Introduction

Reasoning Indivisible Rights

Despite its civil and political rights mandate,[1] the European Court of Human Rights (ECtHR; the Court) increasingly rules on cases concerning socio-economic rights. It decides whether the replacement of a social benefit was proportional[2] or whether the reduction of a pension was justified.[3] Other complaints lead it to reflect on whether the authorities' efforts to provide adequate housing were sufficient[4] or whether a state should have done more to prevent health damage that results from environmental pollution.[5] Dealing with socio-economic issues is a risky endeavour that highlights the complexity of the task the ECtHR faces as the final arbiter of fundamental rights conflicts under the European Convention on Human Rights (ECHR; the Convention).[6] It illuminates the difficulties inherent in striking the right balance between providing effective individual rights protection and deferring to the national authorities whose (democratic) decisions – especially in a field like social policy – need to be respected. Essentially, the puzzle presented by this development is how a supranational Court that proceeds on the basis of civil and political rights norms can protect socio-economic rights without overstepping the boundaries of its legitimate task. The Court is criticized for not providing very transparent socio-economic rulings characterized by consistent reasoning. Because of its vulnerable position and the fact

[1] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5.
[2] See, for example, *Stec a. O. v. the UK*, ECtHR (GC) 6 July 2005 (dec.), 65731/01 and 65900/01.
[3] See, for example, *Valkov a. O. v. Bulgaria*, ECtHR 25 October 2011, 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05.
[4] See, for example, *Winterstein a. O. v. France*, ECtHR 17 October 2013, 27013/07.
[5] See, for example, *Dubetska a. O. v. Ukraine*, ECtHR 10 February 2011, 30499/03.
[6] In fact, protecting socio-economic rights is a difficult endeavour for courts in general. See, for example, Jeff King, *Judging Social Rights* (Cambridge University Press, 2012), 8–9, who holds that 'the best argument' against social rights adjudication is that it is a 'risky enterprise'.

that the effectiveness of the Convention system is dependent on the acceptance and implementation of its judgments by the member states, this reasoning, as well as the ECtHR's role in protecting social rights in the first place, is in need of further clarification.

The argument I develop in this book is that the notion of core rights protection can explain, as well as guide, the ECtHR's socio-economic rights protection. It provides a justificatory explanation for its engagement in this field while presenting a structured approach for the ECtHR's reasoning that fits its unique role and task in a multilevel system of fundamental rights protection. The notion of core rights, briefly stated, entails that a distinction can be made between more and less important, or fundamental, aspects falling within the (potential) reach of a fundamental right. This idea allows for expounding the connection between the Court's emerging socio-economic practice and the role of the Strasbourg system of fundamental rights protection. Why exactly it makes sense to explore a core rights perspective in regard to the ECHR's socio-economic dimension will be elaborated on shortly. I will start by giving some broader context to the questions that are central to this book by introducing the ECtHR and its relation to certain features of and developments in judicial fundamental rights protection.

The ECtHR and Developments in Fundamental Rights Protection

The ECtHR is a supranational court tasked with the interpretation and application of the rights enshrined in the European Convention. This treaty was signed under the auspices of the Council of Europe (CoE) in 1950 and designed 'to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'.[7] Being the first of its kind, the ECtHR, together with the former European Commission of Human Rights (EComHR; the Commission), has developed the idea of fundamental rights protection at a level beyond the state, including the power to render binding judgments on the basis of individual complaints.[8] As natural as this may seem today, in the 1950s supranational judicial enforcement of fundamental rights was a novel phenomenon; it is due in great part to the success of the ECtHR that since then the importance of international and supranational rights adjudication has generally increased worldwide.

[7] Preamble to the ECHR. [8] Art. 46 ECHR.

What is this success story about? Starting with ten CoE member states, presently there are forty-seven European states that have signed and ratified the Convention and are therefore subject to the jurisdiction of the Court. Especially after the fall of the Berlin wall at the beginning of the 1990s, the number of states parties increased significantly and many Eastern European states entered the Convention. This has not been without problems as regards the quantitative increase of complaints, as well as the qualitative standard the Convention could set throughout the continent.[9] Nevertheless, the Court has managed to maintain and even consolidate its important role as a safety net for individuals confronted with interferences in their fundamental rights by the state. Since then, it has created an immense and rich body of case law, which has given content to the rights norms laid down in the Convention and in the several protocols that have been added thereto, but has also influenced the understanding and the protection of fundamental rights in national legal orders.[10] The ECtHR's decisions and judgments are broadly accepted in the member states and widely discussed by legal academics around the world.

The ECtHR is not only known for its successful, pioneering role as a supranational fundamental rights adjudicator. In legal debates, the Court and its practice are referred to as being exemplary of several European and global legal and doctrinal trends related to fundamental rights protection. These trends and developments illuminate what are perceived as some of the hallmarks of the ECtHR's practice, which provide an important background to the topic of this book.

First, there is the Court's emphasis on *proportionality review* and *balancing* in cases concerning interferences with fundamental rights. Where Aleinikoff speaks of an 'age of balancing',[11] and Möller of the emerged 'global model of constitutional rights',[12] both underline the current predominance of a 'proportionality paradigm' in dealing with

[9] Cf. Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, 2006), 105 ff.; Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press, 2012), Ch. 1.

[10] See, for a comparative study on the implementation of the Strasbourg case law, Janneke Gerards and Joseph Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Case Law of the ECtHR in National Case Law* (Antwerp/Oxford/New York: Intersentia, 2014).

[11] T. Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing', *Yale Law Journal*, 96 (1987), pp. 943–1005.

[12] Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012).

clashes between individual and collective freedom. The proportionality test – which has been developed to an important extent by the Federal Constitutional Court of Germany (FCC; *Bundesverfassungsgericht*), and has carefully been expounded by scholars such as Alexy[13] and more recently Barak[14] – consists of multiple subtests. These concern the questions whether an interference with fundamental rights served a legitimate aim and whether it was 'suitable', 'necessary', and finally proportional *stricto sensu*. Of these different tests, the latter is especially seen as illustrative of what proportionality is about. Proportionality in the strict sense boils down to weighing and balancing the rights of the individual against the general interest and/or the rights of others. It finds much expression in the Court's approach, in the sense that the reasoning of the ECtHR discloses a clear preference for proportionality review, and especially balancing. This can partly be explained by the wording of the various provisions of the Convention. Articles 8–11 ECHR require a limitation to be 'necessary in a democratic society', while Article 1 of the First Protocol (P1) speaks of the possibility of 'necessary' controls on the use of property. Starting from this wording, the Court's review of interferences with Convention rights is usually guided by the question of whether a fair balance has been struck between the individual and the general interests at stake. To generate an answer to this question, the Court takes account of the various considerations relevant on both sides of the scale to then reach a conclusion on whether or not a Convention right has been breached.[15]

Second, the ECtHR's case law can be seen as prototypical of another important doctrinal development in the field of fundamental rights, namely the recognition of *positive obligations*. Just like proportionality review, positive obligations are also considered part of the 'global model of constitutional rights'.[16] The link between the two indeed seems

[13] Robert Alexy, *Theorie der Grundrechte* (Baden-Baden: Nomos, 1985) (Robert Alexy, *A Theory of Constitutional Rights*, transl. Julian Rivers [Oxford University Press, 2002]).

[14] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012). Also Möller's 'global model of constitutional rights' can be understood as a moral theory of rights in which proportionality plays the leading part (Möller 2012 (n. 12)). See also Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, 2012).

[15] See, generally, Jonas Christofferson, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden/Boston: Martinus Nijhoff Publishers, 2009). See also Barak 2012 (n. 14), 183–184; Möller 2012 (n. 12), 13–14, Ch. 7.

[16] Möller 2012 (n. 12), 5–10.

obvious: besides in the context of measures taken by the state, the question of whether something was proportional or not can just as well apply to situations in which a state allegedly failed to take action in breach of a fundamental right. In its case law, the ECtHR has expressly created a doctrine of positive obligations. It holds that the rights enshrined in the Convention also give rise to positive duties on the part of the state.[17] Accordingly, if states wish to comply with the rights enumerated in the ECHR, they have to take deliberate action and 'interfere' with the situations of individuals. When the Court started to develop its doctrine of positive obligations, which it already did in the 1960s, this was found remarkable – especially since the ECHR's rights norms are phrased negatively and do not, on the face of it, demand state engagement.[18] However, partly also due to the example set by the ECtHR, the concept of positive obligations has become generally accepted in modern legal debate and practice worldwide.[19]

Third, an apparent trend in constitutional law, and fundamental rights protection in particular, is the increased prominence of *socio-economic fundamental rights*.[20] Although this may seem less obvious, also in this connection the practice of the Strasbourg Court may be considered relevant. Ever since economic and social rights were laid down in international documents, they were considered to have a second-rank status.[21]

[17] *Marckx v. Belgium*, ECtHR 13 June 1979, 6833/74, para. 31; *Case relating to certain aspects of the laws on het use of languages in education in Belgium*, ECtHR 23 July 1968, 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, para. 9. See, on this doctrine generally, Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004); Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (London/Oxford/Edinburgh: Routledge, 2012); Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship Between Positive and Negative Obligations under the European Convention on Human Rights* (Antwerp/Oxford/New York: Intersentia, 2016).

[18] The ECHR provisions generally start with the words 'No one shall . . .' or 'Everyone has the right to . . .', which mirrors a negative duty of the state to refrain from interfering with the different rights. Cf., J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, 3rd ed. (Manchester University Press, 1993), 102–103.

[19] As a well-known exception, the United States can be mentioned. Cf., *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 169 (1989).

[20] See, for example, Murray Wesson, 'The Emergence and Enforcement of Socio-Economic Rights' in L. Lazarus, Ch. McCrudden, and N. Bowles (eds.), *Reasoning Rights: Comparative Judicial Engagement* (Oxford: Hart Publishing, 2014), pp. 281–297; Möller 2012 (n. 12), 5.

[21] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008), 1–2.

The dominant philosophical account of fundamental rights holds that fundamental rights foremost prescribe areas of freedom related to the civil and political sphere.[22] Yet whereas the debate has long been whether socio-economic guarantees can, properly speaking, be seen as 'rights', it has gradually shifted towards a more constructive approach. This shift is visible in particular in national constitutional developments, where it can be seen that especially younger and non-Western constitutions include a reference to economic and social guarantees. These can be phrased as directive principles,[23] but also as self-standing individual rights that can serve as the basis for individual constitutional complaints.[24] At the international level, socio-economic rights catalogues have been supplemented by additional protocols and (collective) complaints mechanisms, allowing states to be held accountable for shortcomings in the provision of socio-economic rights in a more forthright manner.[25] In line with these developments, the ECtHR's case law has supported and even strengthened the emerging perception that there is or should not be a clear distinction between '"permissible" civil and political rights review and "impermissible" social rights review'.[26] As I will demonstrate in this book, the ECtHR's case law illustrates that it is impossible to strictly distinguish between civil and political and economic and social rights protection.[27] The Convention norms are of a classic, civil and political kind, but the Court has interpreted them broadly, thereby expounding their socio-economic dimension.[28] Its increasing engagement in cases concerning topics like housing, health care and social security underlines that no fatal tension exists between socio-economic rights and judicial

[22] Möller 2012 (n. 12), 2.
[23] Cf., Part IV (Directive Principles of State Policy) of the Constitution of India.
[24] Cf., the Constitution of South Africa. See Ch. 5, S. 5.2.
[25] See the Additional Protocol to the European Social Charter (Council of Europe, 5 May 1988, ETS 128 [entry into force 5 September 1992]), creating a collective complaints mechanism, as well as the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (UN General Assembly, 5 March 2009, A/RES/63/117, entered into force 5 May 2013), with a possibility for individual communications. The Charter of Fundamental Rights of the European Union (OJ 18 December 2000 (2000/C 364/01)), under the header of 'Solidarity', also contains a number of socio-economic rights.
[26] Colm O'Cinneide, 'The Problematic of Social Rights – Uniformity and Diversity in the Development of Social Rights Review' in L. Lazarus, Ch. McCrudden, and N. Bowles (eds.), *Reasoning Rights: Comparative Judicial Engagement* (Oxford: Hart Publishing, 2014), pp. 299–317, 300. See also Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press, 2014), 1.
[27] *Airey v. Ireland*, ECtHR 9 October 1979, 6289/73, para. 26.
[28] Möller 2012 (n. 12), 9.

review of individual cases in this field. Even in a supranational judicial context, where this appears even more problematic than at the national and constitutional level, the practice of the ECtHR shows that it is possible for a court to decide on socio-economic measures.[29]

The role the ECtHR plays in regard to the different developments in fundamental rights protection emphasizes its prominent position and forerunner role. The ECtHR not only sets an unprecedented example of supranational rights adjudication as such; when it comes to more particular doctrinal and other developments, its practice can be seen as avant-garde as well. It often breaks ground, if not by instigating new trends, then at least by confirming ongoing changes in the perception of fundamental rights and the way these rights should be dealt with. Notwithstanding this, it must not be forgotten that the Court is constantly moving on thin ice. It needs to be mindful of its supranational position and take stock of the prevailing ideas on fundamental rights in the states that are a party to the Convention. In part because it cannot do without the states parties' support, the Court should be careful not to overstep the boundaries of its competences. In this regard, the question arises whether the success story of the Court may in some way also be endangered by the various developments mentioned. The Court's task is a limited one, and especially when joining the different trends, there appears to be a risk that it obtains a greater role than it can legitimately claim. The recognition of positive obligations in combination with Convention requirements related to economic and social rights can lead to all-encompassing rights review in the sense that the Court's jurisdiction – and thereby its involvement in national policy and democratic decisions – is hardly curtailed. Moreover, it can be questioned whether proportionality review and especially balancing exercises are always the appropriate means for a (supranational) judicial body to decide on a broad range of issues while also trying to steer away from political decisions on the distribution of rights and goods throughout society. These approaches have, after all, been criticized for creating room for judicial discretion and thereby activism.[30] At least in theory, it can be

[29] For an extensive overview of this case law, see Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Leiden: Martinus Nijhoff Publishers, 2009).

[30] See, for example, Francisco J. Urbina, 'A Critique of Proportionality', *American Journal of Jurisprudence*, 57 (2012), pp. 49–80; Ariel L. Bendor and Tal Sela, 'How Proportional Is Proportionality', *International Journal of Constitutional Law*, 13 (2015), pp. 530–544.

argued, the various developments of which the ECtHR's practice is considered a powerful example together may have the result that the ECtHR becomes the final decision-maker in virtually all conflicts concerning individual interests. Especially in a Europe characterized by diversity, this hardly seems desirable.

In addition, there is a practical downside to the success of the Convention system connected with the developments mentioned. A first problem is the recent 'docket crisis'. The immense number of applications that have reached the Strasbourg Court has put pressure on its work almost to the point of collapse. Serious institutional measures had to be taken,[31] and even though the immediate danger has subsided, the question remains whether this issue has been tackled in a lasting manner. The caseload problem cannot be seen apart from the Court's expansive interpretation of the Convention rights, including the socio-economic aspects thereof. That is, its case law might give the impression that it is possible to phrase almost every thinkable interest in terms of the ECHR, thereby qualifying for Convention protection.[32]

A second, related issue is the criticism that is voiced concerning the practice of the ECtHR by both academics and lawyers, but even more prominently by politicians who in some member states even suggest leaving the Convention.[33] Although this criticism may not specifically be related to the positive, socio-economic protection the Court is offering,[34] it does concern the too far-reaching impact of the Convention

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

[32] Cf. Janneke Gerards, 'The Prism of Fundamental Rights', *European Constitutional Law Review,* 8 (2012), pp. 173–202, 179–180.

[33] At the time of finishing this book, particularly in the UK, politicians propelled the idea to leave the Convention. Also in the Netherlands and Belgium, the Court is regularly criticized. See, generally, Janneke Gerards, 'The European Court of Human Rights and the National Courts: Giving Shape to the Notion of "Shared Responsibility"' in J.H. Gerards and J. Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Case Law of the ECtHR in National Case Law* (Antwerp/Oxford/New York: Intersentia, 2014), pp. 13–93, 86–88.

[34] See, however, Marc Bossuyt, 'Should the Strasbourg Court Exercise More Self-Restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations', *Human Rights Law Journal,* 28 (2007), pp. 321–332 (cf., also Marc Bossuyt, 'The Court of Strasbourg Acting as an Asylum Court', *European Constitutional Law Review,* 8 [2012], pp. 213–245).

and the allegedly activist role of the Court in this regard.[35] It is considered problematic that the ECtHR assumes the final say on a broad variety of topics that not always concern what were originally thought to be the fundamental rights protected by the Convention. Besides, the way in which the Court reaches its conclusions, i.e., by balancing case-specific interests and hence in an ad hoc manner, does not seem convincing to some critical observers, adding to the doubts about the broad influence of the Convention.[36]

Thus, the Court's engagement in the socio-economic sphere, combined with the increasing role of positive obligations and the idea that the Court – or (supranational) courts in general – is not very well placed for dealing with 'polycentric' issues of this kind, may constitute a risk for the successful functioning of the Convention system. Even without having regard to the current criticisms, moreover, a fundamental question remains why, and how, a court like the ECtHR should deal with cases concerning economic and social rights that cannot literally be found in the Convention.

Socio-Economic Protection and Core Rights Reasoning

Especially in the context of socio-economic rights protection, the tension between judicial protection and the Court's subsidiary task becomes readily apparent. Social rights issues may be of a fundamental nature, but the scope of the Convention prevents the Court from assuming law-making capacities in this regard. Several authors have addressed the socio-economic dimension of the Convention.[37] They highlight

[35] See, for example, Lord Hoffmann, 'The Universality of Human Rights', *Judicial Studies Board Annual Lecture* (2009), paras. 27 and 36; Patricia Popelier, Sarah Lambrechts, and Koen Lemmens (eds.), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Cambridge/Antwerp/Portland: Intersentia, 2016).

[36] Cf. Stavros Taskyrakis, 'Proportionality: An Assault on Human Rights?', *International Journal of Constitutional Law*, 7 (2009), pp. 468–493; Jochen von Bernstorff, 'Kerngehaltsschutz durch den UN-Menschenrechtsausschuss und den EGMR: vom Wert Kategorialer Argumentationsformen', *Der Staat,* 50 (2011), pp. 165–190; Jochen von Bernstorff, 'Proportionality without Balancing: Why Judicial Ad Hoc Balancing in Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-Determination' in L. Lazarus, Ch. McCrudden, and N. Bowles (eds.), *Reasoning Rights: Comparative Judicial Engagement* (Oxford: Hart Publishing, 2014), pp. 63–86.

[37] See Ida Elisabeth Koch, 'Social Rights as Components in the Civil Right to Personal Liberty – Another Possible Step Forward in the Integrated Human Rights Approach?', *Netherlands Quarterly of Human Rights,* 20 (2002), pp. 29–51; Ida Elisabeth Koch, 'The

important socio-economic cases and point out welcome developments, whereas some also note the shortcomings in the Court's decisions and judgments.[38] Only few authors have addressed more fundamentally the question of how the Court should 'reason indivisible rights', i.e., deal with conflicts between the general interest and individual socio-economic interests that can be linked to the norms enshrined in the Convention. In her articles on the socio-economic protection by the ECtHR, and especially of work-related rights, Mantouvalou has provided a normative account of how the Court should handle socio-economic complaints based on a positive account of freedom.[39] In addition, Koch has developed a 'hermeneutical' perspective to fundamental rights protection under the Convention that includes civil and political as well as socio-economic rights.[40] In this work, Koch presents an extensive overview of the case law of the Court in different socio-economic fields.[41] The current book aims to add to these important works by providing a more up-to-date impression of the socio-economic protection offered by the Court related to housing, health, and social security. Moreover, it explicitly places the socio-economic dimension of the ECHR in the broader context of questions surrounding the legitimate role of the ECtHR, and

Justiciability of Indivisible Rights', *Nordic Law Journal,* 72 (2003), pp. 3–39; Virginia Mantouvalou, 'Work and Private Life: Sidabras and Dziautas v. Lithuania', *European Law Review,* 30 (2005), pp. 573–585; 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), pp. 405–430; Eva Brems, 'Indirect Protection of Social Rights by the European Court of Human Rights' in D. Barak-Erez and A.M. Gross (eds.), *Exploring Social Rights: Between Theory and Practice* (Oxford: Hart Publishing, 2007), pp. 135–167; Colin Warbrick, 'Economic and Social Interests and the European Convention on Human Rights' in M.A. Baderin and R. McCorquodale (eds.), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007), pp. 241–256; Colm O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights', *European Human Rights Law Review* (2008), pp. 583–605; Ellie Palmer, 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights', *Erasmus Law Review,* 2 (2009), pp. 397–425; Ellie Palmer, 'Beyond Arbitrary Interference: The Right to a Home? Developing Socio-Economic Duties in the European Convention on Human Rights', *Northern Ireland Legal Quarterly,* 61 (2010), pp. 225–243; 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* (2013), pp. 529–555. See also Koch 2009 (n. 29).

[38] See Ch. 2, S. 2.3.2. [39] Mantouvalou 2013 (n. 39). See also Mantouvalou 2005 (n. 37).

[40] Koch 2006 (n. 27). See also Koch 2002 (n. 27); Koch 2003 (n. 27); Koch 2009 (n. 29).

[41] Koch 2009 (n. 29), Ch. 5–9.