili had been dependent on the Belgian healthcare system for three and a half years and was lived in the Contracting State for 15 years – he was physically present in the territory – the majority of the Chamber found that the Contracting State did not have a duty to continue providing medical care to him.

Paposhvili v. Belgium, (Chamber), Application no. 41738/10, judgment of 17 April 2014, para. 123: "*The Belgian authorities have provided the applicant with medical assistance throughout the three and a half years in which the case has been pending before the Court. However, this does not in itself imply that the respondent State has a duty to continue to provide him with such assistance.*"

Paposhvili v. Belgium, (Chamber), Application no. 41738/10, judgment of 17 April 2014, para. 124: "*Having regard to the high threshold of severity required under Article 3 of the Convention, particularly in cases which do not engage the direct responsibility of the Contracting State concerned, the Court is of the view that the present case is not characterised by compelling humanitarian considerations weighing against the applicant's expulsion.*"

The Grand Chamber of the Court made and published its final decision[625] in the case in December 2016, by which time the applicant, Paposhvili, had passed away. Referring to *D v. UK*, paragraph 49, it found that an application can exercise Article 3 of the ECHR even when the receiving country is not directly or indirectly responsible for the risk of inhuman or degrading treatment of the person who is expelled (*Paposhvili v. Belgium*, (Grand Chamber), Application no. 41738/10, judgment of 13 December 2016, para.175).

In the April 2014 decision of the Chamber in *Paposhvili v. Belgium*, the majority did not seriously consider the two elements of the "minimum level of severity" criterion: that Paposhvili had physically entered the Contracting State and that medical treatment and support were available in the Contracting State. Accordingly, the Grand Chamber of the Court found that, in that previous decision, the Chamber had focused not on the availability or the level of medical treatment in the returning state but on whether the applicant would be able to access medical care in the receiving country (*Paposhvili v. Belgium* (Grand Chamber), Application no. 41738/10, judgment of 13 December 2016, para. 189). According to the Grand Chamber, in applications concerning asylum on medical grounds, the returning Contracting State must obtain sufficient information and be sure,

625 *Paposhvili v. Belgium*, (Grand Chamber), Application no. 41738/10, judgment of 13 December 2016.

before the expulsion, that the ill applicant will receive proper medical treatment in the receiving state.

The Grand Chamber stressed that "*the returning State must obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment will be available and accessible to the persons concerned*." (*Paposhvili v. Belgium*, (Grand Chamber), Application no. 41738/10, judgment of 13 December 2016, para. 191).

Nevertheless, the Grand Chamber agreed with the Chamber that the Belgian state did not have a duty to provide medical care to seriously ill aliens who are about to be expelled to overcome the discrepancy between the healthcare systems of the returning state and the receiving state. The responsibility of the returning state concerns an act of expulsion that "would result in an individual being exposed to a risk of treatment prohibited by Article 3"; it does not directly concern "the lack of medical infrastructure in the receiving State" (*Paposhvili v. Belgium*, (Grand Chamber), Application no. 41738/10, judgment of 13 December 2016, para. 192). For the Grand Chamber, the issue at stake in this case was not the positive obligation of the returning state to provide healthcare to the applicant, but "the negative obligation not to expose persons to a risk of ill-treatment proscribed by Article 3" (*Paposhvili v. Belgium*, (Grand Chamber), Application no. 41738/10, judgment of 13 December 2016, para. 188).

Similarly, in the precedent case *N v. UK*, the Grand Chamber stressed that the fact that N had benefited from the medical care system in the UK for nine years did not mean the Contracting State had a duty to continue providing medical care services to her.

N v. UK, (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, para. 49: "*The United Kingdom authorities have provided the applicant with medical and social assistance at public expense during the nine-year period it has taken for her asylum application and claims under Articles 3 and 8 of the Convention to be determined by the domestic courts and this Court. However, this does not in itself entail a duty on the part of the respondent State to continue so to provide for her.*"

The Grand Chamber decided that N did not reach the threshold of severity because she was not critically ill (*N v. UK* (Grand Chamber), para. 50), she was fit to travel (*N v. UK* (Grand Chamber), para. 47) and she had family members in the receiving country (*N v. UK,* (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, para. 48).

In *Paposhvili v. Belgium*, the Chamber decided that Paposhvili's case did not reach the minimum level of severity because his life was not in imminent danger (*Paposhvili v. Belgium* (Chamber), para. 120), he was able to

travel (*Paposhvili v. Belgium* (Chamber), para. 120) and his expulsion would not lead to a dramatic deterioration in his circumstances, as the majority of the Chamber was confident that the receiving country, Georgia, would respect the Convention rights because it was a Contracting Party to the ECHR (*Paposhvili v. Belgium* (Chamber), para. 125).

However, I share the view that the applicant's submission and the reports of the World Health Organisation Europe indicated that, despite medical treatment being available in Georgia, Paposhvili could not benefit from it, since healthcare services in Georgia are private and accessible exclusively to individuals with private health insurance (*Paposhvili v. Belgium*, (Chamber), Application no. 41738/10, judgment of 17 April 2014, Referral to the Grand Chamber 20/04/2015, para. 90 and para. 111).

Contrary to the adjudication of the Chamber, the Grand Chamber of the Court decided that Paposhvili's expulsion to Georgia would have breached Article 3, because Belgium did not receive sufficient information to make a reliable decision about whether his deportation would entail a real risk to his health and thus whether he would be exposed to inhuman or degrading treatment (*Paposhvili v. Belgium*, (Grand Chamber), Application no. 41738/10, judgment of 13 December 2016, para. 205, para. 183 and para. 206).

5.4.3 Expulsion and the "threefold condition for exceptional circumstances/humanitarian reasons"

One principle of ECtHR case law is that aliens who are subject to expulsion cannot continue to benefit from medical assistance provided by the expelling state, with the exception that deportation may be resisted on medical grounds when the circumstances are "exceptional" or "very exceptional"[626] (*N v. UK* (Grand Chamber), para. 17). The judgment of the Grand Chamber in *N v. UK* sets out a threefold condition for exceptional circumstances/humanitarian reasons: first, that the applicant is critically ill and close to death; secondly, that the applicant cannot be guaranteed any

626 The activation of the notion of "very exceptional circumstances" raises questions about the extent of citizenship. If an immigrant – not a UK citizen – can be accorded a social right, it might be true that citizenship is a legal construction in the welfare state. See Anne-Mette Magnussen and Even Nilssen, "Juridification and the Construction of Social Citizenship," *Journal of Law and Society* 40, no. 2 (2013), 228, 239-242.

nursing or medical care in the receiving country; and thirdly, that the applicant has no family members in the receiving country who are willing or are able to take care of them (*N v. UK* (Grand Chamber), para. 42). However, it might be argued that there is some overlap between the elements of the "minimum level of severity" and those of the threefold condition for exceptional circumstances/humanitarian reasons.

In *N v. UK*, the majority of the Grand Chamber of the Court decided that N's case did not meet the "exceptional circumstances" criteria.

N v. UK, (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, *para. 38: "The case does not disclose the exceptional circumstances of D. v. the United Kingdom […], where the applicant was in the final stages of a terminal illness, Aids, and had no prospect of medical care or family support on expulsion to St Kitts.*"

In the case of *S.J. v. Belgium*[627] (Grand Chamber), Judge Pinto de Albuquerque criticised some aspects of the threefold condition applied by the majority of the Grand Chamber in *N v. UK*. He argued that the judgment in *N* lacked clear legal criteria for deciding when a terminally ill person may or may not be expelled, in terms of the first and second elements of the threefold condition for exceptional circumstances. He posed the question, "What is a critically ill person?" and, regarding the accessibility and cost of the treatment provided in the receiving state, "What are the required minimum standards which should be accepted by the Court in this regard?"[628] (*S.J. v. Belgium* (Grand Chamber), Dissenting opinion of Judge P. de Albuquerque, para. 8). The Grand Chamber majority opinion in *N v. UK* indicated that the applicant would probably not have been able to access proper medical treatment after her expulsion.

N v. UK, (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, para. 48: *"According to information collated by the World Health Organisation (see paragraph 19 above), antiretroviral medication is available in Uganda, although through lack of resources it is received by only half of those in need. The applicant claims that she would be unable to afford the treatment and that it would not be available to her in the rural area from which she comes.*"

According to Judge Pinto de Albuquerque, the lack of information about the specific features of medical care in the receiving country acted against the applicant. The majority opinion therefore contradicted a basic principle of legal reasoning: conclusions must not be drawn from a lack of

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627 *S.J. v. Belgium*, (Grand Chamber), Application no. 70055/10, judgment of 19 March 2015.

628 Emphasis added.

information (*S.J. v. Belgium*, (Grand Chamber), Application no. 70055/10, judgment of 19 March 2015, Dissenting opinion of judge P. de Albuquerque, para. 9).

The Chamber's April 2014 decision in *Paposhvili v. Belgium* developed an argument similar to that developed by the majority of the Grand Chamber in *N v. UK*. According to the Chamber majority, Paposhvili did not satisfy the exceptional circumstances/humanitarian reasons criteria; the anticipated reduction in his life expectancy and general circumstances following his expulsion was not sufficient to give rise to a violation of Article 3.

Paposhvili v. Belgium, (Chamber), Application no. 41738/10, judgment of 17 April 2014, Referral to the Grand Chamber 20/04/2015, para. 118: "*The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting Party may raise an issue under Article 3 only in a very exceptional case, where the humanitarian grounds against the removal are compelling (see N. v. the United Kingdom, cited above, § 51).*"

Paposhvili v. Belgium, (Chamber), Application no. 41738/10, judgment of 17 April 2014, Referral to the Grand Chamber 20/04/2015, para. 119: "*The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to a breach of Article 3 (ibid.). In the Court's view, the case must be characterised by even more compelling humanitarian considerations.*"

The December 2016 decision of the Grand Chamber in *Paposhvili v. Belgium* included the assessment by the Human Rights Centre at Ghent University that the issue at hand in this case – and in general in cases related to asylum on medical grounds – is the fact that a seriously ill person is about to be intentionally removed from a country in which they could receive "life-saving treatment" to a country "where they could not". The Human Rights Centre pointed out that the Court's case law indicates that the absolute character of Article 3 forbids Contracting States from expelling people when "there were serious reasons for believing that the person concerned, if removed, faced a risk of being subjected to treatment contrary to Article 3" (assessment of Human Rights Centre-Ghent University, in *Paposhvili v. Belgium*, (Grand Chamber), Application no. 41738/10, judgment of 13 December 2016, para. 168).

5.4.4 Expulsion, Article 3 of the ECHR and implied restrictions

Some scholars point out that, despite the absolute character of Article 3, the principle of "implied restrictions" sometimes features in the Court's argumentation in cases that fall within the Article's scope. The Article 3 right is therefore subject to inherent public interest exceptions.[629] However, the right not to be tortured is absolute, and such considerations must not feature in the adjudication of cases relating to Article 3. According to Greer (2006), implicit restrictions of the Article 3 right should not be derived from "ad hoc balancing"[630] or from a direct application of the principle of proportionality.[631]

For example, according to Mantouvalou (2009), the applicant in *N v. UK* (Grand Chamber) failed to reach the minimum level of severity not for the reasons developed by the majority, but for the reason implied in the argument that Contracting States cannot afford the costly burden of providing medical care to ill non-nationals.[632] I share that view. One of the main arguments against the Contracting State's having such an obligation concerned the budgetary restrictions and financial consequences of N's continuing to receive medical care in the UK. The majority opinion assumed that it is almost impossible for Contracting States to agree to spend resources to provide medical services on all aliens who enter their territory, and that the ECHR's interpretation is restricted by the consent of Contracting States.

N v. UK, (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, *para. 17: "It would risk drawing into the United Kingdom large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely so that they could take the benefit of the medical resources that are available in this country. This would result in a very great and no doubt unquantifiable commitment of resources which it is, to say the least, highly questionable the states parties to the convention would ever have agreed to.*"

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629 Steven C. Greer, *The European Convention on Human Rights: Achievements, problems and prospects*, Cambridge studies in European law and policy (Cambridge: Cambridge University Press, 2006), 209.

630 Greer mainly mentions two different kinds of balancing. Applying "ad hoc" balancing, someone specifies, on a case-by-case basis, the relationship between rights and public interests. "Structured" balancing gives priority either to rights or to collective goods for all cases. *ibid*, 208.

631 *Ibid*, 209.

632 Virginia Mantouvalou, "*N v UK*: No Duty to Rescue the Nearby Needy?," *The Modern Law Review Limited* 72 (2009), 825.

N v. UK, (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, *para. 24: "The interpretation of the Convention, as with any international treaty, was confined by the consent of the Contracting States. The practical effect of extending Article 3 to cover the applicant's case would be to grant her, and countless others afflicted by AIDS and other fatal diseases, a right to remain and to continue to benefit from medical treatment within a Contracting State. It was inconceivable that the Contracting States would have agreed to such a provision."*

According to the dissenting opinion in *N v. UK* (Grand Chamber), budgetary restrictions and other policy considerations should not restrict ECHR rights; for them so to do would refute the very nature of the ECHR rights in general and the absolute character of Article 3 in particular. For the dissenting judges, the resources available to a Contracting State must not define not only Article 3 but the ECHR rights in general. When examining a case, the Court or a Government should focus first on the scope of the ECHR rights and their potential abuse, not on available resources or budgetary constraints (see *N v. UK*, (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, Joint dissenting opinion, A. As the general principles, para. 8).

The dissenting opinion accords with the view of scholars who believe that Article 3 falls within the first stage of the bifurcated analysis,[633] meaning that only its scope should be examined, and that other considerations, which may relate to available resources and budgetary restrictions, should be excluded. The ECtHR examines solely the scope of Article 3[634] and, as a result, problems concerning the lack of available resources or states' budgetary restrictions[635] do not arise, since they are not questioned during the first stage of the analysis. Such problems arise only during the second stage, which does not concern the absolute right of Article 3.

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633 For the bifurcated analysis, see section 3.3: The two stage analysis of human rights: a bifurcated analysis.

634 Stijn Smet, "The 'absolute' prohibition of torture and inhuman or degrading treatment in Article 3 ECHR," in *Shaping rights in the ECHR: The role of the European Court of Human Rights in determining the scope of human rights*, ed. Eva Brems and Janneke H. Gerards (Cambridge: Cambridge University Press, 2013), 273, 274, 276.

635 Ingrit Leijten, "Defining the scope of economic and social guarantees in the case law of the ECtHR," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerrards (New York: Cambridge University Press, 2013), 112, 113, 115, 127.

Nevertheless, in practice, the distinction of the so-called bifurcated analysis is not clear. For example, in *N v. UK* (Grand Chamber), the majority's argument blurs the two-stage analysis of rights, creating a deficit in the case law. The Court's argumentation in *N v. UK*, paras. 44 and 49, concerns the second stage of the bifurcated analysis rather than the scope of the right in question. Although Article 3 falls solely under the first stage of the analysis due to its absolute character, the majority in *N v. UK* (Grand Chamber) made an argument relating to the UK's budgetary restrictions – a barrier that should have been examined only at the second stage of the bifurcated analysis.

N v. UK, (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, para. 44: "*While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.*"

N v. UK, (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, para. 49: "*The United Kingdom authorities have provided the applicant with medical and social assistance at public expense. […] However, this does not in itself entail a duty on the part of the respondent State to continue so to provide for her.*"

The dissenting opinion in *N v. UK* (Grand Chamber) criticised the argument in paragraph 44 of the majority opinion, which stated: "A finding to the contrary would place too great a burden on the Contracting States." The dissenting judges argued that the majority's decision was shaped by the fear of mass immigration to Europe, rather than by the criteria that apply to the content of Article 3 itself. Specifically, the dissenting opinion stated: "So does the implicit acceptance by the majority of the allegation that finding a breach of Article 3 in the present case would open up the floodgates to medical immigration and make Europe vulnerable to becoming the 'sick-bay' of the world." (see N v. UK, (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, Joint dissenting opinion, A. As the general principles, para. 8).

The majority's arguments in *N v. UK* (Grand Chamber) were also criticised by Judge Pinto de Albuquerque in his dissenting opinion in *S.J. v.*

Belgium (Grand Chamber).[636] He argued that in *N v. UK*, the Court, instead of scrutinising the scope of Article 3, examined the consequences for European countries and the financial restrictions of the ECHR Contracting States. In that way, the reasoning behind Article 3 was distorted and the Article's legal force was weakened using an *argumentum ad consequentiam*. Of central importance to an examination of the absolute right of Article 3 should be whether the applicant herself was about to be exposed to inhuman and degrading treatment, and whether her human dignity would have been diminished.

Judge Pinto de Albuquerque stressed that the purpose of Article 3 is principally to prevent individuals from being exposed to inhuman treatment, rather than to reduce the expenses of the Contracting States or to secure their financial stability. He observed, however, that in *N v. UK* (Grand Chamber), paragraph 44, the reasoning of the majority was based on a consequentialist argument about how "to avoid a supposedly uncontrollable massive influx of medical migrants towards the Contracting Parties to the Convention, with its allegedly exponential financial cost" (see *S.J. v. Belgium,* (Grand Chamber), Application no. 70055/10, judgment of 19 March 2015, para. 7).

In *Paposhvili v. Belgium*, the Grand Chamber observed that, in *N v. UK*, the Court decided to give more weight to the interests of the community as a whole than to N's individual right, because "a finding to the contrary would place too great a burden on States by obliging them to alleviate the disparities between their health-care system and the level of treatment available in the third country," (*Paposhvili v. Belgium,* (Grand Chamber), Application no. 41738/10, judgment of 13 December 2016, para. 178). In *N v. UK*, the majority of the Grand Chamber explicitly developed balancing considerations in its argumentation, asserting that the whole ECHR is a search for a balance between the general interest and individuals' fundamental rights.

N v. UK, (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, para. 44: *Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights* (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, § 89).

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636 *S.J. v. Belgium,* (Grand Chamber), Application no. 70055/10, judgment of 19 March 2015.

However, from a legal perspective, it is common ground that balancing is incompatible with the absolute character of Article 3. The decision of the Grand Chamber in *N v. UK* was characterised by the Human Rights Centre at Ghent University, whose assessment is included in the judgment of *Paposhvili v. Belgium* (Grand Chamber), as adopting an "excessively restrictive approach […] with regard to the expulsion of persons suffering from serious illness" (*Paposhvili v. Belgium* (Grand Chamber), para. 165). The Human Rights Centre also considered the approach adopted in *N v. UK* (Grand Chamber) to contrast with the general case law related to the adjudication of Article 3 of the ECHR (*Paposhvili v. Belgium* (Grand Chamber), para. 166). The Human Rights Centre stressed that the fair balancing test applied in *N v. UK* (Grand Chamber) contradicts ECtHR case law, because a balancing exercise or proportionality test should not be applied in expulsion cases when the right in question is the absolute right under Article 3 not to be tortured (*Paposhvili v. Belgium* (Grand Chamber), para. 169).

Rather than applying a fair balancing test, the Court must consider whether the case under consideration reaches the threshold of severity by scrutinising the consequences of an expulsion and considering factors such as the deterioration in the applicant's quality of life and the reduction in their life expectancy, the applicant's state of health, and the quality and accessibility of medical treatment (Human Rights Centre – Ghent University, in *Paposhvili v. Belgium* (Grand Chamber), para. 170). Finally, according to the Human Rights Centre, the Contracting State has the positive procedural obligation "to seek or obtain assurances from the receiving State" that the applicant will have access to the medical treatment necessary for their illness "and thus be protected against treatment contrary to Article 3" (Human Rights Centre – Ghent University, in *Paposhvili v. Belgium*, (Grand Chamber), Application no. 41738/10, judgment of 13 December 2016, para. 171).

As mentioned above, the protection afforded by Article 3 is absolute, so balancing exercises and proportionality tests are rejected by both the legal literature and the Court.[637] When examining a case under Article 3, the main concern should be whether there is a real risk of degrading treatment or ill-treatment, rather than striking any kind of balance between the gen-

637 Stijn Smet, "The 'absolute' prohibition of torture and inhuman or degrading treatment in Article 3 ECHR," in *Shaping rights in the ECHR: The role of the European Court of Human Rights in determining the scope of human rights*, ed. Eva Brems and Janneke H. Gerards (Cambridge: Cambridge University Press, 2013), 273, 274, 276.

eral interest of the community and individual rights. Such restrictions are incompatible with the absolute character of the Article 3 right. However, in practice, implied restrictions were present in the argumentation of the Grand Chamber majority in *N v. UK*.

5.4.5 Expulsion and the social aspects of the ECHR

Although the ECtHR cannot assign social rights directly to an applicant, since it has no authority to decide the welfare policy of a Contracting State,[638] the ECHR's civil and political rights have wider policy implications with social aspects. According to the Court, "The Convention does not guarantee the right to any particular standard of medical service or the right to access to medical treatment in any particular country (*Wasilewski v. Poland*[639])."[640] In other words, the ECHR does not directly guarantee a right to healthcare or to be healthy. Traditionally, health-related issues and other socioeconomic rights have been more appropriately addressed by the European Social Charter and the European Code of Social Security.[641] However, "this traditional view must be read in the light of developments in the case-law under the Convention."[642] In migration cases, healthcare issues have served as obstacles to expulsion; case law indicates that the ECtHR accepts that health-related issues may fall within the scope of the right of Article 3 under certain circumstances.[643]

The recognition of social rights has arisen indirectly from the potential for the Articles of the Convention and its Protocols to impose positive obligations upon states as Contracting Parties to the Convention. For example, Article 3 of the Convention encompasses elements of the social right to health. According to the Court, "in principle, the state's failure to make

638 Andrew Connell, "Civil Rights and Social Welfare: Some Thoughts on the Contemporary Relevance of T. H. Marshall," *The Political Quarterly* 83, no. 3 (2012), 556.
639 *Wasilewski v. Poland*, (Chamber), Application no. 32734/96, judgment of 21 December 2000.
640 European Court of Human Rights, "Research Report on health-related issues in the case-law of the European Court of Human Rights," (Council of Europe, 2015), 20.
641 *Ibid*, 4.
642 *Ibid*, 4.
643 *Ibid*, 20.

welfare provision may breach Article 3."[644] The Court has recognised the relationship between Article 3 and the right to health in cases including *Z and others v. the UK*[645] (Grand Chamber) in 2001 and *D v. the UK* (Chamber) in 1997. In the latter case, which is examined above, the Chamber of the Court decided that the expulsion of an AIDS patient to St Kitts would amount to inhuman treatment and, as a result, "the UK would have to bear the cost of his care and treatment in the time he had yet to live."[646]

D v. UK (Chamber) shows that the distinction between Convention rights and their social aspects is not clear-cut. Although D's expulsion to St Kitts did not imply intentionally inhuman acts by public authorities or non-state bodies (*D v. UK* (Chamber), para. 49) and the conditions in St Kitts were not themselves a breach of Article 3 (*D v. UK* (Chamber), para. 53), the Chamber of the ECtHR found that D's expulsion would amount to a breach of Article 3 of the Convention because his situation would be worse in the country to which he would be expelled (*D v. UK* (Chamber), para. 49). The flexibility of the ECtHR to apply Article 3 in an extremely diverse range of contexts illustrates the absolute character and "fundamental importance of Art. 3 in the Convention system" (*D v UK* (Chamber), Application no. 30240/96, judgment of 2 May 1997, para. 49).

The Chamber of the Court's argumentation in *D v. UK* demonstrates that the absence of a decent healthcare system implies treatment that may be characterised as inhuman and degrading, and that such a healthcare system might, in exceptional circumstances, abuse the absolute right of Article 3. In paragraph 52 of its judgment, the Court listed the reasons why D's deportation might entail inhuman and degrading treatment. Defending D's stay in the UK, the Court stressed the absence of an adequate social healthcare system in St Kitts. The Court specifically considered the poor medical treatment in St Kitts, the scarcity of beds at the St Kitts Hospital and D's potential exposure to health and sanitation problems.

However, in *N v. UK* (Grand Chamber), the UK Government, whose position is outlined in the judgment, drew a strict distinction between civil/political and social/economic rights, pointing out that healthcare issues are related to the European Social Charter and the International Covenant

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644 Jo Kenny, "European Convention on Human Rights and Social Welfare," *European Human Rights Law Review*, no. 5 (2010), 5.

645 *Z and others v. the UK*, (Grand Chamber), Application no. 29392/95, judgment of 10 May 2001.

646 Ida Elisabeth Koch, "Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective," *The International Journal of Human Rights* 10 (2006), 408.

on Economic, Social and Cultural Rights, whereas the ECHR protects mainly civil and political rights.

N v. UK, (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, position of the UK Government, para. 24: "*The Convention was intended primarily to protect civil and political, rather than economic and social, rights. The protection provided by Article 3 was absolute and fundamental, whereas provisions on health care contained in international instruments such as the European Social Charter and the International Covenant on Economic, Social and Cultural Rights were merely aspirational in character and did not provide the individual with a directly enforceable right. To enable an applicant to claim access to health care by the "back door" of Article 3 would leave the State with no margin of appreciation and would be entirely impractical and contrary to the intention behind the Convention.*"

The Grand Chamber of the Court seemed to share the view that there is a strict distinction between civil/political and social/economic rights.

N v. UK, (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, para. 44: *"Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights (Airey v. Ireland*, (Chamber), Application no. 6289/73, judgment of 9 October 1979, *§ 26)*."

Accordingly, the majority of the Grand Chamber in *N v. UK* ignored the social dimension of ECHR rights underlined by the Court's decision in *Airey v. Ireland* (Chamber) more than 30 years previously.[647] The idea that the Convention is directed principally at the protection of civil and political rights is challenged by the dissenting opinion in *N v. UK*, which cites *Airey v. Ireland*, according to which the spheres of civil and political rights on the one hand and of social and economic rights on the other are not strictly divided.

In *Airey v. Ireland* (Chamber), the Court stated explicitly that "the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention," *(Airey v. Ireland*, (Chamber), Application no. 6289/73, judgment of 9 October 1979, para. 26).[648] The dissenting opinion in *N v. UK* (Grand Chamber) contended that Article 3 is "one of the core fundamental civil rights" but nevertheless has a social dimension

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647 *Airey v. Ireland* (Chamber), Application no. 6289/73, judgment of 9 October 1979.

648 Mentioned in *N v. UK*, (Grand Chamber), dissenting opinion, para. 6.

that should not be ignored (*N v. UK* (Grand Chamber), dissenting opinion, para. 6).

In *S.J. v. Belgium* (Grand Chamber),[649] Judge Pinto de Albuquerque stressed that the majority in *N v. UK* (Grand Chamber) reversed the argumentation of *Airey v. Ireland* (Chamber), according to which many ECHR rights have implications of a social or economic nature, and the division between civil/political rights and social/economic rights is not clear-cut.

Airey v. Ireland (Chamber), Application no. 6289/73, judgment of 9 October 1979, para. 26: "*The Court is aware that the further realisation of social and economic rights is largely dependent on the situation – notably financial – reigning in the State in question. […] Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. […] the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.*"

According to Judge Pinto de Albuquerque's dissenting opinion in *S.J. v. Belgium* (Grand Chamber), the majority in *N v. UK* (Grand Chamber) underestimated the significance of the social and economic implications of the protection of civil and political rights. In his view, the majority in *N v. UK* sought to protect Contracting States' budgetary and immigration policies, ignoring the social and economic implications of the ECHR rights. As a result, they failed to develop a proper legal reasoning, allowing political considerations to take precedence over legal ones.

S.J. v. Belgium, (Grand Chamber), Application no. 70055/10, judgment of 19 March 2015, dissenting opinion of Judge Pinto de Albuquerque, para. 10: "*The worrying policy considerations set out by the majority, which are aimed at downplaying the importance of the social or economic implications of the protection of civil and political rights, are particularly misplaced in view of the absolute character of the prohibition of ill-treatment in the Convention system. Legal reasoning is abandoned in favour of politics.*"

649 *S.J. v. Belgium*, (Grand Chamber), Application no. 70055/10, judgment of 19 March 2015, dissenting opinion of Judge Pinto de Albuquerque, reference 14.

5.5 Detention and Article 3 of the ECHR

5.5.1 Detention, Article 3 and the "minimum level of severity"

Ill-treatment can be described as "inhuman" or "degrading" when it attains the minimum level of severity. Treatment is degrading "if it grossly humiliates the person concerned before others or drives him to act against his will or conscience." Treatment is inhuman "if it deliberately causes severe suffering, mental or physical."[650] ECtHR case law for cases concerning ill detainees indicates that the minimum level of severity for a case to fall within the scope of Article 3 may be considered more broadly in detention cases than in cases concerning the expulsion of ill non-nationals, such as those discussed in the preceding section. Cases concerning detainees with special needs may reach the threshold of severity if the applicant's treatment during their detention leads to a deterioration in their illness, or if the medical treatment provided to them is not appropriate to secure their recovery.[651]

The principle of "minimum level of severity" is dealt with explicitly in the Court's judgment in *Kalashnikov v. Russia*:[652]

Kalashnikov v. Russia, (Chamber), Application no. 47095/99, judgment of 15 July 2002, para. 95: *"The Court recalls that, Article 3 of the Convention enshrines one of the most fundamental values of democratic society. […] The Court further recalls that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authori-*

650 In *Aerts v. Belgium*, (Chamber), Application no. 61/1997/845/1051, judgment 30 July 1998, Partly dissenting opinion of Judge Pekkanen joined by Judge Jambrek, para. 1.

651 European Court of Human Rights, "Research Report on health-related issues in the case-law of the European Court of Human Rights," (Council of Europe, 2015), 13-14.

652 In *Kalashnikov v. Russia* (Chamber) the ECtHR considered as degrading treatment the applicant's conditions of detention and in particular a. the severely overcrowded and insanitary environment and its detrimental effect on the applicant's health and wellbeing, combined with b. the length of his detention in such conditions (*Kalashnikov v. Russia*, (Chamber), Application no. 47095/99, judgment of 15 July 2002, para. 102). *Kalashnikov v. Russia* (Chamber) falls within the category "detention and hygienic condition of cells".

ties, the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, § 162)."

In *Aerts v. Belgium* (Chamber),[653] the applicant was detained in the psychiatric wing of a prison on the grounds that he had seriously assaulted someone and attacked his ex-wife with a hammer. He complained about the conditions on the psychiatric wing. The Court referred explicitly to the principle of the minimum level of severity in this case, and determined that there was no proof that the applicant's mental health had deteriorated and that the living conditions on the psychiatric wing probably did not have a serious effect on his mental health. It therefore decided that Article 3 had not been violated.

Aerts v. Belgium, (Chamber), Application no. 61/1997/845/1051, judgment 30 July 1998, para. 64: "*The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case (see the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 36, § 107).*"

Aerts v. Belgium, (Chamber), Application no. 61/1997/845/1051, judgment 30 July 1998, *para. 66: "In the present case there is no proof of a deterioration of Mr Aerts's mental health. The living conditions on the psychiatric wing at Lantin do not seem to have had such serious effects on his mental health as would bring them within the scope of Article 3. … even if it is accepted that the applicant's state of anxiety, described by the psychiatrist in a report of 10 March 1993 (see paragraph 9 above), was caused by the conditions of detention in Lantin, and even allowing for the difficulty Mr Aerts may have had in describing how these had affected him, it has not been conclusively established that the applicant suffered treatment that could be classified as inhuman or degrading.*"

In *Wenerski v. Poland*[654], the Court considered that the threshold of severity had been met, because the prison authorities did not provide the applicant with necessary and urgent treatment and, as a result, he suffered considerable pain for a prolonged period. The Court therefore found that Article 3 had been breached.

Wenerski v. Poland, (Chamber), Application no. 44369/02, judgment of 20 January 2009, para. 58: "*In these circumstances, the Court finds it necessary to establish whether the applicant was in fact denied adequate medical assistance*

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653 *Aerts v. Belgium*, (Chamber), Application no. 61/1997/845/1051, judgment of 30 July 1998.

654 *Wenerski v. Poland,* (Chamber), Application no. 44369/02, judgment of 20 January 2009.

in the present case and, as a consequence, was caused suffering. If this question is to be answered in the affirmative, it must be ascertained whether it amounted to ill-treatment of a level exceeding the threshold required to fall within the scope of Article 3 of the Convention."

Wenerski v. Poland, (Chamber), Application no. 44369/02, judgment of 20 January 2009, para. 64: "*The foregoing considerations are sufficient to enable the Court to conclude that by leaving the applicant to suffer considerable pain for a prolonged period of time as a result of the failure to provide him with necessary and urgent treatment on his right eye socket from 1998 until 18 February 2004, the custodial authorities acted in breach of their obligations to provide effective medical treatment and that the applicant was subjected to inhuman and degrading treatment in violation of Article 3 of the Convention.*"

The ECtHR seeks to assess whether diagnosis and care in detention facilities were immediate and precise, and whether regular supervision and a thorough therapeutic method were applied either to secure the detainee's recovery or to prevent the deterioration of their illness.[655] The Court's judgment in *McGlinchey and others v. The United Kingdom* (Chamber)[656] indicates that an irregularity in administering an antibiotic medicine for McGlinchey's arm may have been conceived of as evidence of a contravention of the provisions of Article 3 if it had been proved that the irregularity caused a difficulty or deterioration in the applicant's health condition.

McGlinchey and others v. The United Kingdom, (Chamber), Application no. 50390/99, judgment of 29 April 2003, para. 51*: "In so far as the applicants also mentioned irregularity in administering the antibiotic medicine for Judith McGlinchey's arm, it appears that out of twenty doses over a five day period, some four were omitted.*"

McGlinchey and others v. UK (Chamber) passed the threshold of severity as the applicant suffered due to a delay in the prison authorities' provision of the antibiotic, and her condition deteriorated.

McGlinchey and others v. The United Kingdom, (Chamber), Application no. 50390/99, judgment of 29 April 2003, *para. 52: "Finally, the Court considered the complaints that not enough was done, or done quickly enough, by*

655 European Court of Human Rights, "Research Report on health-related issues in the case-law of the European Court of Human Rights," (Council of Europe, 2015), 13.

656 *McGlinchey and others v. The United Kingdom*, (Chamber), Application no. 50390/99, judgment of 29 April 2003.

way of treating Judith McGlinchey for her heroin withdrawal symptoms, preventing her suffering or a worsening of her condition."

ECtHR decisions indicate that, in detention cases, the "minimum level of severity" threshold is not only met in extreme cases. Detention cases differ in that respect from expulsion cases, in which the applicant's life must be at a terminal stage to meet the minimum level of severity threshold. ECtHR case law in detention cases shows that even delay or negligence on the part of public authorities to provide the necessary medical treatment to a detainee, and a deterioration in the detainee's health, are sufficient reasons for determining that the severity threshold has been met. Detainees need not be close to death to be conceived of as having been humiliated by the lack of provision of appropriate medical care; public authorities have a positive obligation properly to provide effective medical treatment to detainees even if they are not suffering a terminal illness. A detainee's merely suffering pain for a prolonged period can be sufficient for a case to meet the severity threshold. Similar principles are applied to the detention of both ill non-nationals and ill nationals, although the detention of migrants may raise specific questions due to their special legal status.[657]

5.5.2 Detention and "intentional acts or omissions"

The most important innovation in ECtHR case law is that poor detention conditions may entail a breach of Article 3 if they constitute degrading treatment.[658] In *Dougoz v. Greece*[659] (Third Section), the Court decided that the Greek public authorities had breached the applicant's right not to be tortured under Article 3 because of the poor conditions of detention. The applicant, a Syrian national, was imprisoned in two different Greek jails

657 European Court of Human Rights, "Research Report on health-related issues in the case-law of the European Court of Human Rights," (Council of Europe, 2015), 21.

658 Alistair R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, (Oxford-Portland Oregon: Hart Publishing, 2004), 48. See also Jean-François Akandji-Kombe, "Positive obligations under the European Convention: A guide to the implementation of the European Convention on Human Rights," Human rights handbooks, no. 7, (Strasbourg: Council of Europe, 2007), 29.

659 *Dougoz v. Greece*, (Third Section), Application no. 40907/98, judgment of 6 March 2001.

for drugs offences. The Court found that inadequate detention facilities may amount to inhuman and degrading treatment.

Dougoz v. Greece, (Third Section), Application no. 40907/98, judgment of 6 March 2001, para. 46: "*The Court considers that conditions of detention may sometimes amount to inhuman or degrading treatment. In the 'Greek case' (applications nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12) the Commission reached this conclusion regarding overcrowding and inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contact with the outside world.*"

ECtHR case law indicates that an "objectivisation" of the "degrading treatment" criteria[660] has been developed.[661] The most important aspect of the criteria is that, in cases concerning the treatment of detainees, the criterion of intention has been gradually marginalised since the case of *Peers v. Greece* (Chamber),[662] "to the point where it is almost irrelevant when detention conditions are at issue."[663] Even where there is no evidence that the state authorities intended to degrade a prisoner, the ECtHR has regarded the detention of individuals with medical problems under inappropriate conditions as constituting degrading treatment that violates Article 3 of the Convention.[664]

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660 According to Akandji-Kombe, the link of the criteria of the objectivisation of the "degrading treatment" is made by the Court in the case *Farbthus v. Latvia*, (First Section), Application no 4672/02, judgment of 2 December 2004, para. 58. See Jean-François Akandji-Kombe, "Positive obligations under the European Convention: A guide to the implementation of the European Convention on Human Rights," Human rights handbooks, no. 7, (Strasbourg: Council of Europe, 2007), 29.
In *Farbthus v. Latvia* (First Section), para. 58, the Court quotes the case *McGlinchey and others v. The United Kingdom*, (Chamber), Application no. 50390/99, judgment of 29 April 2003, paras. 47-58.

661 Jean-François Akandji-Kombe, "Positive obligations under the European Convention: A guide to the implementation of the European Convention on Human Rights," Human rights handbooks, no. 7, (Strasbourg: Council of Europe, 2007), 29.

662 *Peers v. Greece,* (Chamber), Application no. 28524/95, judgment of 19 April 2001.

663 Jean-François Akandji-Kombe, "Positive obligations under the European Convention: A guide to the implementation of the European Convention on Human Rights," Human rights handbooks, no. 7, (Strasbourg: Council of Europe, 2007), 29-30.

664 Aisling Reidy, "The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights," Human rights handbooks, no. 6, (Strasbourg: Council of Europe, 2003), 26.

In *Peers v. Greece*, the Chamber stressed that, where an action humiliates or debases a detainee, the absence of intention or purpose is not a deciding factor in ruling whether that action breached Article 3.

Peers v. Greece, (Chamber), Application no. 28524/95, judgment of 19 April 2001, para. 74: "*In the light of the foregoing, the Court considers that in the present case there is no evidence that there was a positive intention of humiliating or debasing the applicant. However, the Court notes that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see V. v. the United Kingdom [GC], no. 24888/94, § 71, ECHR 1999-IX).*"

In *Kalashnikov v. Russia*[665] – another positive obligation case concerning a prisoner – the applicant complained about the unhygienic conditions of his imprisonment and about the fact that "there was no treatment available for his skin disease due to a lack of proper medication" (*Kalashnikov v. Russia* (Chamber), para. 20). The Court took into account intention and purpose, but stressed that the absence of intention did not rule out a violation of Article 3. The Court determined that the conditions of Kalashnikov's detention caused him mental suffering and diminished his human dignity. It took particularly into account his sleeping conditions, the deprivation of sleep, the absence of adequate ventilation in his cell, the very limited space and the stuffy atmosphere, the fact that he contracted various skin diseases and fungal infections during his detention, and the fact that, although the public authorities provided him with medical treatment for those diseases, the very poor conditions in the cell obstructed his recovery (see *Kalashnikov v. Russia* (Chamber), paras. 97-98). Therefore, according to the Chamber, although the purpose of the treatment in this case was not to humiliate or debase the applicant, a detainee's living conditions may nevertheless violate Article 3. Accordingly, it determined that Article 3 had been breached (see *Kalashnikov v. Russia*, (Chamber), Application no. 47095/99, judgment of 15 July 2002, para. 103).

Kalashnikov v. Russia, (Chamber), Application no. 47095/99, judgment of 15 July 2002, para. 95: *"However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (see, for example, Peers v. Greece, no. 28524/95, § 74, ECHR 2001-III). The suffering and humiliation*

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665 The case of *Kalashnikov v. Russia* (Chamber) belongs into the category "detention and ´hygienic condition of cells´." *Kalashnikov v. Russia*, (Chamber), Application no. 47095/99, judgment of 15 July 2002.

involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment."

Kalashnikov v. Russia, (Chamber), Application no. 47095/99, judgment of 15 July 2002, *para. 101: "The Court accepts that in the present case there is no indication that there was a positive intention of humiliating or debasing the applicant. However, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot exclude a finding of violation of Article 3 (see Peers v. Greece cited above). It considers that the conditions of detention, which the applicant had to endure for approximately 4 years and 10 months, must have caused him considerable mental suffering, diminishing his human dignity and arousing in him such feelings as to cause humiliation and debasement.*"

So long as detainees are deprived of their liberty, they are greatly dependent on the state authorities,[666] implying that those authorities' acts and omissions probably have a greater effect on detainees' psychological well-being.[667] Detainees are dependent on the authorities for their living conditions. People in detention centres should enjoy satisfactory living conditions, in terms both of equipment and sanitary and hygiene standards, and of access to medical care.[668] To provide satisfactory living conditions in detention centres, the state must ensure among other things that, during their detention, an individual lives in conditions "which are compatible with respect for human dignity" and "their health and well-being are adequately secured through, among other things, requisite medical assistance."[669]

In *Blokhin v. Russia*,[670] the Chamber[671] stressed that positive obligations derive from the provisions of Article 3 for Contracting States. In particular,

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666 European Court of Human Rights, "Research Report on health-related issues in the case-law of the European Court of Human Rights," (Council of Europe, 2015), 13-14.

667 *Ibid*, 13-14.

668 *Ibid*, 13-14.

669 *Kudła v. Poland*, (Grand Chamber), Application no. 30210/96, judgment of 26 October 2000, *para. 94*, see European Court of Human Rights, "Research Report on health-related issues in the case-law of the European Court of Human Rights," (Council of Europe, 2015), 13-14.

670 *Blokhin v. Russia*, (Chamber), Application no. 47152/06, judgment of 14 November 2013 and *Blokhin v. Russia*, (Grand Chamber), Application no. 47152/06, judgment of 23 March 2016.

671 The Chamber made its judgment in *Blokhin v. Russia* on 14 November 2013. The Grand Chamber of the Court delivered a judgment in the case on 23 March

the state has a positive obligation to provide medical care to detained persons in order to protect their physical wellbeing (*Blokhin v. Russia* (Grand Chamber), para. 88).[672]

Blokhin v. Russia, (Grand Chamber), Application no. 47152/06, judgment of 23 March 2016, para 88: "*The Court reiterates that Article 3 of the Convention imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty by, among other things, providing them with the requisite medical care […] The Court has held on many occasions that lack of appropriate medical care may amount to treatment contrary to Article 3.*"

Scholars point out that "what the European Court does to improve these conditions is not founded just on the theory of positive obligations."[673] When the ECtHR adjudicates cases relating to detention conditions, it investigates the applicant's allegations and the facts of the case.[674] If a prisoner has special needs, a failure by the state authorities to take care of those needs will give rise to degrading treatment.[675]

In *McGlinchey and others v. the United Kingdom* (Chamber),[676] the Court considered that the prison authorities' treatment of Judith McGlinchey violated Article 3 (*McGlinchey and others v. The United Kingdom*, para. 58). It examined in detail the medical care provided by the prison authorities dur-

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2016, confirming the Chamber's judgment. I use the judgment of the Chamber in this chapter because it contains detailed argumentation, whereas the Grand Chamber's judgment is principally a confirmation.

672 Some relevant precedent cases are mentioned in *Blokhin v. Russia* (Grand Chamber), para. 88. In particular, the Court refers to the following case law: *Khudobin v. Russia*, (Chamber), Application no. 59696/00, judgment of 26 October 2006, *Mouisel v. France*, (Chamber), Application no. 67263/01, judgment of 14 November 2002, *Kudła v. Poland*, (Grand Chamber), Application no. 30210/96, judgment of 26 October 2000, *Wenerski v. Poland*, (Chamber), Application no. 44369/02, judgment of 20 January 2009, *Popov v. Russia*, (Chamber), Application no. 26853/04, judgment 13 July 2006, *Nevmerzhitsky v. Ukraine*, (Chamber), Application no. 54825/00, judgment of 5 April 2005. Those cases will be discussed in this section of this chapter.

673 Jean-François Akandji-Kombe, "Positive obligations under the European Convention: A guide to the implementation of the European Convention on Human Rights," Human rights handbooks, no. 7, (Strasbourg: Council of Europe, 2007), 29.

674 *Ibid*, 29.

675 Aisling Reidy, "The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights." Human rights handbooks, no. 6, (Strasbourg: Council of Europe, 2003), 26.

676 *McGlinchey and others v. The United Kingdom*, (Chamber), Application no. 50390/99, judgment of 29 April 2003.

ing the applicant's detention, taking into consideration, for example, whether the ill detainee was subject to regular medical monitoring.

McGlinchey and others v. The United Kingdom, (Chamber), Application no. 50390/99, judgment of 29 April 2003, para. 55: "*A locum doctor visited the prison on the Saturday morning, 12 December, but the records do not indicate that he saw Judith McGlinchey. If a doctor was required at any other time over the weekend, the nursing staff were expected to call out a doctor or arrange for transfer to hospital. It appears therefore that Judith McGlinchey was not examined by a doctor for two days.*"

In *Blokhin v. Russia* (Chamber), the Court stated explicitly that "the lack of adequate medical treatment amounted to inhuman and degrading treatment."

Blokhin v. Russia, (Chamber), Application no. 47152/06, judgment of 14 November 2013, para. 95: "*…the Government have not provided sufficient evidence to enable the Court to conclude that the applicant received adequate medical care in respect of his attention-deficit hyperactivity disorder and enuresis during his detention in the Novosibirsk temporary detention centre for juvenile offenders. The Court considers that the lack of adequate medical treatment amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention. In view of that finding, it is not necessary to examine the remainder of the applicant's complaints under that Article.*"

The precedent case law,[677] which includes *Wenerski v. Poland* (Chamber),[678] *Popov v. Russia* (Chamber) and *Nevmerzhitsky v. Ukraine* (Chamber), indicates that the lack of appropriate medical care may amount to treatment that breaches Article 3 of the Convention.

Wenerski v. Poland, (Chamber), Application no. 44369/02, judgment of 20 January 2009, para. 57: "*What the parties disagree on, and what appears to lie at the core of the case at hand, concerns the adequacy of the treatment afforded to the applicant.*"

Wenerski v. Poland, (Chamber), Application no. 44369/02, judgment of 20 January 2009, para. 61: "*the Court accepts that, as the applicant argued (see paragraph 51 above), since both convicted and remand prisoners are in a very vulnerable position in terms of their access to medical assistance, it is the authorities' special duty to provide them with adequate and necessary treatment, in particular when it has been established that such treatment is urgent, regardless of the circumstances.*"

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677 These three cases are quoted in *Blokhin v. Russia* (Chamber), para. 88.

678 *Wenerski v. Poland*, (Chamber), Application no. 44369/02, judgment of 20 January 2009.

In *Popov v. Russia*,[679] the Court considered that the failure of the state authorities to provide the applicant with the requisite medical assistance for his special needs, combined with other factors, amounted to inhuman and degrading treatment (*Popov v. Russia*, (Chamber), Application no. 26853/04, judgment of 13 July 2006, para. 240).

Popov v. Russia, (Chamber), Application no. 26853/04, judgment of 13 July 2006, *para. 213: "Therefore, over a period of one year and nine months during his detention the applicant underwent neither examination by a uro-oncologist nor cystoscopy. Having regard to its findings in paragraph 211 above, the Court considers that in remand prison SIZO 77/1 the applicant was not provided with the medical assistance required for his condition.*"

Popov v. Russia, (Chamber), Application no. 26853/04, judgment of 13 July 2006, *para. 237: "Having regard to its finding in paragraph 211 above, the Court considers that in the YaCh-91/5 prison in Sarapul the applicant was not provided with the medical assistance required for his condition.*"

In *Nevmerzhitsky v. Ukraine*,[680] the Court indicated that lack of appropriate medical care may amount to treatment contrary to Article 3.

In the case of *Mcglinchey*, the Court stated explicitly that prison authorities have a positive obligation to provide medical care to detainees, which means that they must provide medicines to detainees and ensure that there is medical supervision by specialist doctors and regular monitoring.

Mcglinchey and others v. The United Kingdom, (Chamber), Application no. 50390/99, judgment of 29 April 2003, para. 57: "*Having regard to the responsibility owed by prison authorities to provide the requisite medical care for detained persons, the Court finds that in the present case there was a failure to meet the standards imposed by Article 3 of the Convention. It notes in this context the failure of the prison authorities to provide accurate means of establishing Judith McGlinchey's weight loss, which was a factor that should have alerted the prison to the seriousness of her condition, but was largely discounted due to the discrepancy of the scales. There was a gap in the monitoring of her condition by a doctor over the weekend when there was a further significant drop in weight and a failure of the prison to take more effective steps to treat Judith McGlinchey's condition, such as her admission to hospital to ensure the intake of medication and fluids intravenously, or to obtain more expert assistance in controlling the vomiting.*"

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679 *Popov v. Russia*, (Chamber), Application no. 26853/04, judgment of 13 July 2006.

680 *Nevmerzhitsky v. Ukraine*, (Chamber), Application no. 54825/00, judgment of 5 April 2005.

The Chamber of the Court also took into account the need for medical supervision and monitoring by specialist doctors[681] in the case of *Blokhin v. Russia*.

Blokhin v. Russia, (Chamber), Application no. 47152/06, judgement of 14 November 2013, para. 93: "*The Court takes note of the fact that the centre's medical unit was staffed by a paediatrician and several nurses, and a psychologist who had no medical qualification. It follows that during his detention in the centre the applicant was supervised by a paediatrician who had no expertise in the treatment of the mental disorder from which he suffered. There is no evidence that he was examined by a neurologist or a psychiatrist, despite the fact that regular consultations by such specialist doctors were repeatedly recommended for him, or that the medication prescribed by a psychiatrist before his placement in the centre was ever administered during his detention.*"

The precedent cases[682] *Khudobin v. Russia* (Chamber), *Mouisel* and *Kudła*, do not set out a general obligation to release detainees on medical grounds under Article 3. Nevertheless, the failure of the prison authorities to give ill detainees the requisite medical care has been considered inhuman and degrading treatment. However, *Khudobin*, *Mouisel* and *Kudła* indicate that the ECtHR considers medical assistance to be essential to the well-being of detainees.

In *Khudobin*,[683] the Chamber of the Court pointed out that, under Article 3, the Contracting State does not have an obligation to release a detainee on medical grounds. It also stated that detention itself does not contravene Article 3, and that Article 3 does not create an obligation to place an ill detainee in a civil hospital. Nevertheless, it does place the Contracting State under a positive obligation to protect the physical well-being of detainees. Therefore, the authorities must guarantee that the conditions of detention correspond to the detainees' needs.

Khudobin v. Russia, (Chamber), Application no. 59696/00, judgement of 26 October 2006, *para. 93: "However, Article 3 cannot be construed as laying down a general obligation to release detainees on health grounds. It rather imposes an obligation on the State to protect the physical well-being of persons depri-*

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681 The lack of examination by appropriately qualified medical professionals may raise issues under Article 3 and its procedural rights. See Aisling Reidy, "The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights," Human rights handbooks, no. 6, (Strasbourg: Council of Europe, 2003), 42.

682 These three cases are quoted in *Blokhin v. Russia* case (Chamber), para. 88.

683 *Khudobin v. Russia*, (Chamber), Application no. 59696/00, judgement of 26 October 2006.

ved of their liberty. The Court accepts that the medical assistance available in prison hospitals may not always be at the same level as in the best medical institutions for the general public. Nevertheless, the State must ensure that the health and well-being of detainees are adequately secured by, among other things, providing them with the requisite medical assistance […] In Farbtuhs,[684] *cited above, the Court noted that if the authorities decided to place and maintain a [seriously ill] person in detention, they should demonstrate special care in guaranteeing such conditions of detention that correspond to his special needs resulting from his disability (§ 56).*"

Kalashnikov v. Russia, (Chamber), Application no. 47095/99, judgment of 15 July 2002, para. 95: "*Yet it cannot be said that detention on remand in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain specific medical treatment.*"

In *Mouisel v. France* (Chamber),[685] the Chamber pointed out that Article 3 places a positive obligation on Contracting States to protect the physical well-being of prisoners, but not to release detainees on medical grounds. It stated that the conditions of detention must be compatible with human dignity.

Mouisel v. France, (Chamber), Application no. 67263/01, judgement of 14 November 2002, para 40: "*[…] The Court has also emphasised the right of all prisoners to conditions of detention which are compatible with human dignity, so as to ensure that the manner and method of execution of the measures imposed do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention; in addition, besides the health of prisoners, their well-being also has to be adequately secured, given the practical demands of imprisonment.*"

In *Kudła v. Poland*,[686] the Grand Chamber stated that the Contracting State must ensure that prisoners' health and well-being are adequately protected. To guarantee the adequate protection of detainees, the Contracting State has a positive obligation to provide them with the requisite medical

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684 The case *Farbthus v. Latvia, (First Section)*, Application no 4672/02, judgment of 2 December 2004, is available in HUDOC only in French.

685 *Mouisel v. France*, (Chamber), Application no. 67263/01, judgement of 14 November 2002.

686 *Kudła v. Poland*, (Grand Chamber), Application no. 30210/96, judgement of 26 October 2000.

assistance. The living conditions of detained persons must be compatible with respect for their human dignity.

Kudła v. Poland, (Grand Chamber), Application no. 30210/96, judgement of 26 October 2000, para 94: *"Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance."*

Finally, in cases involving ill detainees, the Court takes into account the applicant's medical records. This means, first, that the Contracting State must submit the requested medical reports and, secondly, that they must be detailed and independent, given that they may be a crucial element in the Court's assessment of the facts of the case.[687]

For example, in *Popov v. Russia*, the Court assessed whether the medical reports derived from an independent source.

Popov v. Russia, (Chamber), Application no. 26853/04, judgment 13 July 2006, para. 235: *"As regards the first argument, the Court observes that the oncological dispensary in Izhevsk is a civilian medical institution not affiliated to the prison system. Consequently, the dispensary itself and the uro-oncologist who examined the applicant, Dr K., were institutionally independent from both the medical unit of the YaCh-91/5 prison and the Department for the Execution of Sentences. As for the allegations that Dr K. had written his report under the instructions of the Head of the medical unit of the YaCh-91/5 prison, they are not corroborated by any evidence. Accordingly, the Court is satisfied that the examination was independent."*

In *Blokhin v. Russia*, the government did not submit the requested medical reports, which would have shown whether the applicant had received regular treatment and specialist medical supervision during his 30-day detention in the temporary detention centre for juvenile offenders. The Chamber of the Court assessed that the government's failure to submit the medical records counted in favour of the applicant's assertions.

Blokhin v. Russia, (Chamber), Application no. 47152/06, judgement of 14 November 2013, para. 91: *"In view of the above, the Court finds the Government's explanations for their failure to submit the requested documents in-*

687 Aisling Reidy, "The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights," Human rights handbooks, no. 6, (Strasbourg: Council of Europe, 2003), 42.

sufficient and considers that it can draw inferences from the Government's conduct in view of the well-founded nature of the applicants' allegations (see, for similar reasoning, Maksim Petrov v. Russia, no. 23185/03, §§ 92-94, 6 November 2012)."

Blokhin v. Russia, (Chamber), Application no. 47152/06, judgement of 14 November 2013, para. 93: "*Further, the Court notes that the Government did not submit any document capable of refuting the applicant's allegation that during his detention in the temporary detention centre for juvenile offenders he did not receive medical supervision and care appropriate to his health condition.*"

The above case law indicates that the criterion of *intentionality* is not considered to be important in detention cases. In adjudicating detainees' cases, the ECtHR focuses principally on the real facts (i.e. acts or omissions by the state authorities) that might constitute ill-treatment, and thus a violation of Article 3 rights.

5.6 Overview of the ECtHR case law relating to Article 3 of the ECHR

The ECtHR case law indicates that the positive obligations on Contracting States that derive from Article 3 depend on:

a) Intentionality – in other words, whether a Contracting State's act or omission was intentional.

In expulsion cases, the ECtHR strictly imposes the *intention* criterion. Its expulsion case law indicates that, in most cases involving the expulsion of an ill non-national illegally residing in a Member State, both the Chamber and the Grand Chamber of the Court have argued that the negative effects on the non-national's health and life expectancy are caused by their illness, not by the *act* of expulsion. Nevertheless, the expelled person's illness may be exacerbated by their deportation and the inefficient medical system in the receiving countries.

The ECtHR case law indicates that, in detention cases, the Court does not consider the criterion of *intention* to be important. It is almost insignificant in the positive obligation cases concerning detention conditions. This does not mean that it does not weigh heavily when a detainee has been intentionally ill-treated, but only that in these cases Article 3 is frequently found to have been violated even in the absence of any intention to inflict ill-treatment. In detention cases, the state authorities have a positive obligation to provide medical assistance to detainees with medical needs. If they have failed to provide medical care to detainees in need, they may have violated Article 3. In detention cases, it is repeatedly stressed that the

detention conditions must be compatible with respect for human dignity and must ensure the detainee's health and well-being.

b) The principle of the "minimum level of severity" and the "threefold condition for exceptional circumstances/humanitarian reasons".

The ECtHR case law indicates that these conditions are applied narrowly in expulsion cases, as opposed to detention cases. The criteria of the "minimum level of severity" and "exceptional circumstances" mean that Article 3 is applied too narrowly, because in ECtHR case law relating to expulsions the Court focuses on the worst circumstances that the person could experience. Therefore, the Article 3 right is strictly limited to exceptional conditions; it does not guarantee conditions in which a person can live a good life. Worse, it is obstacle against the ill-treatment of non-nationals only in "exceptional circumstances" – when the non-national is close to death. Therefore, human dignity[688] is secured merely in its basic form – to the extent that the applicant deserves a decent death. In expulsion cases, Article 3

688 A core purpose of Article 3 is to protect people's dignity. See Aisling Reidy, "The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights," Human rights handbooks, no. 6, (Strasbourg: Council of Europe, 2003), 9.
In the Court's jurisprudence, the respect of human dignity is characterised as the very substance of the fundamental objectives of the ECHR.
"the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom," (*SW v. UK*, (Chamber), Application no. 20166/92, judgment of 22 November 1995, para. 44).
So long as the very essence of the fundamental objectives of the Convention is respect for human dignity, the provisions of Article 3 tend to preserve human dignity too. Moreover, in the case of *N v. UK*, the dissenting opinion stressed that a treatment may be characterised as "degrading" and may fall within the scope of Article 3 when human dignity is diminished, or when the moral and physical resistance of an individual are harmed by humiliating treatment that causes an individual to experience feelings of fear, anguish or inferiority. (see *Pretty v. UK*, (Chamber), in *N v. UK* (Grand Chamber), Application no. 26565/05, judgment of 27 May 2008, Joint dissenting opinion, para. 5).
The normative meaning of the notion human dignity is not explicitly defined either by the Convention, or by the Court's case law. Some aspects of the legal definition of human dignity are determined in the Charter of Fundamental Rights of the European Union (2000/C 364/01). They include the right to physical and mental integrity (Article 3 of the Charter) and the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 of the Charter). So long as the right to physical and mental integrity is incorporated into the no-

secures non-nationals' human dignity only by guaranteeing a relatively decent death.

The ECtHR case law indicates that the "minimum level of severity" criterion is applied more broadly in detention cases than in expulsion cases. In detention cases, Article 3 is not applied solely to prevent the worst circumstances that the person might experience. Therefore, it protects human dignity and well-being by safeguarding conditions that are necessary for a decent life. The "severity" criterion, as applied in detention cases, may create a common ground for the adjudication of positive obligations cases that fall under Article 3.

c) The case law discussed above indicates that the ECtHR is sometimes reluctant to rule that Contracting States are under a positive obligation to provide health assistance to individuals, because this would require the allocation of recourses. Consequently, it would require Contracting States to take on an extra financial burden to guarantee the Convention rights. This kind of reasoning concerns not the *prima facie* positive obligations, but the definitive ones. Therefore, these considerations should be scrutinised during the second stage of the bifurcated analysis – when the Court applies a fair balance test. Consequently, as the financial considerations relate to the fair balance test and the second stage of the bifurcated analysis, this kind of reasoning is not relevant when the Court adjudicates cases based on the absolute right not to be tortured under Article 3.

The ECtHR is sometimes reluctant to rule that countries are bound by *prima facie* positive obligations deriving from ECHR rights, because Contracting States enjoy a wide margin of appreciation in choosing their financial policies. According to the ECtHR, this margin of appreciation can be limited only in exceptional circumstances. Therefore, it is reluctant to adjudicate in a way that places a positive obligation on Contracting States to provide healthcare in a broader sense, not only because financial policies are not its business, but because countries have limited resources. Nevertheless, both arguments concern the definitive positive obligations, not the *prima facie* ones. As discussed in previous chapters, they should be scrutinised during the second stage of the bifurcated analysis – namely, when the

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tion of "human dignity", this indicates that individuals' dignity, does not merely relate to minimum conditions, such as not being tortured. Human dignity relates to a quality of life that serves and preserves physical and mental integrity. For this reason, it escapes from the narrow sphere of minimum conditions and minimum standards. If this assumption is correct, the credentials of the provisions of Article 3 refer to a quality of life, as Article 3 incorporates respect for human dignity.

ECtHR adjudicates to find a fair balance between the competing interests. Thus, these concerns should not be applied in positive obligation cases in which the Court adjudicates on the absolute[689] right not to be tortured under Article 3, as the absolute nature of this right cannot be balanced.

The above case law shows that in adjudicating cases relating to Article 3, expulsion, detention and health, the Court applies some common principles. In some cases, it interprets these principles narrowly, and in others it interprets them more broadly. The case law confirms the initial claim of this book, as it indicates that the ECtHR does not apply a consistent theory of positive obligations.

The social aspects of the ECHR are present in most case law relating to the medical care of detainees, and in expulsion cases. They are evident in the Chamber's argumentation in *D v. UK* and to some extent in the Grand Chamber's December 2016 decision in *Paposhvili v. Balgium*. The interpretation of Article 3 in these cases guarantees its absolute character. Some elements of these cases and the argumentation of dissenting opinion in *N v. UK* (Grand Chamber) and *S.J. v. Belgium* (Grand Chamber) could be used the basis for a coherent framework of positive obligations cases relating to Article 3.

5.7 General characteristics of Article 8 of the ECHR and its relationship with healthcare and positive obligations

The Article 8 right to respect for private and family life protects four aspects of personal autonomy: private life, family life, the home and correspondence. To ensure this right, Contracting States have a negative obligation not to interfere in any of these aspects of personal autonomy. However, the ECtHR has acknowledged that Contracting States also have positi-

689 The absolute nature of Article 3 is spelled out explicitly both by the relevant academic literature and by the ECtHR case law. For example, see *D v UK* (Chamber), para. 49: "…given the fundamental importance of Article 3 in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts which might arise. […] To *limit the application of Article 3* in this manner *would be to undermine the absolute character of its protection.* In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State."

ve obligations to secure the values contained in the right.[690] Several Article 8 applications have been lodged claiming positive obligations, and many of them have been upheld by the ECtHR.[691]

The Court has divided Contracting States' positive obligations into "procedural" and "substantive" obligations.[692] Judicial/legal measures are mainly "procedural" obligations, whereas practical measures are mainly "substantive" obligations. For example, Contracting States have the positive obligation to impose sanctions on anyone who infringes the Convention rights, and to make regulations such as licences (judicial measures, or "procedural" obligations). Public authorities have the positive obligation to give individuals sufficient information relating to the protection of their rights, to introduce technical measures to prevent, for example, prisoner suicide, and to equip prisons with sanitary facilities (practical measures, or "substantive" obligations).[693] If a Contracting State has a positive obligation to introduce practical and/or judicial measures, the ECtHR has acknowledged that it should enjoy a wide margin of appreciation because it is best placed to determine which measures to introduce.[694]

The idea that public authorities are subject to positive obligations is supported by the fact that the Article 8 right to private and family life implies

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690 Ursula Kilkelly, "The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights," Human rights handbooks 1 (2003); 10, 20. See also *Pentiacova and 48 others v. Moldova* (Fourth Section), B. Alleged violation of Article 8 of the Convention, p 12.
The ECtHR explicitly states that Article 8 may give birth to positive obligations in the case law *Kroon v. the Netherlands* (Chamber), para. 31: "*The Court reiterates that the essential object of Article 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life*".

691 Alistair R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, (Oxford-Portland Oregon: Hart Publishing, 2004), 127.

692 Jean-François Akandji-Kombe, "Positive obligations under the European Convention: A guide to the implementation of the European Convention on Human Rights," Human rights handbooks, no. 7, (Strasbourg: Council of Europe, 2007), 16. This article states that the distinction between "substantive" and "procedural" obligations is mentioned explicitly in the *Öneryıldız v. Turkey* judgment (Grand Chamber), para. 97.

693 *Ibid*: 7.

694 See for example *Fadeyeva v. Russia* (First Section), para. 96.

respect for "the quality of private life".[695] Moreover, although the ECHR does not contain a right to health, certain health rights can be derived from the ECHR rights.[696] Consequently, health issues in a broader sense have been adjudicated under Article 8. For example, although the ECHR does not include a "right to free medical care", the ECtHR, in adjudicating relevant cases, has acknowledged that "private life" encompasses individuals' physical and psychological integrity. Therefore, a Convention right may indirectly place a positive obligation on a Contracting State to allocate public resources to medical treatment.

Pentiacova and 48 others v. Moldova, (Fourth Section), Application no. 14462/03, judgment of 4 January 2005, p 13: "*The Court has previously held that private life includes a person's physical and psychological integrity (Niemietz v. Germany, judgment of 16 December 1992, Series A no. 251-B, § 29). While the Convention does not guarantee as such a right to free medical care, in a number of cases the Court has held that Article 8 is relevant to complaints about public funding to facilitate the mobility and quality of life of disabled applicants (see, Zehnalová and Zehnal, cited above, and Sentges v. the Netherlands (dec.) no. 27677/02, 8 July 2003). The Court is therefore prepared to assume for the purposes of this application that Article 8 is applicable to the applicants' complaints about insufficient funding of their treatment.*"

The general principles that are applied in Article 8 cases relate to the causal link between an activity and an action or omission. The question is whether there has been a direct and serious effect on the applicant's private or family life and whether an action interfering in the Article 8 right has reached a certain threshold of harm.[697] However, interfering in the Article 8 right to private and family life does not always imply a violation of Article 8 because, as discussed in the introduction, the right to respect for one's private and family life is not absolute. It falls within the category of so-called "qualified rights": it can be limited, and a fair balance must be struck between the individual's right and the interests of the community. In adjudicating such cases, the ECtHR applies the "democratic necessity test". The Contracting States may enjoy a wider margin of appreciation, and the prin-

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695 Council of Europe, "Manual on Human Rights and the Environment," 2nd ed. (Strasbourg: Council of Europe Publishing, 2012), 19.

696 Greer gives the example of *Hatton v. United Kingdom* case law, which is discussed in the next chapters of this study. Steven C. Greer, *The European Convention on Human Rights: Achievements, problems and prospects*, Cambridge studies in European law and policy (Cambridge: Cambridge University Press, 2006), 258.

697 Council of Europe, "Manual on Human Rights and the Environment," 2nd ed. (Strasbourg: Council of Europe Publishing, 2012), 45-46.

ciple of "proportionality to a pressing social need" is applied in the Court's decisions.[698]

Unlike the Article 3 right prohibiting torture, which is absolute, Article 8 contains a second paragraph that permits the right to private and family life to be restricted for "legitimate aims". These limitation clauses outline the exceptional conditions under which the Article 8 right can be limited. The restrictions must be lawful or "in accordance with the rule of law,"[699] they must pursue a legitimate aim, and they must be necessary in a democratic society. In other words, a fair balance between individual and public interests must be struck, and the principle of proportionality must be applied.[700]

The general conditions of this restriction can be separated into three categories or sub-tests. The first relates to the test of "legality", the second relates to "legitimacy" and the third to "necessity/proportionality". This means that the Article 8 right can be limited when the restrictions are "in accordance with the law" (legality) and their goal is "necessary in a democratic society" (necessity/proportionality) in order to serve a "legitimate aim" (legitimacy).[701] In both negative and positive obligation cases, the Court has acknowledged that Contracting States should enjoy a margin of appreciation in striking a fair balance between individual and public interests.[702]

The restrictions set out in the second paragraph of Article 8 are open to different interpretations. As Greer (2006) points out, "although various patterns have been identified in the case law on Articles 8-11, most commen-

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698 Steven C. Greer, *The European Convention on Human Rights: Achievements, problems and prospects*, Cambridge studies in European law and policy (Cambridge: Cambridge University Press, 2006), 257-258.

699 The ECtHR has stressed that the principle of the rule of law is one of the most fundamental principles of a democratic society, and is inherent in all Articles of the ECHR. See *Tysiąc v. Poland* (Fourth Section), para. 112. In this case law of the Court the decisions below are mentioned: *Iatridis v. Greece* (Grand Chamber), para. 58; *Carbonara and Ventura v. Italy* (Second Section), para. 63; and *Capital Bank AD v. Bulgaria* (First Section), para. 133.

700 Steven C. Greer, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Human rights files 15 (Strasbourg: Council of Europe Publishing, 1997), 6-17.

701 See Laurens Lavrysen, "The different structure of the Court's examination under Articles 8-11." in *Human Rights in a positive state: Rethinking the relationship between positive and negative obligations under the European Convention on Human Rights*, (Doctoral thesis, University of Ghent, 2016), 207.

702 See also Council of Europe, "Manual on Human Rights and the Environment," 2nd ed. (Strasbourg: Council of Europe Publishing, 2012), 54-55.

tators agree that the 'legitimate purposes' are fluid and are not underpinned by any clear or coherent rationale."[703] Whether a case falls within the limitation clauses in the second paragraph of Article 8 depends on the ECtHR judges' interpretation. In this respect, cases that may fall within the second paragraph of Article 8 are, to use Razian vocabulary, partly-regulated, and the role of the Court, in making decisions, is to "make new law". At the same time, the "open-textured" language of the second paragraph leads to disputes among the judges, who may put forward contradictory arguments.[704]

In adjudicating on the Article 8 right, the Court applies the two-stage analysis test – the bifurcated approach discussed in the third chapter. In the first stage, the Court considers the applicability of Article 8 and whether there has been interference in the Article 8 right. It examines the definitions of the terms "private life", "family life" and "home". The applicability of Article 8 is examined on a case-by-case basis, and the terms are conceived of as having an "autonomous meaning". If Article 8 is inapplicable, the dispute ends. If it is applicable, the Court continues to the second stage of the test.

In the second stage, the Court considers whether an action or omission has led to a violation of Article 8. It considers whether the State had a negative obligation to refrain from action, whether it had a positive obligation to act, and finally whether its action or omission was justified under the second paragraph of Article 8.[705] At this stage, as described above, the Court considers, among other factors, whether a fair balance between public and individual interests has been struck. When an application is admissible, ECtHR case law indicates that a fair balance between individual and

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703 Steven C. Greer, *The European Convention on Human Rights: Achievements, problems and prospects*, Cambridge studies in European law and policy (Cambridge: Cambridge University Press, 2006), 258.
See also Steven C. Greer, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Human rights files 15 (Strasbourg: Council of Europe Publishing, 1997), 42.

704 Ursula Kilkelly, "The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights," Human rights handbooks 1 (2003), 6-7. See also Steven C. Greer, *The European Convention on Human Rights: Achievements, problems and prospects*, Cambridge studies in European law and policy (Cambridge: Cambridge University Press, 2006), 257-258.

705 Ursula Kilkelly, "The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights," Human rights handbooks 1 (2003), 8-10.

public interests must be struck in both negative and positive obligation cases.

There is no clear distinction between negative and positive obligations, and similar principles are applied to both. The Court applies similar principles both in positive obligation cases in which Contracting States should act to protect the right in Article 8, paragraph 1, and in cases of state interference, which should be justified under Article 8, paragraph 2. In both situations, Contracting States enjoy a margin of appreciation in deciding which measures to take, and a fair balance between the competing interests must be struck.[706]

Hatton and others v. The United Kingdom (Hatton v. UK), (Grand Chamber), Application no. 36022/97, judgment of 8 July 2003, para. 98: "*Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar.*"

Pentiacova and 48 others v. Moldova, (Fourth Section), Application no. 14462/03, judgment of 4 January 2005, p 12: "*While the boundaries between the State's positive and negative obligations under this provision do not always lend themselves to precise definition, the applicable principles are similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole.*"

5.8 Interference by public authorities and Article 8 of the ECHR

Cases involving the expulsion or medical treatment of ill individuals, environmental hazards, detention, abortion and several other issues may fall within the scope of Article 8. Given that Article 8 is not absolute, interference by the Contracting State in the private and family life of individuals in such situations does not necessarily imply a violation of the Article 8 right.

For example, a decision to expel a migrant from a Contracting State's territory may be considered interference in their private and family life if

706 See *Powell and Rayner v. the United Kingdom* (Chamber), para. 41; *Greenpeace and others v. Germany* (Fifth Section), "The Law", para. 1; *Hatton v. UK* (Grand Chamber), para. 98; *Fadeyeva v. Russia* (First Section), para. 94; *Dubetska and Others v. Ukraine* (Fifth Section), para. 140; *Lopez Ostra v. Spain* (Chamber), para. 51; *Tysiąc v. Poland* (Fourth Section), para. 111.

their children or other relatives reside in the country. However, it may not entail a breach of the Article 8 right if it is compatible with the provisions in Article 8, paragraph 2. In adjudicating expulsion cases, except those relating to family and social ties, the Court takes into account factors such as how much time the applicant has spent in the Contracting State, the effect of the expulsion on the applicant's family, and any psychological or health issues that the applicant may face.[707]

Another example concerns abortions. The failure of a Contracting State to provide a legal, therapeutic abortion (i.e. practical measures/substantive positive obligations) may fall within the scope of Article 8 and the right to the protection of women's private life. The same applies if the Contracting State fails to fulfil is positive obligations by not setting out a comprehensive legal framework (i.e. judicial measures/procedural positive obligations) to guarantee individuals' right to private life in general and to a legal, therapeutic abortion in particular.[708] The ECtHR has accepted that legislation that regulates the interruption of pregnancy falls within the sphere of private life. Moreover, ECtHR case law indicates that the right to private life in Article 8 encompasses individuals' physical and social identity, and incorporates the right to personal autonomy and personal development.[709] However, interference in the private life of a pregnant woman does not always constitute a violation of Article 8, as the Court must first test whether the interference was "in accordance with the law" and "necessary in a democratic society."

The Court has considered cases relating to environmental pollution under the ECHR. Although there is no ECHR right to a healthy environment, environmental pollution can constitute a violation of Convention rights. The ECtHR has adjudicated several cases relating to environmental pollution under Article 8 and others. In particular, the Article 8 right to private and family life may be violated if there is direct interference in a person's home. Smells, emissions and other nuisances may amount to interference into the home, and private and family life, and thus may constitute a breach of Article 8. For Article 8 to be applicable in cases of environmental degradation, the interference must be sufficiently severe and must

707 Ursula Kilkelly, "The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights," Human rights handbooks 1 (2003), 57-58.

708 *Tysiąc v. Poland* (Fourth Section), para. 67, para. 75, para. 76, para. 105, para. 106.

709 See *Tysiąc v. Poland* (Fourth Section), paras. 106, 107.

directly affect the applicant's home and private and family life.[710] The following sections focus on cases involving medical treatment, expulsion and environmental hazards that have been raised under Article 8. They are typical examples that illustrate the way the ECtHR adjudicates positive obligation cases relating to Article 8 and health issues in a broader sense.

5.9 Article 8 of the ECHR and the minimum threshold of severity

As mentioned in previously, an application falls within the scope of Article 8 if the Court finds that there is a causal link between the Contracting State's act or omission and the harm to the applicant's family or private life. The Court must find that the effect was direct and serious, and that it reached a certain threshold of harm. In the case of *Hatton v. UK,* which related to aircraft noise pollution from Heathrow Airport, the Grand Chamber of the Court applied the principle that the applicability of Article 8 in environmental cases depends on whether the environmental pollution has had a serious and direct effect on the applicant's private and family life.

Hatton v. UK, (Grand Chamber), Application no. 36022/97, judgment of 8 July 2003, para. 96: *"… but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8."*

Furthermore, the applicability of Article 8 depends on whether the environmental pollution has "adversely affected" the applicant's private life and well-being. In the case of *Powell,* which also relates to aircraft noise from Heathrow Airport, the Chamber of the Court ruled that Article 8 was applicable because the daytime air noise adversely affected the applicants' private lives.

Powell and Rayner v. the United Kingdom, (Chamber), Application no. 9310/81, judgment of 21 February 1990, para. 40: *"…albeit to greatly differing degrees, the quality of the applicant's private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow Airport."*

In the case of *Greenpeace,* the applicants indicated to the German Federal Bureau of Motor Vehicles and Drivers that measures should be introduced to reduce respirable car dust emissions from diesel vehicles. The Court took into account the effect of diesel emissions on health in considering whether the applicants had been seriously affected. The Fifth Section of

710 See *Fadeyeva v. Russia* (First Section), paras. 68, 69.

the ECtHR found that Article 8 was applicable because diesel vehicles had a negative effect on the applicants' health.

Greenpeace E. V. and others v. Germany, (Fifth Section), Application no. 18215/06, judgment of 12 May 2009, "The Law", para. 1: "*… the Court accepts that soot and respirable dust particles can have a serious detrimental effect on health, in particular in densely populated areas with heavy traffic. It also accepts, […] that the applicants (except for the applicant Greenpeace e.V.) were all sufficiently affected by soot and dust to be able to claim to be victims of the alleged violation. The Court concludes that Article 8 is applicable in the present case.*"

In the case of *Fadeyeva*, the applicant lived in vicinity of a steel plant. She claimed that her Article 8 right had been breached because the Contracting State had failed to protect her private life and home from severe environmental nuisance caused by the steel plant. The Court pointed out that, for Article 8 to be applicable, the interference must have directly affected the applicant's right, and that the severity must have been of a sufficient level.

Fadeyeva v. Russia (First Section), Application no. 55723/00, judgment of 9 June 2005, para. 68: "*Article 8 has been relied on in various cases involving environmental concern, yet it is not violated every time that environmental deterioration occurs […] in order to raise an issue under Article 8 the interference must directly affect the applicant's home, family or private life.*"

Fadeyeva v. Russia (First Section), Application no. 55723/00, judgment of 9 June 2005, para. 70: "*Thus, in order to fall within the scope of Article 8, complaints relating to environmental nuisances have to show, firstly, that there was an actual interference with the applicant's private sphere, and, secondly, that a level of severity was attained.*"

In the case of *Dubestka*, the Court examined the severity of the effects of environmental pollution on the applicants' health in deciding whether Article 8 was applicable. The case concerned the state-owned Vizeyska coal mine and the Chervonogradska coal-processing factory (state-owned until 2007), which operated in the rural area where the applicants lived. The applicants alleged that their Article 8 right had been violated because the coal mine and factory caused them chronic health problems and harmed their homes. As in the previous cases, the Court examined whether the environmental pollution had reached a threshold of severity.

Dubetska and Others v. Ukraine, (Fifth Section), Application no. 30499/03, judgment of 10 February 2011, para. 105: "*…an arguable claim under Article 8 may arise where an environmental hazard attains a level of seve-*

rity resulting in significant impairment of the applicant's ability to enjoy his home, private or family life. The assessment of that minimum level is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life."

The Court decided that Article 8 was applicable because the applicants' air and water supply had been polluted for more than 12 years. Moreover, the pollution was caused by state-owned plants, which showed that the Contracting State was aware of it and its harmful effects on the residents' health.

Dubetska and Others v. Ukraine, (Fifth Section), Application no. 30499/03, judgment of 10 February 2011, para. 118: "*Consequently, it appears that for a period exceeding twelve years since the entry of the Convention into force in respect of Ukraine, the applicants were living permanently in an area which […]was unsafe for residential use on account of air and water pollution and soil subsidence resulting from the operation of two State-owned industrial facilities.*"

Dubetska and Others v. Ukraine, (Fifth Section), Application no. 30499/03, judgment of 10 February 2011, para. 119: "*In these circumstances the Court considers that the environmental nuisance complained about attained the level of severity necessary to bring the complaint within the ambit of Article 8 of the Convention.*"

In *Lopez Ostra v. Spain*, the Chamber of the Court ruled that Article 8 was applicable because the applicants' well-being had been seriously affected by the pollution from a liquid and solid waste treatment plant, despite the fact that it did not endanger their health. The Chamber ruled that Article 8 does not only protect the "minimally good life", and is not applicable only when individuals' health is at risk; rather, it protects individuals' well-being. In this way, the Chamber avoided a narrow application of Article 8.

Lopez Ostra v. Spain, (Chamber), Application no. 16798/90, judgement of 09 December 1994, para. 51: "*Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.*"

Nevertheless, most ECtHR case law indicates that, for a case to fall within the scope of Article 8, the danger to the applicants' autonomy must attain a level of severity: an action or omission must have caused serious harm to the applicants' lives. The Court generally adopts the "minimally good life" principle in most cases. This means that Contracting States, un-

der both the negative and the positive obligations, should not harm individuals' private and family life. The principle of the minimum level of severity indicates that the protection of family and private life under Article 8 requires Contracting States not to interfere in individuals' lives and to adopt judicial or practical measures (positive obligation) to prevent hazard that may harm individuals. The minimum level of severity implies that the Court has a positive obligation to protect the Article 8 right and to prevent the worst harm being done people's health, not to improve individuals' health. This will be clear in the following sections, which present the ECtHR's argumentation in detail.

5.10 Fair balance between individual interest and the interest of the community

The ECtHR applies the sub-tests of "legality", "legitimacy" and "necessity/proportionality" when it examines cases involving negative obligations. In cases involving positive obligations, it applies a "broadly similar" test: the three sub-tests are merged into a single general test to examine whether a fair balance has been struck between "the interest of the individual" (i.e. the applicant) and "the general interest" or "the interest of the community as a whole." Examining positive obligations cases through a merged single test to assess a "fair, balance of interests" has been described as a problematic practice.[711] The following sections will not discuss the challenges relating to the merged test; they will present the Court's argumentation when it applies the merged test to assess whether a fair balance of interests has been struck.

5.10.1 Medical care treatment

In the case of *Pentiacova and 48 others v. Moldova* (Fourth Section), the applicants alleged a breach of Article 8 because the Contracting State had failed to cover their expenses for their renal failure treatment. The applicants claimed that, because the state did not provide them with all the medication necessary for hemodialysis, they had to spend their families' savings on

711 Laurens Lavrysen, "The different structure of the Court's examination under Articles 8-11." in *Human Rights in a positive state: Rethinking the relationship between positive and negative obligations under the European Convention on Human Rights*, (Doctoral thesis, University of Ghent, 2016), 207-210.

their treatment, which had a detrimental effect on their family lives.[712] As mentioned in the previous chapter, although the ECHR does not guarantee a right to free medical care, Article 8 is applicable in some cases relating to free medical care because the protection of private life also includes individuals' physical and psychological integrity.

However, Contracting States enjoy a wide margin of appreciation in cases relating to the allocation of public resources. Moreover, when Contracting States have limited resources, the ECtHR (Fourth Section) has ruled that they enjoy a wider margin of appreciation. The Court has ruled that Contracting States with scarce resources must find a balance among individuals' needs; an application that calls for public funding may cause some "other worthy needs funded by taxpayers" to be marginalised.

Pentiacova and 48 others v. Moldova, (Fourth Section), Application no. 14462/03, judgment of 4 January 2005, p 13: *"The margin of appreciation referred to above is even wider when, as in the present case, the issues involve an assessment of the priorities in the context of the allocation of limited State resources. […] However, it notes that the applicants' claim amounts to a call on public funds which, in view of the scarce resources, would have to be diverted from other worthy needs funded by the taxpayer.*"

From the reasoning in *Pentiacova*, it is clear that the Fourth Section of the Court is tolerant towards Contracting States that do not give all individuals free access to healthcare, especially if the treatment is expensive and the illness is chronic. It could therefore be claimed that there is tolerance towards the exclusion of more vulnerable groups who are suffering from chronic illnesses from access to free medical care. According to the Court's reasoning, it is acceptable for a Contracting State that lacks resources not to give patients the treatment they need, because this would be an economic burden to it and its taxpayers. Consequently, it could be claimed that the ECtHR principally defends the financial interests of Contracting States and their taxpayers at the expense of ill individuals' well-being and their rights, which promote their well-being.

Pentiacova and 48 others v. Moldova, (Fourth Section), Application no. 14462/03, judgment of 4 January 2005, p 13: "*While it is clearly desirable that everyone should have access to a full range of medical treatment, including life-saving medical procedures and drugs, the lack of resources means that there are, unfortunately, in the Contracting States many individuals who do not enjoy them, especially in cases of permanent and expensive treatment.*"

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712 See *Pentiacova and 48 others v. Moldova*, (Fourth Section), Application no. 14462/03, judgment of 4 January 2005, Complaints, para. 5, pp 10, 12.

Pentiacova and 48 others v. Moldova, (Fourth Section), Application no. 14462/03, judgment of 4 January 2005, p 14: "*in the circumstances of the present case it cannot be said that the respondent State failed to strike a fair balance between the competing interests of the applicants and the community as a whole.*"

In *Sentges v. the Netherlands*, the Second Section of the Court decided that the applicant's claim that the refusal of the Netherlands to provide him with a robotic arm constituted a breach of Article 8 was manifestly ill-founded. The sixteen-year-old applicant was completely paralysed and dependent on his family. One of his main arguments was that the failure of the Contracting State to provide a robotic arm constituted a degradation of his quality of life, leading to the loss of his personal autonomy and a violation of his right to private and family life, given that, without the support of the robotic arm, he was totally dependent on his parents.[713] The Second Section of the Court stressed that Article 8 is applicable only in exceptional cases, not in every situation in which an individual's everyday life is disturbed. Exceptional cases are those in which the Contracting State's failure to take measures to protect individuals interferes with their "personal development" and their "right to establish and maintain relations with other human beings and the outside world."[714]

In *Sentges v. the Netherlands*, the Court stated that, even if the Contracting State's failure to provide the individual with a robotic arm indeed constituted interference with his personal development, this would not be sufficient to claim that Article 8 had been breached, because a fair balance between the competing interests has to be struck. Moreover, as in the case of *Pentiacova*, the Court considered that the Contracting State enjoyed a wide margin of appreciation. In the Court's reasoning, the wide margin of appreciation related to the fact that procuring the robotic arm would entail the allocation of public funds, and would thus require a decision-making procedure that balanced the needs of the patients in the healthcare system. In such cases, the ECtHR maintains that national authorities are better placed to make decisions about public financial issues.

Sentges v. the Netherlands, (Second Section), Application no. 27677/02, judgment of 8 July 2003, p 7 and *Pentiacova and 48 others v. Moldova*, (Fourth Section), Application no. 14462/03, judgment of 4 January 2005, p 13: "*In view of their familiarity with the demands made on the health care sys-*

713 See *Sentges v. the Netherlands*, (Second Section), Application no. 27677/02, judgment of 8 July 2003, p 5.

714 See *Sentges v. the Netherlands* (Second Section), p 6.

tem as well as with the funds available to meet those demands, the national authorities are in a better position to carry out this assessment than an international court."

The Court found that the Contracting State had not exceeded its margin of appreciation, and rejected the application as manifestly ill-founded.[715] The ECtHR has declared applications as inadmissible on several different grounds, one of which is inadmissibility on the basis of the application's merits. In these cases, the Court may declare the application manifestly ill-founded.[716]

In the case of *Pentiacova*, the Court found that there had been no violation of Article 8, because the Contracting State had not failed to strike a fair balance between the individual interests of the applicants and the interests of the community as a whole. The applicants had access to the basic medical care and medication, and after 2004 they received almost full medical care. What is of particular importance in this case is the fact that the ECtHR directly acknowledged the correlation between the full medical treatment provided by a Contracting State and the improvement of private and family life. However, the Fourth Section of the Court decided that a fair balance had been struck between the competing interests; it seems that the Court was reluctant to take a decision that would place a financial burden on the Contracting State. It therefore seems that, in the Court's reasoning, the public funds in Moldova had greater weight than the personal funds of the patients who were suffering from renal failure and needed hemodialysis, which placed a major financial burden on them and their families. In the Court's decision, this constituted a fair balance between the competing interests.

Pentiacova and 48 others v. Moldova, (Fourth Section), Application no. 14462/03, judgment of 4 January 2005, p 14: "*The Court by no means wishes to minimise the difficulties apparently encountered by the applicants and appreciates the very real improvement which a total haemodialysis coverage would entail for their private and family lives. Nevertheless, the Court is of the opinion that in the circumstances of the present case it cannot be said that the respondent State failed to strike a fair balance between the competing interests of the applicants and the community as a whole.*"

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715 See *Sentges v. the Netherlands*, (Second Section), Application no. 27677/02, judgment of 8 July 2003, p 7.

716 Council of Europe. "Practical Guide on Admissibility Criteria." Strasbourg: Council of Europe/European Court of Human Rights, 2014, 82-88.

In *Pentiacova*, the Fourth Section of the Court first considered a fair balance test, as discussed above, and then decided that the complaint under Article 8 should be rejected as it was manifestly ill-founded.[717]

5.10.2 Expulsion

In *Paposhvili v. Belgium*, the Grand Chamber (December 2016 decision) adjudicated the application on the basis of the positive obligations of the Belgian authorities in the light of new developments in the case – namely, the deterioration of the applicant's health and his ultimate death.[718] In April 2014, the Chamber decided that the expulsion of the applicant – a migrant illegally residing in Belgium who was suffering from tuberculosis, leukaemia and hepatitis C – would not breach Article 8. In its reasoning, it claimed that a fair balance between the competing interests had been struck, given that the applicant's expulsion served the interest of the community as a whole because of the number and seriousness of his offences.[719]

The Grand Chamber criticised the fact that the Chamber had not scrutinised the extent to which the impairment of the applicant's health caused him to depend on his family. However, evaluating the impact of the applicant's expulsion on his family life due to his state of health is a task for the domestic authorities, not the ECtHR; it "constitutes a procedural obligation with which they must comply in order to ensure the effectiveness of the right to respect for family life."[720] The Grand Chamber decided that if the applicant had been deported to Georgia, Article 8 would have been violated – not on the grounds of his health issues, but principally because Belgium had not assessed whether his family would be able to follow him.[721]

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717 *Pentiacova and 48 others v. Moldova*, (Fourth Section), Application no. 14462/03, judgment of 4 January 2005, p 14.

718 *Paposhvili v. Belgium*, (Grand Chamber), Application no. 41738/10, judgment of 13 December 2016, para. 221.

719 *Paposhvili v. Belgium*, (Chamber), Application no. 41738/10, judgment of 17 April 2014, Referral to the Grand Chamber 20/04/2015, paras. 145-147.

720 *Paposhvili v. Belgium*, (Grand Chamber), Application no. 41738/10, judgment of 13 December 2016, para. 224.

721 *Paposhvili v. Belgium*, (Grand Chamber), Application no. 41738/10, judgment of 13 December 2016, paras. 225-226.

5.10.3 Environmental protection

As mentioned in the introduction, the ECHR contains only first-generation rights, not third-generation rights such as the right to a healthy environment or second-generation rights such as the right to healthcare. Nevertheless, the ECtHR has adjudicated cases involving environmental and health issues. In the case of *López,* the applicant alleged that her Article 8 right had been violated. A waste-treatment plant run by a limited company, which was originally built to address the grave environmental problems caused by the heavy concentration of tanneries in the municipality of Lorca, had caused nuisance and health problems to several local people.[722] The town council offered the affected residents three months of free accommodation, and ended some of the plant's activities, but the environmental problems continued even after this partial closure. A Spanish domestic court ordered the temporary closure of the plant, but the municipality suspended this judicial decision. The adjudication of the Chamber of the ECtHR indicates that the municipality failed to take the necessary measures.[723]

According to the Chamber, the Spanish authorities did not strike a fair balance between the competing interests. The free accommodation offered to the applicant and her family was not adequate compensation, as they had already been affected by the noise pollution from the plant. The applicant's family had suffered the noise pollution for three years before moving house. Their move was even recommended by the applicant's daughter's paediatrician. The Chamber decided that Article 8 had been violated, as the Spanish authorities had not fairly balanced the competing interests.

Lopez Ostra v. Spain, (Chamber), Application no. 16798/90, judgement of 09 December 1994, para. 58: *"despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right to respect for her home and her private and family life."*

Unlike in the case of *López,* in *Hatton and others v. UK* the Grand Chamber decided that Article 8 had not been breached, and that the UK had struck a fair balance between the competing interests. The applicants alleged a violation of the Article 8 right because of the aircraft noise caused by night flights at Heathrow Airport. Article 8 may be applicable to envi-

722 *López Ostra v. Spain* (Chamber), paras. 7-8, para. 52.
723 *López Ostra v. Spain* (Chamber), para. 56.

ronmental issues when a Contracting State either directly causes environmental pollution or fails to introduce measures to control private industries that cause environmental hazards.[724] The Grand Chamber of the Court acknowledged that a 1993 policy concerning the restriction of the night flights at Heathrow Airport had adversely affected the applicants.[725]

However, this did not mean that the application of the 1993 policy breached Article 8. The Court had to assess whether a fair balance had been struck between the interests of the individuals affected by the disturbance and the interests of the community as a whole.[726] In assessing the balance of interests, the Grand Chamber of the ECtHR took into consideration the interests of passengers in there being night flights and the interests of the residents living nearby Heathrow Airport, who were disturbed by the night aircraft noise. The Grand Chamber concluded that the disturbance caused by the night flights was "subjective" and concerned a "small minority of people,"[727] as it affected a limited number of people in the area,[728] whereas a further restriction of night flights would lead to "serious passenger discomfort."[729] Moreover, the night aircraft noise had not caused house prices to decrease, so the residents could have left the area "without financial loss."[730] The Grand Chamber also stated that the night flights contribute to the country's economy, and so a restriction of night flights would have a national economic cost. It stated that the UK and the aviation industry shared the same economic interests; it was therefore "difficult, if not impossible, to draw a clear line between the interests of the aviation industry and the economic interests of the country as a whole."[731]

The Grand Chamber said that Contracting States do not have a narrow margin of appreciation in cases involving sleep disturbances because, as opposed to the precedent case law such as *Dudgeon v. the UK* (Plenary), the sleep disturbances do not concern an intimate aspect of private life. *Dudgeon v. the UK* (Plenary) related to sexual intimacy.[732] The Grand Chamber

724 *Hatton v. UK*, (Grand Chamber), Application no. 36022/97, judgment of 8 July 2003, para. 98.
725 *Hatton v. UK* (Grand Chamber), para. 118.
726 *Hatton v. UK* (Grand Chamber), para. 119.
727 *Hatton v. UK*, (Grand Chamber), Application no. 36022/97, judgment of 8 July 2003, para. 118.
728 *Hatton v. UK* (Grand Chamber), para. 127.
729 *Hatton v. UK* (Grand Chamber), para. 126.
730 *Hatton v. UK* (Grand Chamber), para. 127.
731 *Hatton v. UK* (Grand Chamber), para. 126.
732 *Hatton v. UK* (Grand Chamber), para. 123.

stressed that the Contracting State is free to choose how to meet its duty to protect Article 8, because the Court's role is supervisory, and is of a subsidiary nature.[733] Finally, in its judgment, the Grand Chamber stated that the public authorities did not exceed their margin of appreciation by failing to strike a fair balance between the individuals' right to respect for their private and family life and home, and the interests of the community as a whole. Therefore, Article 8 was not breached.[734]

The dissenting opinion of the Grand Chamber in *Hatton v. UK* (Grand Chamber) focused principally on four points of the majority of the Grand Chamber's argumentation. First, the Court majority put great weight on the discomfort of passengers, which was, in fact, an abstract interest, and reduced the residents' concrete need for sleep to a "subjective element [of] a small minority of people." The dissenting opinion criticised the fact that the disturbance of sleep was characterised as "subjective". It stated that not only are there objective criteria to assess the impact of noise pollution on sleep, but even if the sleep disturbance affects only a small minority of people, the protection of small minorities is central to the purpose of human rights.

Hatton v. UK, (Grand Chamber), Application no. 36022/97, judgment of 8 July 2003, Joint dissenting opinion, para. 14: *"Indeed, one of the important functions of human rights protection is to protect "small minorities" whose "subjective element" makes them different from the majority.*"

Secondly, the dissenting opinion stated that the case concerned the applicants' health, which was affected by the sleep disturbances, and their privacy; both are interrelated. Health is "intimate" and one of the most vital aspects of private life.[735] Furthermore, privacy is not only an "end in itself," but an "aspect of the person's general well-being." Accordingly, the dissenting opinion affirmed that health is essential to well-being and is a precondition of a meaningful private life. Therefore, the protection of private life and the protection of health overlap.

Thirdly, the dissenting opinion pointed out that the Contracting State has a positive obligation to ensure that people can enjoy peaceful sleep, which is an intimate aspect of their lives. The Court majority found no violation of Article 8, despite the fact that it acknowledged that the residents

733 *Hatton v. UK* (Grand Chamber), para. 123.
734 *Hatton v. UK*, (Grand Chamber), Application no. 36022/97, judgment of 8 July 2003, paras. 129-130.
735 *Hatton v. UK*, (Grand Chamber), paras. 9-10.

were adversely affected by the 1993 policy, and did not find that the applicants were "capricious".

Hatton and others v. The United Kingdom (Hatton v. UK), (Grand Chamber), Application no. 36022/97, judgment of 8 July 2003, Joint dissenting opinion, para. 12:"*When it comes to such intimate personal situations as the constant disturbance of sleep at night by aircraft noise there is a positive duty on the State to ensure as far as possible that ordinary people enjoy normal sleeping conditions.*"

Finally, the dissenting opinion stated that the Contracting State's margin of appreciation should be narrowed, because the right to sleep, which relates to privacy and health, should be outweighed only by the pressing needs of the Contracting State.

Hatton and others v. The United Kingdom (Hatton v. UK), (Grand Chamber), Application no. 36022/97, judgment of 8 July 2003, para. 17:"*The margin of appreciation of the State is narrowed because of the fundamental nature of the right to sleep, which may be outweighed only by the real, pressing (if not urgent) needs of the State. Incidentally, the Court's own subsidiary role, reflected in the use of the "margin of appreciation", is itself becoming more and more marginal when it comes to such constellations as the relationship between the protection of the right to sleep as an aspect of privacy and health on the one hand and the very general economic interest on the other hand.*"

Unlike in the case of *Hatton and others v. UK* (Grand Chamber), the Second Section of the Court decided in *Deés v. Hungary* that there was a violation of the Article 8 right to private life and home because the increase of the crosstown traffic caused noise and damage to the applicants' homes, which made them almost uninhabitable. The crosstown traffic volume had increased in Alsónémedi after a private motorway company introduced tolls. As a result, trucks started driving through Alsónémedi to avoid the high toll burden.[736] The Hungarian authorities introduced several costly and time-consuming measures to reduce the noise nuisance and pollution in the neighbourhood, but the Second Section of the Court found them to be insufficient, as "the applicant was exposed to excessive noise disturbance over a substantial period of time." The Second Section decided that the Hungarian Contracting State had failed to fulfil its positive obligation to guarantee the Article 8 right, since the traffic noise "exceeded the statutory level" and "created a disproportionate individual burden for the applicant."

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736 *Deés v. Hungary*, (Second Section), Application no. 2345/06, judgment of 9 November 2010, paras. 6-8.

The Court ruled that the Contracting State did not strike a fair balance between the interests of road-users and the interests of the residents.[737]

In the case of *Greenpeace*, the applicants asked the German Federal Bureau of Motor Vehicles and Drivers to introduce measures to restrain respirable car dust emissions from diesel vehicles. As mentioned in the previous section, the Fifth Section of the Court ruled that Article 8 was applicable because soot and respirable dust molecules "can have a serious detrimental effect on health, in particular in densely populated areas with heavy traffic." It acknowledged that "the applicants were […] sufficiently affected by soot and dust" caused by diesel vehicles and therefore could claim that they were victims.[738] However, it pointed out that the Court plays a subsidiary role, and the Contracting States enjoy a margin of appreciation as they are better placed to decide which measures and policies to apply to guarantee the ECHR rights. Finally, the Fifth Section of the Court's judgment indicated that Article 8 was not breached, because "the applicants have not shown – and the documents submitted do not demonstrate – that the Contracting State, when it refused to take the specific measures requested by the applicants, exceeded its discretionary power by failing to strike a fair balance between the interests of the individual and of the community as a whole."[739]

5.11 Overview of the ECtHR case law relating to Article 8 of the ECHR

The ECtHR case law described above indicates that, as stated in the previous chapter,[740] the Court does not apply a specific theory of positive obligations. Consequently, in dealing with health-related issues that would place a financial burden on the Contracting State, the ECtHR has been reluctant to rule that Contracting States have a positive obligation either to provide healthcare to individuals, or to protect individuals' health from disturbances. The ECtHR has been reluctant to derive prima facie positive obligations from to ECHR rights and health issues for two interrelated reasons. First, since the Court does not have a theory of positive obligations, the principles relating to positive obligations have been applied narrowly

737 *Deés v. Hungary* (Second Section), paras. 23-24.
738 *Greenpeace E. V. and others v. Germany*, (Fifth Section), Application no. 18215/06, judgment of 12 May 2009, p 4.
739 *Greenpeace E. V. and others v. Germany* (Fifth Section), p 5.
740 See Chapter 0 Creating new duties: the dynamic aspect of rights.

in some cases and broadly in others. Nevertheless, as long as the positive obligations relating to health issues mainly imply the allocation of funds, in most cases the ECtHR has applied the concepts of "minimum core obligations" and the "minimally good life" in interpreting the Convention rights, given that measures to address health issues place a financial burden on Contracting States.

Secondly, ECtHR case law creates precedent. For example, in *Sentges v. the Netherlands* (Second Section), which was discussed in the sections above, the Court explicitly stated that its decisions may establish precedent. It did not wish to "make new law" and so was reluctant to rule that Article 8 was applicable in this case, because such a decision would place new positive obligations on Contracting States and create extra financial burdens.

Sentges v. the Netherlands, (Second Section), Application no. 27677/02, judgment of 8 July 2003, p 7: "*the Court should also be mindful of the fact that, while it will apply the Convention to the concrete facts of this particular case in accordance with Article 34, a decision issued in an individual case will nevertheless at least to some extent establish a precedent.*"

The same applies to the case of *Pentiacova*, which refers to *Sentges v. the Netherlands* case law.

Pentiacova and 48 others v. Moldova, (Fourth Section), Application no. 14462/03, judgment of 4 January 2005, p 13: "*the Court should also be mindful of the fact that,* […] *a decision issued in an individual case will nevertheless at least to some extent establish a precedent.*"

In *Paposhvili v. Belgium*, the Grand Chamber of the Court (December 2016 decision) stated explicitly that its judgments are not exclusively restricted to the individual cases adjudicated in front of the Court. Moreover, one of the tasks of the ECtHR is to clarify and develop the rules that are established in the ECHR and to raise the general standards for the human rights protection. In its decision, the Grand Chamber also pointed out that determining issues on public policy grounds in the common interest is part of its remit.

Paposhvili v. Belgium, (Grand Chamber), Application no. 41738/10, judgment of 13 December 2016, para. 130: "*The Court has repeatedly stated that its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, […] Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights.*"

The Grand Chamber made this clarification after the applicant had passed away. Therefore, its principal objective in the decision was to clarify and develop the rules and provisions relating to Convention rights, not "to provide individual relief."

CHAPTER 6: ECtHR case law and Joseph Raz's approach to rights

6.1 Introduction

The objective of this chapter is to show that, if we accept a Razian approach to rights, the ECtHR's practice of reading new rights and obligations into old rights is inevitable due to what Joseph Raz calls "the dynamic character of human rights,"[741] one of the main consequences of the political character of rights. The chapter attempts to demonstrate that the progressive reading of ECHR rights developed by the ECtHR in some cases is justified because it accords with a plausible theory of rights. As discussed in previous chapters, Raz's theory of rights is the most plausible of the prominent contemporary accounts of human rights.

Raz's theory can be used to examine the relationship between rights and positive obligations. It offers a political account of rights that extends beyond the concepts of the "minimally good life" and "minimum core obligations". Razian rights combine collective goods with the ideal of autonomy, the autonomy-based doctrine of freedom and the concept of the worthwhile life. Raz's approach is not individualistic, since he believes that rights not only protect individual well-being but also preserve collective goods. Raz's "double-dimension rights" offer a middle-ground approach, which constitutes the most appropriate understanding of what precisely rights are. It may have a general application, but it certainly applies to the ECtHR and the conditions under which it adjudicates.

This chapter identifies similarities between Raz's theory of rights and the reasoning of the ECtHR in selected case law. Much of the ECtHR's case law does not accord with Razian rights, but those cases were not selected for this study. The case law selected for analysis in this chapter is restricted to decisions that interpret Convention rights broadly; decisions that interpret the rights narrowly were omitted. This book contends that ECtHR decisions that apply a broader reading of Convention rights accord with the

741 The "dynamic character of rights" relates to the "how-dimension" of Razian rights. See this book, section 4.8.2 Creating new duties: the dynamic aspect of rights; see also Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1996), 269.

Razian account of rights. If Razian theory offers the most plausible understanding of rights, the reasoning of the judges in Court decisions that are in line with Raz's account of rights can be justified more soundly because they accord with an accurate theory of rights. That account of rights is politically inevitable.

This chapter reviews ECtHR case law to identify the main health-related positive obligations that derive from Articles 3 and 8 of the ECHR, and their relationship with Razian double-dimension rights. Applying the preceding analysis of ECtHR case law, I argue that the way the Article 3 right has been read by the ECtHR accords with Razian double-dimension rights for two main reasons. First, the Court has argued that the Article 3 right not to be tortured serves and preserves democracy. If we accept that democracy is a collective good then, in the Court's reasoning, the Article 3 right serves a collective good. That accords with the Razian account of rights, which asserts that rights serve and preserve collective goods (the "why-dimension").

Secondly, to the extent that the Article 3 right not to be tortured and the Article 8 right to private and family life have been read as giving rise to new positive obligations on states with respect to either individuals' medical care or the protection of their health in general, their application resembles Raz's autonomy-based freedom and the "how-dimension" of Razian rights – the second element of the Razian double-dimension rights. In Razian thought, the "how-dimension" allows rights to create additional duties when social circumstances change. Consequently, new duties may be created from old rights. The ECtHR's reasoning has been developed to protect individuals' physical well-being and health. In Razian thought, which applies the autonomy-based doctrine of freedom, a state has the responsibility to develop individuals' capacities, such as their health. Therefore, Convention rights and Razian rights both protect individuals and collective goods.

6.2 Broadening the interpretation of the principles applied to the ECHR rights

It is clear from chapter 3 that in health-related positive obligation cases, the ECtHR interprets the same principles in different ways. They have been read broadly in some cases and narrowly in others because of the absence of a positive obligation theory. This chapter isolates the main points of ECtHR reasoning that have similarities with the Razian account of rights in

order to establish a common ground for the justification of positive obligations to healthcare under Articles 3 and 8 of the ECHR.

As mentioned in previous chapters, it is not only Raz's theory that can justify positive obligations; other contemporary political theories can, too. For example, Rawls's notion of democratic equality has been used to justify the protection of individuals' positive freedom and capabilities. His principles of justice may also imply that a society has a positive obligation to provide access to healthcare and reduce the inequalities caused by the natural lottery. The provision of healthcare can also be justified by the "capability approach" developed by Amartya Sen and Martha Nussbaum,[742] and positive obligations can be derived from Dworkin's thinking, in which societies have the positive obligation to provide healthcare for health problems caused by "brute luck". Communitarian theory can justify positive obligations to provide healthcare on the grounds of primary features of health which have a priority when political arrangements are evaluated.

However, as mentioned above, those approaches are not used to justify the positive obligations implied by the ECHR rights, since the ECHR is neither a communitarian treaty nor an egalitarian one that aims to promote and preserve a welfare state.[743] The Razian approach is the most plausible theory of rights because it develops the idea that rights are not one-dimensional; rather, they protect both the individual and the community.

6.2.1 The absence of healthcare and inhuman treatment

ECtHR case law holds that the absence of healthcare may constitute inhuman and degrading treatment, because one of the criteria for the "exceptional circumstances/humanitarian reasons" principle is whether there is appropriate medical care in the receiving country. Consequently, the absolute right of Article 3 may be violated if a seriously ill person is removed from a country in which they could receive "life-saving treatment" to a country in which they could not receive proper medical treatment.[744]

Accordingly, in the Court's reasoning, in applying the "minimum level of severity" principle it must take into account both the availability and the

742 For the capability approach and relevant bibliography, see section 1.5.1 above.
743 For a thorough argumentation about positive obligations as they are justified by egalitarian and communitarian theories, see section 1.5.2.
744 See the assessment of the Human Rights Centre at Ghent University in *Paposhvili v. Belgium* (Grand Chamber), para. 168.

level of the medical treatment in the receiving state. One of the preconditions for removal is the procedural positive obligation of the Contracting State to obtain "individual and sufficient assurances" from the receiving state that appropriate treatment will be both available and accessible to the applicant.[745] Nevertheless, in recent case law concerning an asylum application on medical grounds, the Court pointed out that the Contracting State has a *negative* obligation not to expel an individual to a country with an insufficient healthcare system, rather than a *positive* obligation to provide healthcare to the individual to alleviate the inadequacies of the healthcare system in the country to which they are returning.[746]

The principle of the minimum level of severity is applied more broadly in cases concerning detainees than in expulsion cases. In detainee cases, public authorities have a *positive* obligation to provide medical treatment to detainees to secure the Article 3 right. Public authorities therefore have a positive obligation to provide regular supervision and proper medical treatment either to secure the detainee's recovery or to prevent the deterioration of their illness.[747]

ECtHR case law indicates that the Article 3 right not to be tortured has a social dimension.[748] The implications of some ECHR rights are of a social or economic nature, and there is no clear distinction between civil/political rights and social/economic rights.[749] For Raz, human rights are social concepts that aim to secure the good life rather than merely the minimum conditions of life. The following section discusses the relationship between the protection of well-being, the Convention and Razian rights.

6.2.2 Positive obligation to healthcare, physical well-being and Razian autonomy-based freedom

The Court's reasoning indicates that Articles 3 and 8 have the potential to secure individuals' well-being and are not restricted to guaranteeing only a decent death or a minimally good life. Health is regarded as a vital aspect

745 See *Paposhvili v. Belgium* (Grand Chamber), paras. 189, 191.
746 See *Paposhvili v. Belgium* (Grand Chamber), para. 192.
747 See *Wenerski v. Poland,* para. 64, and *McGlinchey and others v. UK* case.
748 See *N v UK*, dissenting opinion, para. 6.
749 See dissenting opinion in *S.J. v. Belgium,* the reasoning developed by Judge Pinto de Albuquerque.

of private life, so, under the Convention rights, states have a positive obligation to protect it.

More specifically, ECtHR case law concerning asylum applications on medical grounds indicates that the Contracting State must take into account the applicant's health status and the medical conditions in the receiving country. In such cases, the Article 3 right not to be tortured should not apply solely where the acts or omissions of a state or non-public authority were intentional. Article 3 may be breached even where ill-treatment in the receiving country was not caused intentionally, since the issue at stake is whether the receiving country is able to provide proper medical treatment to the expelled person.[750] In detention cases, the intentionality criterion has less importance. Public authorities must secure proper living and detention conditions to protect a detainee's Article 3 rights. Factors that may lead to the violation of Article 3 include sleeping conditions and the deprivation of sleep, the size of the detainee's cell and the ventilation of the cell.[751]

According to the Court's adjudication in the Article 8 case of *Dudgeon v. the UK* (Plenary), the disturbance of sleep concerns an intimate aspect of private life, so Contracting States have a narrow margin of appreciation. Similarly, according to the dissenting opinion in *Hatton v. UK*, which also related to Article 8, the majority of the Grand Chamber should not have characterised the sleep disturbance caused by night flights as "subjective". The dissenting judges pointed out that there are objective criteria for assessing the impact of noise on sleep, and that insofar as a sleep disturbance affects only a minority of people, human rights should apply because one of their purposes is to protect minorities. The dissenting judges argued that Contracting States have a positive obligation to secure normal sleeping conditions for people because sleep is directly related to health. Health is one of the "intimate" and most vital aspects of private life, and both privacy and health are fundamental aspects of the well-being of individuals. Accordingly, health must be protected in order to protect private life and well-being.[752]

In detention cases, proper living conditions are related to public authorities' positive obligations to protect the health and well-being of detainees, and to provide them with the necessary medical assistance. To secure the

750 See *D v. UK* (Chamber).
751 See *Kalashnikov v. Russia* (Chamber), paras. 97-98.
752 *Hatton and others v. UK* (Grand Chamber), Joint dissenting opinion, paras. 9, 10, 12, 14, 17.

Article 3 right, the state has a positive obligation to provide the requisite medical care to detainees to protect their physical well-being.[753] The reasoning developed by the ECtHR in some cases indicates that it conceives of medical assistance as a factor that can secure detainees' well-being and protect their Article 3 right. Therefore, Contracting States have a positive obligation to provide detainees with proper medical assistance to secure both their health and their well-being.[754]

The expulsion case *D v. UK* implies that Contracting States have a new positive obligation to provide medical care to non-nationals, which derives from the old right not to be tortured. Similarly, in detention cases, it is clear that to protect a detainee's right under Article 3 of the Convention, the Contracting State has a positive obligation to provide them with effective medical treatment in a timely fashion. Public authorities have a positive obligation to provide ill individuals with proper medicine, examinations by specialist doctors and regular monitoring.

Therefore, although the Article 3 right does not directly entail a duty to provide healthcare, the reasoning in ECtHR case law gives Article 3 a dynamic character, which gives rise to new obligations. Although the Article 3 right is formulated negatively, in the sense that it is a right against inhuman and degrading treatment, in practice to secure the right it is not enough for a public authority merely not to engage in degrading actions. Rather, Article 3 implies that Contracting States have a positive obligation to protect the physical well-being of ill individuals, including ill detainees. Thus, a new positive duty is derived from an old negative right, reflecting the "how-dimension" of Razian rights.

Applying the Razian approach to rights and the reasoning of the ECtHR, I argue that states that subscribe to the Convention rights have a positive obligation under Articles 3 and 8 to secure the natural and social conditions that make possible the protection of individuals' physical well-being. The preservation of individuals' physical well-being relates to the social conditions that Contracting States must provide. In particular, the effective provision of the Article 3 right presupposes the social conditions that make possible the availability of healthcare, since ECtHR case law states that an applicant not being "provided with the medical assistance re-

753 See *Blokhin v. Russia* (Chamber, First Section), para. 88; *McGlinchey and others v. The United Kingdom* (Chamber), para. 57; *Wenerski v. Poland* (Chamber)*; Popov v. Russia* (Chamber)*;* and *Nevmerzhitsky v. Ukraine* (Chamber).

754 *Khudobin v. Russia* (Chamber); *Mouisel v. France* (Chamber); *and Kudła v. Poland* (Grand Chamber).

quired for his condition"[755] is sufficient to determine a breach of the Article 3 right not to be tortured.

Similarly, the Second Section of the Court has found that the Article 8 right to private and family life is applicable in exceptional cases, namely when a Contracting State fails to take measures to avoid interference in "personal development" and the "right to establish and maintain relations".[756] Moreover, the ECtHR's adjudications in cases relating to Article 8 indicate that the improvement of private and family life depends on the provision of full medical treatment by a Contracting State.[757] In Razian thought, the state is responsible for the development of individuals' capacities, including health. The dissenting opinion in *Hatton v. UK* indicates that health is fundamental to individuals' well-being, and constitutes a precondition for a meaningful private life and intimacy.

I therefore argue that the ECtHR's reasoning resembles Razian autonomy-based freedom, to the extent that, in Razian thought, the principle of autonomy gives rise to the positive obligation to secure the conditions that enable people to develop their capacities, such as their physical abilities and their health.[758] As mentioned in chapter 1, in Razian thinking, the principle of autonomy leads to both negative obligations not to interfere and positive duties.[759] For Raz, "the principle (of autonomy) requiring people *to secure the conditions of autonomy for all people*, *yields duties which go far beyond the negative duties of non-interference*, which are the only ones recognized by some defenders of autonomy."[760] The so-called autonomy-based duties towards persons are grounded in the value of the autonomous life and refer to a duty to secure autonomy as capacity. That means there is an obligation to secure conditions that enable people to develop their inner capacities, including "health, and physical abilities and skills."[761]

Accordingly, in the reasoning of the Court, positive obligations to preserve physical well-being and health derive from rights that, at first glance, impose mainly negative obligations. For the Court, in detention cases, the Article 3 right not to be tortured implies that the authorities of Contract-

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755 *Popov v. Russia* (Chamber), para. 213.
756 *Sentges v. the Netherlands* (Second Section), p 6.
757 See *Pentiacova and 48 others v. Moldova* (Fourth Section); see also *Deés v. Hungary* (Second Section).
758 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 408.
759 *Ibid*, 425. See above section 1.5.
760 *Ibid*, 408. See above section 1.5.
761 *Ibid*, 408. See above section 1.5.

ing States have a positive obligation to secure the natural and social conditions that will protect the physical well-being and health of individual detainees. I therefore argue that in detention cases, and in expulsion cases such as *D v UK*, the Court's reasoning indicates that the absence of a decent health system might lead to inhuman and degrading treatment. Therefore, from an old negative right the Court recognises new positive obligations for states related to the social right to health, reflecting the Razian "how-dimension".

6.2.3 Right-holders: Physically present and members of the same moral community

I argue that ECtHR case law indicates that seriously ill non-nationals do not deserve less protection than nationals, so long as they are all members of the same community. Article 3 leads to positive obligations concerning the protection of seriously ill foreign nationals' health.[762] One principle applied in such cases – the "minimum level of severity" of ill-treatment – concerns individuals who are physically present in the state's territory even if they are non-nationals. In other words, the absolute right of Article 3 protects all individuals residing within the territory of a Contracting State; it is not restricted to individuals who hold citizenship.[763]

In Razian thinking, potential right-holders are individuals who have the "capacity to have rights", which means individuals who are members of the "same moral community".[764] The term "same moral community" means a community of people who respect and share common liberal values, such as democracy and toleration, and thus encompasses all moral agents who are members of a community, not solely the "citizens" of a community. Razian rights therefore protect the members of the community in general, not just the citizens or nationals.

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762 See *S.J. v. Belgium* (Grand Chamber), Application no. 70055/10, judgment 19 March 2015, the reasoning developed by Judge Pinto de Albuquerque.

763 For the difference between the semantic (technical) and pragmatic (physical) dimension of the notion "entrance" as it has been developed by the ECtHR, see *D v. UK* (Chamber).

764 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 176. See also above section 4.5, Rights and interests.

6.2.4 Balancing interests and financial restrictions

The ECtHR case law indicates that the Court, when adjudicating cases relating to the absolute right of Article 3, must not take into account budgetary restrictions or future consequences for Contracting States, because these considerations undermine the absolute character of Article 3 and the nature of the ECHR rights in general.[765] The factors that must be taken into account when a seriously ill migrant faces expulsion is whether there will be detriment to their quality of life, whether their life expectancy will be reduced and whether the quality of the medical treatment in the receiving country is adequate.[766]

Unlike Article 3, the right to private and family life in Article 8 is not absolute. The limitation clause in Article 8 indicates that the right to private and family life can be restricted if doing so is necessary to protect a democratic society. Therefore, a balance must be struck between the right to private life and the interests of the community.[767] I have previously claimed that the Court's reasoning can be justified as long as it accords with a plausible theory of rights. Both Raz and the ECtHR case law suggest that rights may be restricted to safeguard public interests. In chapter 2, I stated that Raz distinguishes between collective goods, which are protected by rights, and public interests, which may conflict with rights. The distinction between individual rights and public interests is present not only in the ECtHR case law, but in the ECHR itself. For Raz, the common good benefits everyone within a society, but the public interest relates to many different, potentially contradictory, interests. For example, in making a decision about new infrastructure, a balance among the different interests must be struck.

The interests of those who will directly or indirectly benefit from the new infrastructure are balanced against the interests of those who will be negatively affected due to environmental pollution or because they will suffer an economic loss. Joseph Raz does not indicate how to strike a fair balance of interest. His contribution to the debate about balancing public interests is that he distinguishes between collective goods, which relate to rights, and public interests, which concern balancing considerations. The

765 See *S.J. v. Belgium* (Grand Chamber), the reasoning developed by judge Pinto de Albuquerque, who criticises the decision in *N v. UK* (Grand Chamber).

766 See Human Rights Centre – Ghent University, in *Paposhvilli v. Belgium* (Grand Chamber), para. 170.

767 See ECHR, Art. 8, para. 2.

Razian account of rights deems acceptable the Article 8 limitation clause, which allows interference in a person's private and family life when it is necessary in a democratic society and the conflicting interests have been balanced. In this context, the notion of democratic society by definition "accepts" the tensions within the society and tends to merge them, even if this means that rights must be limited. This definition of a democratic society is different from the conception of a democratic society as a collective good that preserves, rather than limits, rights.

6.2.5 Democracy as a collective good

The positive obligation of Contracting States to provide healthcare to protect the Article 3 right not to be tortured does not solely derive from individualistic reasoning. Like Raz's approach to rights, the ECtHR's argumentation indicates that the right not to be tortured is not solely about protecting a person as an individual and safeguarding their well-being and autonomy. The central contribution of the Article 3 right is its social aspect – namely, it enables people to live together peacefully. It protects not only the individual but the values of the democratic society. Similarly, Razian rights protect not only the individual but the community. Although one of the Court's principal arguments relates to the protection of individuals' physical well-being (e.g. in detainee cases), it is clear that the well-being of the community is also an important factor in ECtHR case law relating to the protection of the Article 3 right. In both *Kalashnikov v. Russia* (para. 95, detention case) and *D v. UK,* the ECtHR acknowledged that the Article 3 right "enshrines one of the most fundamental values of democratic society."

In *D v. UK*, the Court's argumentation had several similarities with the "why-dimension" of Raz's public good-based theory of rights: the Court's non-individualistic approach acknowledged that there were social elements to the Article 3 right. The Court's reasoning was non-individualistic because it argued that the Article 3 right should be upheld to protect a collective good: democracy. Like Raz's thought, the Court's decision in *D v UK* was inspired by "a liberal morality on non-individualistic grounds".[768] It was based on the need to protect and enhance a collective good: the va-

768 This term is used by Joseph Raz. See Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 18, 267-368.

lue of a democratic society. To be more specific, in an "individualistic"[769] approach, the individual human being and aspects of their lives such as freedom, autonomy, etc, are considered intrinsically good or valuable. Conversely, a non-individualistic approach would treat these notions as tools that are instrumentally useful in maintaining the well-being of the individual.[770]

Joseph Raz criticises individualistic approaches to human rights: "the rights tend to be individualistic in being rights to what each person can enjoy on his or her own: such as freedom from coercive interference by others, rather than to aspects of life which are essentially social, such as being a member of a cultural group."[771] Accepting this point of view, I support the view that in *D v. UK* the Court's reasoning was not individualistic, because it based its decision not on the well-being, freedom or autonomy of the individual. Rather, the significance of the expulsion of the non-national *D* and the breach of Article 3 related to the protection of the value of a democratic society.

I therefore claim that the Court's reasoning in *D v UK* preserves an individual or liberal right (the absolute right against torture, inhuman and degrading treatment) with the aim of preserving a collective good. It follows from the Court's argumentation that the absolute individual right in Article 3 is neither a "right as a trump"[772] nor an "ethical side constraint".[773] Furthermore, there is no evidence of any type of consequentialist calculation in the Court's decision. On the contrary, the Court protected the absolute right of Article 3 to maintain a collective good: democratic society.

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769 Another approach to the individualist conception of rights concerns the reasons of action. The individualist interpretation of reasons is divided into two categories: first, idealist interpretations, which consider the individual to be a rational subject and rights to be universal standards; and secondly, the pragmatic interpretation, which relates to the psychological characteristics of subjects. See George Pavlakos, "Non-Individualism, Rights, and Practical Reason," *Ratio Juris* 21, no. 1 (2008), 152-153.

770 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 267-368.

771 Joseph Raz, "Human Rights Without Foundations," Legal Studies Research Paper Series, no. 14/2007, University of Oxford Faculty of Law, 2007, 3.

772 For "rights as trumps", see Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), and above the Section 2.3.2.

773 In Nozick's thought, rights act as ethical side-constraints, see Robert Nozick, *Anarchy, State, and Utopia*, (Oxford: Blackwell Publishers, 1999) and sections 0 and 0.

Consequently, the Court's reasoning resembles neither a deontological nor a consequentialist approach to human rights; rather, it mirrors – perhaps unconsciously – the Razian public good-based theory of human rights. To be more specific, in this case the Court explicitly stated that the purpose of Article 3 is to protect the values of democratic society. I therefore suggest that the Court's approach was similar to Joseph Raz's theory of rights, as they both connect rights not only to individual well-being, but to collective goods (in this case, democracy). However, this then raises the question of the further determination content of the collective good.[774]

As mentioned above, for Raz, something is a public good only if the potential beneficiaries control its distribution and benefits. Public goods are divided into two categories: contingent public goods (e.g. water supply, clean air, etc) and inherent public goods (e.g. a tolerant or democratic society), which are also called collective goods.[775] Collective good can be "general beneficial features" that create a coherent framework for the existence of a society. It follows that societies are directed by collective goods that have been adopted earlier in their history. For example, toleration and education may be collective goods if they prevail in a particular society (i.e. a tolerant or educated society).[776] Since a collective good (or inherent public good) is the specific evaluative context that a society has adopted, and it is dominant as the orientational framework of this society, it could be said that the collective good of a society that has adopted a democratic context is democracy.

For Raz, collective goods have an intrinsic,[777] not an instrumental, value.[778] Liberal rights have an instrumental, not an intrinsic, value because their goal is to serve a collective good – which does have intrinsic value. Consequently, if the right not to be tortured serves and preserves the collective good of democracy, then the Article 3 right has an instrumental value, because it is secured *in order* to preserve democracy, which is of intrinsic value. According to Raz, most if not all rights are not side-constraints.[779] In Razian thought, rights have two dimensions. First, they are

774 For a detailed analysis of the Razian collective good, see sections 0 to 0.
775 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 198.
776 *Ibid*, 198.
777 *Ibid*, 201.
778 *Ibid*, 198.
779 *Ibid*, 279-280.

created to serve and promote certain collective goods,[780] which belong to a certain public culture and a certain community. The importance of rights consists in the fact that they serve the collective good, and not solely in the fact that they protect the well-being of the right-holder:[781] "Without the public good the right would not have had the significance it did have."[782]

Secondly, as mentioned above, rights perform functions and act as tools for different purposes. For example, they are a check and balance mechanism against state power, and they preserve interests. The Chamber of the Court's argumentation in *D v. UK* suggests that the Article 3 right not to be tortured is a check and balance mechanism against inhuman and degrading treatment. It not only protects the physical well-being of individuals (mainly in cases involving detainees or medical treatment), but preserves "one of the fundamental values of democratic society", as stressed in *D v. UK*.

D v UK (Chamber), Application no. 30240/96, judgment of 2 May 1997, para. 47: "However, in exercising their right to expel such aliens Contracting States must have regard to Article 3 of the Convention (art. 3), *which enshrines one of the fundamental values of democratic societies. It is precisely for this reason that the Court has repeatedly stressed* in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 (art. 3) prohibits *in absolute terms* torture or inhuman or degrading treatment or punishment and that *its guarantees* apply irrespective of the reprehensible nature of the conduct of the person in question."

Although the Court seems to view democracy as a collective good, there is a gap in its reasoning, as it does not define democracy and the fundamental values of democratic societies. Consequently, it does not define explicitly what the relationship is between individual rights and democracy. Although a concrete definition of democracy is absent in these cases, it is clear from the ECtHR's reasoning that the Article 3 right protects not only individuals, but a collective good: democracy.

For both the ECtHR and Raz, in practice rights protect collective goods in order to preserve specific communities and social institutions. In other words, they derive their status not merely from the fact that that they protect individual well-being, but from the fact that there is a need to protect

780 There might be conflicts between rights and collective goods. Raz states that, if this happens, there is no general rule that gives priority either to rights or collective goods. See *ibid,* 254-255.

781 *Ibid*, 187.

782 *Ibid,* 251.

public goods. From a Razian point of view, if communities did not have public goods then rights would have another form, because their objective would be to protect the individual, not to preserve both individual well-being and collective goods. For Raz, rights must be taken seriously because their goal is to preserve the community's social institutions, not just individuals. Likewise, the ECtHR's argumentation implies that the absolute right of Article 3 must be taken seriously not merely for the sake of individuals, but because it preserves the fundamental values of democratic societies.

In *D v UK*, the indirect protection of the social right to health endorses the individual right of Article 3, which enhances D's individual freedom. However, following the Court's reasoning, the implicit expansion of this individual right into a social right not only enhances the applicant's individual freedom but, importantly, preserves the values of democratic society. Therefore, for the Court, rights are not only side-constraints; they also have social aspects as they intend to serve collective goods, like democracy (the "why-dimension"). In this sense, the Court's decision-making process in *D v UK* mirrored the Razian non-individualistic approach to human rights, as it highlighted the social elements of rights.

6.2.6 "Human rights inflation"?

Critics of the ECtHR often point to the danger of "human rights inflation", whereby the ECtHR reads new rights – mainly positive obligations – into the ECHR.[783] Analysing the extent to which the Court engages in human rights inflation is beyond the scope of this study. However, following a Razian approach to rights, I would argue that it is inevitable that the ECtHR reads new rights and obligations into old ECHR rights due to what Raz calls "the dynamic character of human rights". For Raz, this dynamic character is one of the principal features of the political character of rights.

Nevertheless, Raz himself warns against the potential inflation of rights. One of his principal criticisms of Dworkin's approach is that conceiving of

783 Laurens Lavrysen, "The scope of rights and the scope of obligations: Positive obligations," in *Shaping rights in the ECHR: The Role of the European Court of Human rights in Determining the scope of Human Rights*, ed. Eva Brems and Janneke Gerrards (New York: Cambridge University Press, 2013), 173.

rights as "trumps" may lead to inflation.[784] Nevertheless, his criticism of the inflation of rights does not mean that inflation can be avoided simply by following a Razian approach. In practice, however, human rights inflation in ECtHR decisions is limited because, although individual rights have wider policy implications by definition, the ECtHR cannot directly assign social rights (e.g. the right to health) to individuals because it does not have the authority to make decisions about Contracting States' welfare services or policies.[785] However, this argument opens up a discussion about the margin of appreciation, even though it is not, in principle, applicable to absolute rights, such as the Article 3 absolute right not to be tortured. Ultimately, the question of the danger of the inflation of rights, which is indirectly related to the "how-dimension" of rights, remains open.

6.3 Overview of chapter six

The discussion in chapter 6, *first*, indicated that the absence of healthcare may be regarded as inhuman and degrading treatment and may breach the absolute right of Article 3.

Secondly, given that, in adjudicating positive obligation cases, the ECtHR does not apply a coherent theory of positive obligations, its decisions do not always safeguard positive obligations in similar cases. Thus, the case law shows that the ECtHR's reasoning oscillates between an evolutive interpretation of the Convention rights on the one hand and an interpretation that recognises the minimum potential of the ECHR rights on the other.

Thirdly, under the Convention rights, seriously ill non-nationals do not deserve less protection than nationals. Likewise, for Raz, right-holders are members of the "same moral community", not people who hold citizenship.

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784 See Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), 365. More specifically, Raz points out that "Dworkin's attempt to make us take rights seriously is carried out through an inflationary conception of rights which, if pursued to its logical conclusion, turns every valid consideration into a right," Joseph Raz, "Professor Dworkin's theory of rights," Review of *Taking Rights Seriously*, by Ronald Dworkin. *Political Studies* XXVI, no. 1 (1983), 130.

785 Andrew Connell, "Civil Rights and Social Welfare: Some Thoughts on the Contemporary Relevance of T. H. Marshall," *The Political Quarterly* 83, no. 3 (2012), 556.

Fourthly, both Raz and the ECtHR case law suggest that some rights may be limited to safeguard public interests. Raz distinguishes between collective goods, which are protected by rights, and public interests, which may conflict with rights. Similarly, the distinction between individual rights and public interests is present in both the ECtHR case law and the ECHR itself. Raz clarifies that whereas the common good benefits everyone within the community, the public interest relates to different, potentially contradictory, interests.

Fifthly, in the Court's reasoning, the ECHR rights have social dimensions. Likewise, for Raz, human rights are social forms that secure well-being – in other words, they preserve more than the minimum conditions of individuals' lives. For Raz, states are responsible for the development of individuals' capacities, such as their health, on the basis of their autonomy-based freedom. In the Court's reasoning, states have a positive obligation to protect individuals' health in order to safeguard their well-being. The Razian "how-dimension" of rights is present in this approach, since the ECtHR derives new positive obligations relating to the social right to health from an old negative right.

Sixthly, the social aspects of ECHR rights relate to the fact that, in the ECtHR's reasoning, the Article 3 right enables people to live together peacefully. One of the effects of the right not to be tortured is the preservation of the values of democratic society. In the previous sections I argued that if someone accepts that democracy is a collective good, then in both the Court's reasoning and Raz's thought rights have social elements to the extent that they protect collective goods.

In the previous sections, Raz's theory of rights was applied to the argumentation of the Court, which was discussed in detail in the third chapter. I am not arguing that the ECtHR is obliged to adopt a Razian theoretical framework; my aim is more modest. I merely suggest that, in analysing ECHR rights, we should take the Razian notions of autonomy, the worthwhile life and common goods seriously for two reasons. The first is to realise the potential of the ECHR rights. The Court recognises that the evolving nature of Convention rights should be taken into consideration in its reasoning. In some cases, the potential of the ECHR rights might indicate a more systematic recognition of positive obligations and rights as key elements of ECHR rights. In these cases, the Convention rights are similar to Razian rights and collective goods. The second reason is that focusing on the similarities between the Razian approach to rights and ECtHR reason-

ing of Convention rights offers a theoretical justification of rights as a basis for the positive obligations derived from ECHR rights.

CHAPTER 7: Conclusion

7.1 Raz's theory of rights: A synopsis

According to Raz, to ensure autonomy, it is necessary to secure much more than the minimum conditions of life. It is not enough that individuals' survival needs are met; they must be able to live a worthwhile life. For this ideal to be realised, people need not only choices but an adequate range of options. The autonomous individual must be released from their survival needs and "have options which will enable him to develop all his abilities, as well as to concentrate on some of them."[786] Consequently, the options available must not be just trivial or short-term; they must include long-term engagements and activities.

The adequacy of the options available relates not to their number but to their variety. Raz supports the view that human beings' natural characteristics are greatly influenced by culture and civilization. He argues that a (perfectionist) society is responsible for providing adequate options to enable individuals to develop their natural capacities or not as they wish.

Societies consequently have a positive obligation to secure the natural and social conditions[787] that enable individuals to lead an autonomous life. For Raz, the development of an autonomous life relates to social conditions. He avoids the individualism that is often present in liberal theories. For him, autonomy is preserved not solely by a right to autonomy,[788] but by several collective goods, although societies protect and preserve collective goods through rights. In other words, Raz claims that certain options are possible only in the context of a common culture. A common culture gives substance to options: it makes it possible to consider them as options and gives them value. Societies establish options as worthwhile, valuable and acceptable through social conditions and social forms.[789]

Therefore, from a Razian liberal perspective, the availability of many collective goods increases the chances that people will live autonomous lives.

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786 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 376.
787 *Ibid*, 156.
788 See above the section 4.7.2.
789 See above the section 4.7.2.

Rights should then be adopted to ensure that people have access to the collective goods. From this reasoning, Raz derives the "why-dimension" of rights, according to which rights are adopted to serve and preserve collective goods, and ultimately to create the conditions for an ideal autonomous life.

In this study, I highlighted two attributes of Raz's account of rights: the "why-dimension" and the "how-dimension". According to the "why-dimension", rights are adopted, first, to preserve a certain moral, public or political culture,[790] and, secondly, to protect inherent public or collective goods,[791] which serve the communal peace. For Raz, rights do not just set limits to protect a person or personal autonomy from the demands of "collective goals" and the "communal peace". They relate to autonomy but are not restricted to it. Rights do not just protect individuals in isolation; much more importantly, they enable people to live together harmoniously by preserving collective goods and securing communal peace.[792] Raz's approach is not individualistic. For him, the well-being of the community is also a matter of rights. The "how-dimension" of rights relates to the practical significance of rights. From this perspective, rights are a checks and balances mechanism, or a weapon against state sovereignty. They have a dynamic character, and inevitably create new duties.

This distinction is particularly important because, although Raz's account of rights has been categorised as an "interest theory", it is not concerned only with interests. Approaches that categorise Raz's account of rights as an interest theory are incomplete because they are unable to illustrate two crucial aspects of it, which relate to "rights in general". The first is the relationship between rights and collective goods. Interest theories focus on interests and duties, so they cannot shed light on collective goods. However, the relationship between rights and collective goods is a core element of Razian rights in general and of the "why-dimension" in particular. This relationship is Raz's most important contribution to human rights theory and therefore cannot be downplayed.

The second issue that the "double dimension of rights" highlights, and not from the perspective of an interest theory, is the dynamic character of

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790 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 245, 261.

791 *Ibid*, 251-252, 255-256, 261-262 and Joseph Raz, *Ethics in the public domain: Essays in the Morality of Law and Politics*, (New York: Oxford University Press, 1996), 52-53, 57, 59.

792 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 251.

rights, which relate to the "how-dimension". Interest theories conceive of duties as having a static character; they do not give weight to the additional duties that could arise from future changes in the society. For Raz, on the contrary, rights have a dynamic character. He takes the future changes in circumstances seriously, and highlights the capacity of old rights to generate new duties. The double dimension of rights analysis applies to both legal and non-legal – in other words, moral – rights.

Given that the double dimension of rights shows that certain rights may exist if certain social practices exist, it leads to a non-individualistic political account of rights. From the "double dimension" perspective, rights are adopted to protect and preserve collective goods, not solely individual interests. The double dimension of rights is able to give proper weight to the two aspects of rights (i.e. "why" and "how"), which both relate to social practices and therefore cannot be analysed by an interest theory. The "why-dimension" gives due consideration to the relationship between rights and collective goods, and the "how-dimenstion" highlights the dynamic character of rights, which can lead to new duties.

7.2 Critique of Joseph Raz's account of rights and "research desiderata" for further research

This study proposed that Raz's philosophy of rights is the most plausible liberal theory of rights for justifying positive obligations to provide healthcare. Nevertheless, this does not mean that the Razian account of rights does not have deficiencies. Indeed, they are more apparent when one studies the theory in depth.

A significant deficiency in Raz's approach to rights is the fact that he does not clearly define the collective goods that are preserved through rights. The term "collective goods" is used sporadically in his books and articles. In "Rights and Individual Well-Being" (1992), he states explicitly that he adopted the notion from John Finnis. I therefore had to reconstruct Raz's use of the term using Finnis's definition and Raz's dispersed clues. A further issue that arises from the Razian account of rights is, in the absence of a definitive list of collective goods and a clear definition, whether someone is free to decide which common good is hidden behind a particular right. I posed this question to Raz himself, and he answered: "it is not a matter for decision. Either there are goods that establish the existence of the right, or there are not. We can try to find out. We could of course decide whether to invoke a right that we have or not. Very often in our inter-

actions with others we do not invoke rights."[793] His answer suggests that this remains an open question. Consequently, the scholar of Razian rights must invest time in discovering which collective goods relate to which rights.

A second question that emerges from this study of Raz's philosophy of rights is whether his theory could be used to demand more rights (as opposed to a universalist thesis). If "individuals' practical reasonableness about what is valuable" is shaped by their society, can people escape from their social biases and demand a right that the society does not consider to be an "inherent good"? According to Raz, "two different matters may be affected by social practices. Certain rights may exist if some practices exist but not otherwise, and our understanding of what is going on may be biased by social practices. We can escape such biases. But not the impact of social practices on what rights there are in that society."[794] In other words, social practices affect rights and people's perceptions. They define the existence of rights, but they may predetermine individuals' understanding of the word. Although the existence of rights is always defined by the existing social practices, new rights can nevertheless be secured through statutory law because social practices change. If individuals can escape from the prejudices of their society and develop another understanding of what is valuable, this implies that social practices can also be shaped differently. Therefore, if, as Raz claims, one can escape from one's social biases, which indicate what is valuable according to practical reasonableness, then the social practices themselves can be shaped differently, and the rights in the society can change too. In these terms, Raz's account of rights can justify the creation of other rights on the grounds that new social practices can be shaped by a new understanding of what is valuable according to practical reasonableness. Further research is needed to resolve these deficiencies and open questions. These deficiencies can be seen as the "desiderata" of this study, and could be the subject of further research.

Finally, in researching this book, it became clear to me that, in his account of rights, Raz contradicts himself on several crucial points. Although this book has not raised and developed these contradictions, highlighting them here might help future research on Razian thinking. For example, in *The Morality of Freedom* (1988), he explicitly excludes property rights from

793 Joseph Raz, e-mail correspondence with author, February 14, 2017.
794 Joseph Raz, e-mail correspondence with author, February 14, 2017.

his theory of rights,[795] but in "Rights and politics" (1995), he discusses property at length. Moreover, he uses the right to property as an example when discussing his rights theory, and points out that property may be a collective good in some societies.[796] When he was confronted with this contradiction, his answer was that "rights are rights."[797] It can be assumed that this answer implies that, as long as a society recognises property rights, their status as rights cannot be refuted. Although this answer is consistent with his philosophy, it does not explain the initial inconsistency.

7.3 Findings of the study and concluding remarks

As discussed previously, the ECtHR applies common principles when interpreting the Convention rights, but in health-related cases it sometimes interprets these principles broadly and sometimes more narrowly due to the absence of a coherent theory of positive obligations. It was not the intention of this study to construct a new, coherent theory of positive obligations. Its principal objective was to compare the basic social aspects of the Convention rights and the interrelated positive obligations of the Contracting States. This basic ground of positive obligations is inspired by a progressive reading of ECHR rights, which reveals the social aspects of the ECHR that have been spelled out by the ECtHR. It then merged these progressive aspects of ECHR rights with several elements of Raz's theory of rights, with the intention of proposing a reading of ECHR rights in positive obligation cases on health-related issues that will enable their potential to be realised. It intended to find a middle-ground approach to human rights that goes beyond individualistic approaches and the protection of a "minimally good life".

Why is a middle-ground approach of rights needed to scrutinise the social elements of rights during their adjudication, and not a dominant liberal theory of rights like Ronald Dworkin's notion of rights as "trumps"? The starting point of this study was that ECtHR case law indicates that the liberal rights of the ECHR may place positive obligations on states towards

795 In *The Morality of Freedom* (1988) Raz mentions explicitly that rights which are not related to common goods are: 1) Consensual rights, 2) Property rights, and 3) Rights to personal security. See Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1988), 255.

796 Joseph Raz, "Rights and Politics," *Indiana Law Journal* 71, no. 27 (1995), 37, 40.

797 Joseph Raz, e-mail correspondence with author, February 9, 2017.

the individuals who live within their jurisdictions. These positive obligations are not restricted to the judicial (e.g. regulations, licences) and practical measures (e.g. investigations, information) that states must adopt to protect Convention rights. The ECtHR has also proposed that states may have positive duties that derive indirectly from the social aspects of rights. For example, a state may have a positive obligation to provide healthcare to protect a civil right enshrined in the ECHR. However, healthcare has traditionally been justified with reference to social rights, not civil rights. This study therefore examined how the ECtHR has justified ruling that states have a positive obligation to protect elements of social rights that indirectly derive from the Convention's civil rights. More specifically, what is the justification, if there is one, of the social aspects of civil rights? To answer this question, it is necessary to take into account the role of the courts and the law, and to analyse the social aspects of rights. It is first necessary to ask why societies adopt rights, and secondly how rights operate.

The first two chapters discussed the dominant accounts of human rights and legal theory. They argued that Ronald Dworkin's theory of rights are less powerful in explaining the social elements of rights than Raz's, because for Dworkin rights relate mainly to what individuals wish to have or do. They exist as long as a collective goal is not a sufficient justification for removing them,[798] and they may be justified as "trumps" over some political decisions.[799] In other words, Dworkin's rights are mainly about protecting the individual, not the community that fosters the social aspects of rights. For him, collective goods have a utilitarian character, so rights are in tension with aggregate collective goods.

For Raz, on the contrary, collective goods are not utilitarian. In analysing why rights are adopted and how they operate, he starts with social practices and collective goods, not with the individual. Therefore, his theory escapes from individualism and can be used to analyse the social aspects of rights. The general characteristics of the ECHR rights and of the ECtHR decisions were presented in chapter 3, and Raz's approach to rights was scrutinised in the chapter 4.

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798 "Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do", see Ronald Dworkin, *Taking Rights Seriously*. 2nd ed. (Cambridge, Mass.: Harvard University Press, 1978), ix, 90-94.

799 Ronald Dworkin, "Rights as trumps," in *Theories of Rights*, ed. Jeremy Waldron. 1rst ed. 153-167, (Oxford: Oxford University Press, 1984), 153, 158.

Chapter 5 presented ECtHR decisions about health-related issues in a broad sense and Articles 3 and 8 of the ECHR in particular. The ECtHR case law that has been discussed shows that the "minimum level of severity"[800] condition has been applied narrowly in expulsion cases, but more broadly in detention cases. In most cases relating to the deportation of ill migrants, the Article 3 right not to be tortured has been interpreted as securing a "decent death", rather than a "good life". In expulsion cases, the criterion of intentionality has been applied strongly. In several decisions, the Court has claimed that deporting a migrant to a country with an inadequate healthcare system would not breach Article 3, even if it is unclear whether the applicant would continue to receive medical care. This is the case because, according to some ECtHR judges, the absence of medical care is not caused by an intentional act of the Contracting State.

In some cases, the ECtHR has been reluctant to apply the Convention rights broadly because it has taken into account budgetary considerations – even cases brought under Article 3, which cannot be balanced because of the absolute character of the Article 3 right. Nevertheless, in adjudicating cases under the absolute right of Article 3, the Court's reasoning takes into account financial considerations. For example, in *N v. UK* the Court stated explicitly that "Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States." (*N v. UK* (Grand Chamber), para. 44). Hence, the Court's approach to balancing the obligations stemming from rights and financial considerations is unequivocal.

Contrary to this reasoning developed by the ECtHR, before the Court decides whether the Contracting State has a definitive duty to provide

800 As mentioned above, the "minimum level of severity" condition overlaps with the condition of "exceptional circumstances/humanitarian reasons" to the extent that both conditions concern individuals who are critically ill. Moreover, the latter condition is not applicable in detention cases. These are the main reasons why this section focuses on the minimum level of severity and does not refer to the the condition of "exceptional circumstances/humanitarian reasons".

medical treatment deriving from Article 3, it must first examine whether there is a prima facie positive obligation, rather than apply a fair balancing test. Nevertheless, the Court sometimes makes judgments directly based on the definitive positive obligations before examining the prima facie ones. It applies the tests of proportionality – in other words, it balances individual and public interests – despite the fact that absolute rights are not subject to this test. In the case law discussed in this study, this is particularly obvious in expulsion cases.

However, in cases relating to detainees, the ECtHR focuses on ensuring that the detention conditions guarantee the detainees' health and well-being, and preserve their human dignity. It has found that if the public authorities do not provide adequate medical healthcare to detainees, the Article 3 right is breached irrespective of whether the ill-treatment resulted from an *intentional* act or omission on the part of the public authorities. As mentioned in previous chapters, the fact that detainees are totally dependent on the public authorities means that states have a greater responsibility to ensure that their living conditions are adequate. States do not have this responsibility for individuals who are not detainees and are consequently independent. Moreover, it is difficult to discuss the notion of the "good life" in relation to detainee cases, as a "good life" relates to the availability of options and choices. Detainees' choices are restricted by definition, and so they cannot experience a "good life" in the Razian sense of the term. For Raz, detainees have few choices and limited autonomy, and are thus far from the ideal of the "good life". Nevertheless, the ECtHR's progressive reading of Article 3 in detention cases can be applied more broadly.

Thus, leaving aside the special status of detainees, I claim that the Court's reasoning in detention cases implies that the provisions of the Article 3 right not to be tortured can secure more than the "minimally good life" and protect against more than simply "the worst circumstances that someone might experience". The fact that the failure of a Contracting State to provide medical health assistance to a detainee in need may breach Article 3, irrespective of the gravity of the detainee's offence and regardless of the intentionality criterion, implies that Article 3 has a social aspect that relates to the Contracting State's positive duty to take care of the detainee's health, not just to refrain from an inhuman or degrading action.

In chapter 6, I argued that cases relating to the health of detainees show that the Article 3 absolute right not to be tortured guarantees not only a "decent death", but a positive obligation on Contracting States to protect individuals' (for example, detainees' and migrants') health and well-being.

Chapter 6 showed that if the assumption that Article 3 can ground the positive obligation to protect medical care is correct, it follows that this approach to Article 3 accords with the Razian account of rights.

Chapter 6 shows that the Raz's double-dimension rights not only shed light on the social aspects of rights, but could be a theoretical basis for justifying the positive obligations derived from the Convention rights. This is the case because the ECtHR's argumentation has several similarities with Raz's philosophy of rights. Chapter 6 highlighted *three main similarities* between Raz's theory of rights and the ECtHR's argumentation.

First, Raz and some ECtHR judges acknowledge that rights have social aspects. The social elements of Razian rights relate to the "why-dimension" because, for Raz, rights are adopted to serve and preserve collective goods. ECtHR argumentation sometimes resembles Raz's approach, in that Court judges sometimes recognise implicitly or explicitly that rights have social aspects that should not be marginalised when cases are adjudicated. However, although the social aspects of rights are recognised in several ECtHR case decisions, the ECtHR has not developed a coherent theory that could be used to justify the social aspects of the Convention rights. Consequently, the ECtHR sometimes recognises the social elements of Articles 3 and 8, and sometimes marginalises them. Thus, the social aspects of the Articles 3 and 8 rights appear in the ECtHR's argumentation in a scattered way; they have not been regularised. I therefore proposed to collect the arguments supporting the social elements of rights and compare them to Raz's theory of rights. In chapter 6, I discussed the similarities between Raz's approach to rights and the ECtHR's reasoning.

Secondly, both Raz and the ECtHR case law indicate that new obligations and rights can be derived from old rights on the grounds of protecting well-being and health. For Raz, this relates to the dynamic character of rights. However, the ECtHR often does not take into account the dynamic character of rights. The "how-dimension" of Raz's theory of rights may be used as a theoretical basis for justifying new rights and positive obligations deriving from the Convention rights. It would enable the ECtHR to take into account the dynamic character of rights when adjudicating cases.

Thirdly, both Raz and the ECtHR suggest that rights may be limited to safeguard public interests. Chapter 4 stated that Raz differentiates between collective goods, which are protected by rights, and public interests, which may conflict with rights and collective goods. Accordingly, the distinction between individual rights and public interests is present not only in the ECtHR case law, but in the ECHR itself. However, chapter 5 stated that the ECtHR case law indicates that the argumentation supporting such a differ-

entiation is sometimes blurred. From this perspective, the Razian theory of rights may be used as a theoretical justification not only for absolute rights, but for rights that are not absolute and contain exception clauses (i.e. Articles 8 to 11), making it clear that collective goods and public interests belong to two distinct categories.

This study has argued that, in some cases, positive obligations (and social rights) may (or should) indirectly derive from individual rights, because individual rights do not or should not secure only the minimal standards for a worthwhile life. Scholars and judges sometimes conceive of individual rights as rights that protect basic personal needs relating to survival (for example, the Article 3 prohibition of torture). However, according to a Razian approach and a progressive reading of ECHR rights, the needs that are to be protected are not simply those that relate to survival, but those that enable a person to live a worthwhile life. I therefore argued that ECHR individual rights in their current form can protect needs relating to a worthwhile life either through the recognition of positive obligations of states to provide health care, or through the extension of negative rights to include either a positive dimension or positive rights. Since some ECtHR decisions have derived a positive obligation to provide medical assistance from the ECHR rights, Raz's account of rights might offer a better way to understand the ECtHR's reasoning. Raz's account of rights can also be the basis for a more consistent interpretation and adjudication of rights in the future.

Raz's approach to rights suggests that societies may have a positive obligation to secure social conditions that enable individuals to lead an autonomous life. This positive obligation may expand to include social rights. In the previous chapters, it was accepted that personal autonomy is protected not by a right to autonomy, but by various collective goods, and that collective goods are protected by rights. It follows that rights are needed to preserve and protect various collective goods and realise the ideal of personal autonomy. Individual rights may consequently be legal reasons for creating new duties and new individual or social rights; they may lead to a legal change. However, there remains an open question about the new rights that derive from or are implied by old rights. If the dynamic aspect of rights – the "how-dimension" – indicates that old rights may be legal reasons for new duties and new rights, one may ask whether this may lead to an inflation of rights. Demarcating these boundaries is an important endeavor. It should be left not only to the sphere of adjudication, but to political and legal scholars, if not to society at large.

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