

## ARTICLE

# When Healthcare Goes up in Tobacco Smoke: A Selective Healthcare System from a (European) Human Rights Perspective

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This contribution sets out to answer the question to what extent fundamental rights may act as a constraint for states to employ lifestyle differentiation, particularly between smokers and non-smokers, regarding the access to their healthcare systems. In human rights treaties a tension is palpable between the obligations of states, which represent the general interest, and the rights of smokers, who attempt to hold on to their individual freedom. On the one hand, states have to guarantee the health of their citizens. On the other hand, they are unable to mandatorily enforce health standards as smokers do not have to tolerate unbridled state interference in their private lives. However, this right to self-determination is not absolute. If the smoker persists in using tobacco products, states are granted a broader margin of appreciation in their socio-economic obligations, which in itself is already wide, out of respect for that individual choice beyond their control. As a result it is possible that a state differentiates between lifestyles and imposes mandatory conditions for the right to healthcare, which require smokers to alter their behaviour, even though the right to healthcare should be guaranteed to all without discrimination. For example the Belgian state explicitly settles the tension between the individual and the general interest by viewing the solidarity of the social security system as a double-edged sword. Every individual, including smokers, has to contribute to the realisation of equitable rights for all. With rights, come responsibilities. As always, however, state interference has to be proportional to the desired, legitimate goal.

**Keywords:** human rights; right to healthcare; lifestyle differentiation; self-determination; smoking behaviour

## 1. Introduction

We all grew up with idiomatic expressions that warn that 'we reap what we sow' or remind that 'we must lie in our beds, as we make them'. When applied to others we often endorse them, whilst on the receiving end of reproach we might disagree on their applicability. In any case, the idioms reflect a straightforward and intuitive view on justice. They entail that one must bear the consequences of one's own deliberate actions. This same notion of justice finds its way into the realm of law as a Belgian example illustrates. In December 2015 the committee that advises on the reimbursement of pharmaceuticals to the National Institute for Health and Disability Insurance decided to link the reimbursement of a pharmaceutical for a lung disease to the lifestyle of afflicted patients. The right to reimbursement was made conditional on not smoking and thus made dependent on personal responsibility. Smoking is believed to have a detrimental effect on the course of the illness and to hinder the effectiveness of the pharmaceutical, which carries a hefty yearly price tag. Not only did this decision spark discussion in the media, it also led to official enquir-

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ies in the Belgian Parliament addressed to the Belgian Minister of Social Affairs and Health.<sup>1</sup> The ethical sensitiveness of the matter is unsurprising,<sup>2</sup> but the decision of the committee also raises interesting legal questions on access to healthcare, matters of equality and state interference in the private lives of citizens.

It is commonplace to encourage patients to alter their lifestyles in order to stimulate treatment. One can envision a doctor urging an obese patient, suffering from cardiovascular disease, to lose weight. Following the Belgian decision, personal responsibility exceeds encouragement and becomes a condition for the access to healthcare, before treatment has started. The level of care on which patients can rely depends on their chosen lifestyle. Only those that stray away from certain risks are guaranteed integral healthcare. A political value judgement of those risks is inevitable.<sup>3</sup> Even with little imaginative power, the criterion of personal responsibility, therefore, instils fear of a moralising regime in an Orwellian future, wherein the state imposes a model lifestyle based on 'healthism',<sup>4</sup> the assumption that a healthy lifestyle is the only correct way of living. Consequently, healthcare might become selective, elitist and even arbitrary. This begs the question whether such an evolution is desirable in social security schemes, which are fundamentally rooted in collective solidarity.

However, one must not become too fixated on that fear, lest running the risk of becoming bogged down in a one-sided vision on lifestyle differentiation in healthcare policy. Even though the individual freedom of the smoker is indeed restricted, justifications for state interference could exist. First, such a restriction may reflect a paternalistic concern for the individual well-being of the smoker.<sup>5</sup> Second, state action may be motivated by the more general interest of society at large. The modern state has become a welfare state, which plays a key role in the equitable protection and promotion of the social and economic well-being of all its citizens.<sup>6</sup> In times where demographic ageing and mass migration cause budgetary stringency, the welfare state is under strain.<sup>7</sup> It is evident that states that strive to maximise social welfare wish to use scarce public resources as efficiently as possible. An argument for state interference is then the avoidance of the social costs that are associated with unhealthy lifestyles.<sup>8</sup> On the one hand, denying an expensive treatment to a single individual who consciously harms him/herself can provide leeway to aid several others, perhaps less inclined to self-harm. On the other hand, it is financially sound policy to try and prevent expensive treatments by discouraging behaviour that causes their need. After all, an ounce of prevention is worth a pound of cure. In a more pragmatic sense one could also argue that society, through its parliamentary representatives, simply connects certain consequences to certain actions it deems undesirable, absent any concern for the individual health of the smoker or for the financial health of the state.

There is no escaping the fact that those motivations are politically coloured. Importantly, they expose a tension between individual and social well-being. The conflict between the interests of the individual smoker and the society at large is also clear in human rights treaties. Two fields of tension arise from those treaties and their interpretation by human rights courts. They hinge on the contrast between the fundamental rights

<sup>1</sup> Questions for the minister of Social Affairs and Health Maggie De Block, *Hand. Kamer* 2015–2016, 15 March 2016, CRIV 54 COM 366, pp. 29–36.

<sup>2</sup> See for an overview of ethical objections that can be raised against lifestyle differentiation in health care, Raad voor de Volksgezondheid en Zorg, *Leefstijldifferentiatie in de zorgverzekering. Een overzicht van ethische argumenten* (2013) (71 pages).

<sup>3</sup> A first indication hereof is the political composition of the advisory committee on the reimbursement of pharmaceuticals in Belgium, whose members are appointed by the king, see Article 122*nonies* KB 3 juli 1996 tot uitvoering van de wet betreffende de verplichte verzekering voor geneeskundige verzorging en uitkeringen, gecoördineerd op 14 juli 1994, *BS* 31 July 1996, p. 20.285.

<sup>4</sup> Term derived from S. Huster, 'Individual Responsibility and Paternalism in Health Law', in T. Schramme (ed.), *New Perspectives on Paternalism and Health Care* (2015), p. 224.

<sup>5</sup> A modern definition of paternalism is the one found in the works of Dworkin, which states that the term means '(...) the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced.', see G. Dworkin, 'Paternalism', (1972) 56 *The Monist*, no. 1, p. 65. In more recent works this definition is refined by replacing 'liberty of action' with the broader 'liberty', thus including paternalistic manipulation of citizens by the state as is the case with 'nudging', see G. Dworkin, 'Defining paternalism', in T. Schramme (ed.), *New Perspectives on Paternalism and Health Care* (2015), p. 21.

<sup>6</sup> C. Semmelmann, 'Theoretical reflections on the public-private distinction and their traces in European Union law', (2012) 2 *Oñati Socio-Legal Series*, no. 4, p. 32.

<sup>7</sup> See V. Meier & M. Werding, 'Ageing and the welfare state: securing sustainability', (2010) 26 *Oxford Review of Economic Policy*, no. 4, pp. 655–673; N. Gaston & G. Rajaguru, 'International migration and the welfare state revisited', (2013) 29 *European Journal of Political Economy*, no. 1, pp. 90–101. It is usually argued that steady increases in immigration lead to public pressure for lower levels of publicly-funded social expenditures. However, studies exist that both prove and disprove the negative effects of immigration on the welfare state. The cited source is merely an example in this controversy.

<sup>8</sup> J. Flanigan, 'Can Social Costs Justify Public Health Paternalism?', in T. Schramme (ed.), *New Perspectives on Paternalism and Health Care* (2015), p. 233. A rather cynical counterargument against this method of avoiding social costs is that people with an unhealthy lifestyle tend to live for a shorter time than healthy people, thus relying on the social security scheme for a less extended period of time, i.e. 'costing less'.

of the smoker to health/healthcare, protection of property and protection of private life at one end and the obligation of states to provide healthcare to all citizens without discrimination on the other end. First, the individual interest of the smoker in self-determination stands at odds with the general interest of society in a financially healthy and balanced social security scheme.<sup>9</sup> Second, the obligation of states to provide their citizens a healthy life clashes with the protection of smokers against unjustified state interference in their private lives.

This contribution inquires to what extent human right treaties form a constraint for states that wish to discourage the use of products that are lawful, yet potentially threatening to human health by making reimbursement of treatment in their national healthcare scheme conditional on the lifestyle of the citizen. Thus, the question that lies at its heart is the following:

*To what extent do fundamental rights act as a constraint for states to employ lifestyle differentiation regarding access to their healthcare systems?*

In answering that question, the contribution touches upon the related question of what the consequences are of lifestyle choices by individual citizens regarding the societal solidarity they may expect to retain. After all, delimiting the measures that states may possibly take concerning lifestyle differentiation in part answers that question. However, the perspective of the contribution is hinged on state measures.

The focus of the contribution lies on the European Convention for Human Rights (ECHR), which Belgium has signed and ratified. This convention is of interest because of the extensive scrutiny of its compliance by the European Court of Human Rights (ECtHR). The comprehensive and thorough jurisprudence of this court offers a valuable source of research. Moreover, the analysed principles are largely transposable to other legal systems because of the similarity of fundamental core rights,<sup>10</sup> at least in the Western hemisphere.<sup>11</sup>

The first part outlines the right to health (care) of the smoker and the related obligations of states. This right to health (care) must be ensured without discrimination. A refusal of reimbursement of a pharmaceutical that is otherwise generally available to the public seems at first glance to be irreconcilable with that obligation as it differentiates the access to healthcare. However, a state can justify the difference in treatment if it pursues a legitimate aim. Moreover, the ECtHR tends to grant states a far-stretching margin of appreciation in socio-economic matters. The contribution investigates whether a difference in treatment between smokers and non-smokers is justified or discriminatory.

The second part delves into the right that lends itself particularly well as a shield against state interference; namely, the right to protection of private life. A more selective healthcare may constrict the freedom of each citizen to lead a fully autonomous life. An important consideration in this regard is how self-determination interferes with the obligations of states. Does perseverance in smoking behaviour equate to a waiver of the right to health (care)?

## 2. Discrimination and the right to health (care)

The right to health is a well-established right in treaties at all levels of the multi-levelled legal order, as is made clear by other contributions to this special issue. The right to healthcare is one of two pillars of that right. At its base stands the principle of equality.<sup>12</sup> States should provide equal access to healthcare to all.

<sup>9</sup> See also R. Labonté, 'Global health in public policy: finding the right frame?', (2008) 18 *Critical Public Health*, no. 4, p. 477.

<sup>10</sup> See for example a comparison between the principle of equality within the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the ECHR, B. Saul et al., *The International Covenant on Economic, Social and Cultural Rights. Commentary, cases and materials* (2014), pp. 178–179. The interpretation of the Belgian Constitutional Court (*Grondwettelijk Hof*, GwH) ties in with the jurisprudence of the ECtHR as is reflected in the use of similar wording and concepts as employed by the ECtHR in its discrimination test, see GwH 18 November 1992, no. 74/92, B.3.2; GwH 8 July 1997, no. 37/97, B.7; GwH 18 June 2015, no. 91/2015, B.5.1; GwH 28 April 2016, no. 61/2016, B.5. See also A. Alen & K. Muyle, *Compendium van het Belgisch Staatsrecht* (2014) II, pp. 241–242; M. Van Damme, *Overzicht van het Grondwettelijk Recht* (2015), p. 348.

<sup>11</sup> The universality of human rights is contested by some, with cultural relativism as the bone of contention. For example, sometimes it is argued that Asian countries emphasise collective rights more than individual rights, see for example Labonté, *supra* note 9, p. 477. Taking a different view is D. Emmerson, 'Singapore and the "Asian Values" Debate', (1995) 6 *Journal of Democracy*, no. 4, pp. 95–104. See in general J. Donnelly, 'The Relative Universality of Human Rights', (2007) 29 *Human Rights Quarterly*, no. 2, pp. 281–306. A remark is that universality and uniformity are not the same. Relative differences do not exclude similarity.

<sup>12</sup> See about the right to health contained in Art. 12 of the ICESCR, UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, available at <[www.refworld.org/docid/4538838e10.html](http://www.refworld.org/docid/4538838e10.html)> (last visited 11 September 2019), para. 10; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, available at <[www.refworld.org/docid/4538838d0.html](http://www.refworld.org/docid/4538838d0.html)> (last visited 11 September 2019), paras. 19, 30 and 43; M. Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and*

However, the ECHR itself does not contain an explicit substantial right to health.<sup>13</sup> Nevertheless, the ECtHR does not rule out state responsibility for healthcare.<sup>14</sup> States do have an obligation to stimulate the health of their citizens.<sup>15</sup> According to established case law of the ECtHR the ECHR does not only impose negative obligations on states to abstain from violating rights, it also obliges them positively to secure the effective enjoyment of fundamental rights.<sup>16</sup> The ECtHR has found a 'right' to healthcare as a positive obligation under both the right to life and the right to respect for private life. This 'right' is also found as an implicit negative obligation under the prohibition of torture.<sup>17</sup> Even though the ECtHR acknowledges that the right to health relates to Article 2 of the ECHR, it tends to judge the merits of cases under Articles 3 and/or 8.<sup>18</sup> Furthermore, the right to reimbursement of a pharmaceutical is a financial, social benefit that could fall under the First Additional Protocol to the ECHR, which protects the right to property. The smoker who is denied healthcare can invoke those (implicit) rights to healthcare in conjunction with the explicit prohibition of discrimination that is found in the ECHR to contest the refusal of reimbursement of a pharmaceutical. Finally, the Twelfth Additional Protocol to the ECHR contains an autonomous prohibition of discrimination.

## 2.1. Implicit obligations

### 2.1.1. Right to life (Article 2 of the ECHR)

The first limb of Article 2 of the ECHR not only imposes on states the negative obligation to abstain from deliberate and unlawful killing, but also the positive obligation to undertake all necessary steps to safeguard the life of every individual in their jurisdiction.<sup>19</sup> The ECtHR has underlined that it does not exclude the possibility that acts and omissions of the authorities in the context of public health policies may, in certain circumstances, engage the states' responsibility under the substantive limb of Article 2.<sup>20</sup> In its judgment *Cyprus v Turkey* it entertains the thought that Article 2 may impose an obligation to make available a certain standard of healthcare, but it does not examine this possibility further.<sup>21</sup> However, the ECtHR rules in this case and others that states violate the right to life in any case if they refuse a person healthcare that they

*Cultural Rights* (2003), p. 179; M. San Giorgi, *The Human Right to Equal Access to Health Care* (2012), pp. 16–17 and 25–28; Saul et al., *supra* note 10, pp. 1007–1009; F. Louckx, *Staat en gezondheidszorg* (2015), p. 36.

<sup>13</sup> *Pentiacova and others v Moldova*, Decision of 4 January 2005 (partly dec.), no. 14462/03; *Tysiac v Poland*, Decision of 20 March 2007, no. 5410/03, para. 107; *Lopes de Sousa Fernandes v Portugal*, Decision of 19 December 2017, no. 56080/13, para. 165. See P. Schoukens, 'The right to access health care: health care according to international and European social security law instruments', in A. den Exter (ed.), *International Health Law. Solidarity and Justice in Health care* (2008), p. 43; C. O'Conneide, 'A modest proposal: Destitution, State Responsibility and the European Convention on Human Rights', (2008) *EHRLR*, no. 5, p. 590; A. Hendriks, 'The Council of Europe and Health and Human Rights', in B. Toebes et al. (eds.), *Health and Human Rights in Europe* (2012), p. 30; Louckx, *ibid.*, p. 15, note 55; J. Gerards, 'The ECtHR's response to fundamental rights issues related to financial and economic difficulties. The problem of compartmentalization', (2015) 33 *NQHR*, no. 3, p. 282; T. Goffin, 'Gedwongen meerooken en het recht op gezondheid(szorg)', in I. Samoy & E. Coutteel (eds.), *Het rookverbod uitbreiden? Juridisch onderzoek, casussen en aanbevelingen* (2016), p. 90.

<sup>14</sup> *Lopes de Sousa Fernandes v Portugal*, *ibid.*, para. 165; S. Da Lomba, 'The ECHR and the Protection of Irregular Migrants in the Social sphere', (2015) 22 *IJMGR*, no. 1, p. 51.

<sup>15</sup> Hendriks, *supra* note 13, p. 30 and pp. 43–44.

<sup>16</sup> See *inter alia* for Art. 2 of the ECHR: *LCB v United Kingdom*, Decision of 9 June 1998, no. 23413/94, para. 36; *Osman v United Kingdom*, Decision of 28 October 1998, no. 23452/94, para. 115; *Cyprus v Turkey*, Decision of 10 May 2001, no. 25781/94, para. 219; *Calvelli and Ciglio v Italy*, Decision of 17 January 2002, no. 32967/96, para. 48; *Kontrova v Slovakia*, Decision of 31 May 2007, no. 7510/04, para. 49; *Hristozov and others v Bulgaria*, Decision of 13 November 2012, nos. 47039/11 and 358/12, para. 106. For Art. 8 of the ECHR: *Marcx v Belgium*, Decision of 13 June 1979, no. 6833/74, para. 31; *Airey v Ireland*, Decision of 9 October 1979, no. 6289/73, para. 32; *Guerra and others v Italy*, Decision of 19 February 1998, no. 14967/89, para. 58.

<sup>17</sup> S. Da Lomba, 'The ECHR, Health Care and Irregular Immigrants' in M. Freeman et al. (eds.), *Law and Global Health* (2014), p. 151; Goffin, *supra* note 13, p. 91.

<sup>18</sup> E. Palmer, 'Protecting Socio-Economic Rights Through the European Convention of Human Rights: Trends and Development in the European Court of Human Rights', (2009) 2 *Erasmus L. Rev.*, no. 4, p. 410. See also D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (2012), pp. 158–159.

<sup>19</sup> *LCB v United Kingdom*, *supra* note 16, para. 36; *Osman v United Kingdom*, *supra* note 16, para. 115; *Cyprus v Turkey*, *supra* note 16, para. 219; *Calvelli and Ciglio v Italy*, *supra* note 16, para. 48; *Kontrova v Slovakia*, *supra* note 16, para. 49; *Hristozov and others v Bulgaria*, *supra* note 16, para. 106.

<sup>20</sup> *Powell v United Kingdom*, Decision of 4 May 2000, no. 45305/99, para. 1; *Nitecki v Poland*, Decision of 21 March 2002, no. 65653/01, para. 1; *Pentiacova and others v Moldova*, *supra* note 13; *Trzepalko v Polen*, Decision of 13 September 2011 (dec.), no. 25124/09, para. 23; *Panaiteescu v Romania*, Decision of 10 April 2012, no. 30909/06, para. 28; *Wiater v Poland*, Decision of 15 May 2012 (dec.), no. 42290/08, para. 35; *Hristozov and others v Bulgaria*, *supra* note 16, para. 106; *Lopes de Sousa Fernandes v Portugal*, *supra* note 13, paras. 167 and 190.

<sup>21</sup> *Cyprus v Turkey*, *supra* note 16, para. 219.

have undertaken to make available to the population generally.<sup>22</sup> This reasoning reflects the importance of the principle of equality contained within the right to healthcare. As a result, this case law establishes a direct prohibition of discrimination within Article 2 of the ECHR, requiring any distinction to be justified. It is, however, not necessary that the right to health is breached for a violation of the prohibition of discrimination contained within Article 14.

Furthermore, in a number of cases the ECtHR has examined allegations of denial of access to medical treatment because of refusal by the state to fully cover the cost of a particular form of conventional treatment.<sup>23</sup> So far, the court has not found a breach of Article 2 of the ECHR.<sup>24</sup> In each case the court ruled that, given the need to balance the individual interest in an expensive treatment with the general interest, it could not be found that states in the particular circumstances of the case abused their margin of appreciation in allocating scarce public resources. That margin carries considerable weight as will emerge from the remainder of this contribution (see in particular sections 2.1.2, 2.1.4 and 2.3). Either the ECtHR considered that sufficient medical treatment and facilities had been provided to the applicants on an equal footing with other persons in a similar situation (see *Nitecki* and *Gheorghe*) or that the applicants had failed to adduce any evidence that their lives had been put at risk (see *Pentiacova and others*).

### 2.1.2. Right to respect for private life (Article 8 of the ECHR)

The right to protection of private life too has been invoked by ill or disabled persons in an attempt to enforce a healthcare claim.<sup>25</sup> The ECtHR accepts that a positive obligation to provide medical care can be derived from the right to respect for one's physical and mental integrity.<sup>26</sup> Such an obligation arises when the refusal of claimed treatment or aid interferes with the individual's right to personal development and his or her right to establish and maintain relations with other human beings and the outside world.<sup>27</sup> That interference must go beyond nuisance to everyday life and attain a minimum level of severity.<sup>28</sup> Also, the individual has to prove a direct and immediate link between the measures sought and his or her private life, demonstrating a special link with the needs of that particular life.<sup>29</sup> In its case law the ECtHR so far has declared a case inadmissible in which a disabled individual sought a robotic arm to assist his mobility. The court considered that the provision of said arm fell in the margin of appreciation as the applicant had access to the general package of healthcare provided in the state.<sup>30</sup> The court did, however, find that reducing the level of care given to a woman with limited mobility violated Article 8, but only for a limited period during which the UK did not comply with its own laws.<sup>31</sup> Both cases differ insofar as the first applicant never enjoyed a particular form of medical assistance, whereas the second applicant complains not of a lack of action, but rather of the decision to reduce the care package that had until then been made available.

Thus, in the eyes of the ECtHR Article 8 of the ECHR is relevant to complaints about insufficient funding of treatment of persons who require healthcare in order to improve their quality of life.<sup>32</sup> In the assessment of that funding the court seeks to balance the interests of society at large and the individual. In doing so it takes into account the wide margin of appreciation that states enjoy in the assessment of the priorities in the context of the allocation of limited state resources. The ECtHR acknowledges that the national authorities are in a better position to carry out this assessment than an international court, in view of their famili-

<sup>22</sup> *Cyprus v Turkey*, *ibid.*; *Nitecki v Poland*, *supra* note 20, para. 1; *Pentiacova and others v Moldova*, *supra* note 13; *Gheorghe v Romania*, Decision of 22 September 2005 (partly dec.), no. 19215/04; *Makuc and others v Slovenia*, Decision of 31 May 2008 (partly dec.), no. 26828/06, para. 176; *Wiater v Poland*, *supra* note 20, para. 34; *Hristozov and others v Bulgaria*, *supra* note 16, para. 106; *Mehmet Şentürk and Bekir Şentürk v Turkey*, Decision of 9 April 2013, no. 13423/09, para. 88; *Elena Cojocaru v Romania*, Decision of 22 March 2016, no. 74114/12, para. 107; *Lopes de Sousa Fernandes v Portugal*, *supra* note 13, para. 173. See also C. Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention* (2003), p. 124.

<sup>23</sup> *Nitecki v Poland*, *supra* note 20, para. 1; *Pentiacova and others v Moldova*, *supra* note 13 (in conjunction with Art. 8 of the ECHR); *Gheorghe v Romania*, *supra* note 22; *Wiater v Poland*, *supra* note 20.

<sup>24</sup> See *Lopes de Sousa Fernandes v Portugal*, *supra* note 13, para. 174.

<sup>25</sup> *Goffin*, *supra* note 13, p. 90.

<sup>26</sup> *Palmer*, *supra* note 18, p. 410.

<sup>27</sup> *Sentges v The Netherlands*, Decision of 8 July 2003 (dec.), no. 27677/02.

<sup>28</sup> In *Sentges v The Netherlands* (*ibid.*) the ECtHR held that Art. 8 cannot be considered applicable each time an individual's everyday life is disrupted, but only in exceptional cases. See O'Conneide, *supra* note 13, p. 592; Gerards, *supra* note 13, p. 281.

<sup>29</sup> *Sentges v The Netherlands*, *supra* note 27.

<sup>30</sup> *Ibid.*

<sup>31</sup> *McDonald v United Kingdom*, Decision of 20 May 2015, no. 4241/12, paras. 50 ff.

<sup>32</sup> *Pentiacova and others v Moldova*, *supra* note 13. The ECtHR refers to the following case law: *Zehnalová and Zehnal v The Czech Republic* Decision of 5 May 2002 (dec.), no. 38621/97; *Sentges v The Netherlands*, *supra* note 27.

arity with the demands made on the healthcare system as well as with the funds available to meet those demands.<sup>33</sup> This is part of the ‘fair balance’ test in which the court affords states a margin of appreciation in balancing the interests of private individuals with the competing general interest of society.<sup>34</sup> The search for this balance is inherent to the whole of the ECHR.<sup>35</sup>

### 2.1.3. Prohibition of torture and inhuman treatment (Article 3 of the ECHR)

Article 3 of the ECHR dictates that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. As one of the fundamental values in democratic society, this prohibition is formulated in an absolute manner so that no restriction thereof is possible.<sup>36</sup> The margin of appreciation of states is slim to non-existent. The refusal of or insufficient provision of medical treatment can be equated with inhuman treatment, in particular in the context of deprivation of liberty. The ECtHR has found that states failing to provide adequate healthcare to detainees breach Article 3 of the ECHR, if this results in sufficiently severe ill-treatment.<sup>37</sup> After all, states have an increased duty of care regarding that category of citizens as they are responsible for the deprivation of their liberty, which hinders them to provide in their own (medical) needs.<sup>38</sup>

In a few cases the ECtHR has extended that duty of care to individuals outside the context of a detainment context.<sup>39</sup> The court ruled that the expulsion of a patient suffering from AIDS to his country of origin would constitute inhuman treatment if there is a lack of adequate healthcare in that country to treat the disease.<sup>40</sup> However, the circumstances of those cases are exceptional as the wronged individuals stand under a heightened form of control by the state.<sup>41</sup> Therefore, the state remains directly responsible for those persons. Even though the personal scope of this case law is limited, it makes clear that an obligation to provide healthcare can arise if ‘human dignity’ is put in jeopardy.<sup>42</sup>

The obligation of states to safeguard that human dignity could open up perspectives for the individual who is denied healthcare. The argument that the refusal of reimbursement of a pharmaceutical constitutes inhuman treatment might just strike a chord with the ECtHR. In several decisions on admissibility the applicants argued that the social benefits they received were insufficient for their basic human needs.<sup>43</sup> Interestingly, the ECtHR does not dismiss the applicability of Article 3 on their claimed state perpetuated destitution. Even though the ECHR does not guarantee as such socio-economic rights, including the right to free medical assistance, the court accepts that the living conditions of individuals could in principle amount to treatment contrary to Article 3 should they attain a minimum level of severity.<sup>44</sup> The mentioned decisions, however, do not provide a guideline to determine when that level is attained.<sup>45</sup> Necessarily, the benchmark

<sup>33</sup> *Sentges v The Netherlands*, supra note 27; *Pentiacova and others v Moldova*, supra note 13 (under Art. 2 of the ECHR); *Gheorghe v Romania*, supra note 22 (under Art. 2 of the ECHR); *McDonald v United Kingdom*, supra note 31, para. 54.

<sup>34</sup> See in general for this test under Art. 8 of the ECHR, *Hokkanen v Finland*, Decision of 23 September 1994, no. 19823/92, para. 55; *Nuutinen v Finland*, Decision of 27 June 2000, no. 32842/96, para. 127; *Gnahore v France*, Decision of 19 September 2000, no. 40031/98, para. 52; *Kutzner v Germany*, Decision of 26 February 2002, no. 46544/99, para. 62.

<sup>35</sup> *Cossey v United Kingdom*, Decision of 27 September 1990, para. 37, *Christine Goodwin v United Kingdom*, Decision of 11 July 2002, no. 28957/95, para. 72.

<sup>36</sup> *Labita v Italy*, Decision of 6 April 2000, no. 26772/95, para. 119; Y. Haec & J. Vande Lanotte, *Handboek EVRM* (2004), II, p. 719; J. Velu & R. Ergec, *Convention européenne des droits de l'homme* (2014), pp. 237–238, para. 236; W. Schabas, *The European Convention on Human Rights* (2015), p. 168.

<sup>37</sup> States are under an obligation to protect the health of persons deprived of their liberty, see *Keenan v United Kingdom*, Decision of 3 April 2001, no. 27229/95, para. 111; *Mouisel v France*, Decision of 14 November 2002, no. 67263/01, para. 40. Therefore, they have to ensure that the health and well-being of detainees are adequately secured by, amongst other things, providing them with the requisite medical assistance, see *Kudla v Poland*, Decision of 26 October 2000, no. 30210/96, para. 94; *Kalashnikov v Russia*, Decision of 15 July 2002, no. 47095/99, para. 95; *McGlinchey and others v United Kingdom*, Decision of 29 April 2003, no. 50390/99, para. 46; *Sakkopoulos v Greece*, Decision of 15 January 2004, no. 61828/00, para. 37; *Khudobin v Russia*, Decision of 26 October 2006, no. 59696/00, para. 93; *Mozer v Republic of Macedonia and Russia*, Decision of 23 February 2016, no. 11138/10, para. 178.

<sup>38</sup> Hendriks, supra note 13, p. 34; Gerards, supra note 13, p. 284.

<sup>39</sup> Gerards, *ibid.*, note 46.

<sup>40</sup> *D. v United Kingdom*, Decision 2 May 1997, no. 30240/96, paras. 46–54. See also *N. v United Kingdom*, Decision 27 May 2008, no. 26565/05, paras. 42–51.

<sup>41</sup> O’Cinneide, supra note 13, p. 588.

<sup>42</sup> Palmer, supra note 18, p. 410.

<sup>43</sup> *Pancenko v Latvia*, Decision of 18 October 1999 (dec.), no. 40772/98; *Larioshina v Russia*, Decision of 23 April 2002 (dec.), no. 56869/00; *Denisenkov v Russia*, Decision of 22 September 2005 (partly dec.), no. 40642/02; *Kutepov and Anikeyenko v Russia*, Decision of 25 October 2005 (partly dec.), no. 68029/01, para. 62; *Budina v Russia*, Decision of 18 June 2009 (dec.), no. 45603/05.

<sup>44</sup> P. Schoukens, ‘Recht op gezondheidszorg volgens het internationale socialezekerheidsrecht’, (2008) 13 *T. Gez.*, no. 2, p. 114; O’Cinneide, supra note 13, pp. 588–589.

<sup>45</sup> I. Koch, *Human Rights as Indivisible Rights. The protection of Socio-economic Demands under the European Convention on Human Rights* (2009), pp. 181–182.

is determined by the peculiar circumstances of the case. Anyhow, the minimum level of severity entails that there must be damage to the physical or mental health of the claimant or that the claimant faces a real and immediate risk either to his or her physical integrity or life.<sup>46</sup> In the decision *Budina v Russia* the ECtHR referred *mutatis mutandis* to its judgment in *Nitecki v Poland*.<sup>47</sup> In the latter case the court ruled, in light of Article 2 of the ECHR, that the fact that the claimant could only rely on reimbursement of 30% of the total cost of medical treatment did not run counter to the provisions of the convention.<sup>48</sup> This case elucidates that it is not excluded that patients have to partly fund treatment themselves, provided that the funding of the remaining part by a state is not deficient to the extent that their health becomes damaged or their physical integrity or life becomes threatened.

#### 2.1.4. Restrictive case law

The ECHR plays only a subsidiary role in guaranteeing fundamental rights at the national level.<sup>49</sup> Therefore, the 'margin of appreciation' doctrine runs deep in the case law of the ECtHR.<sup>50</sup> The ECtHR states that national authorities are better placed than an international court to evaluate local needs and conditions.<sup>51</sup> In matters of general policy, on which opinions within a democratic society may reasonably differ, the role of the domestic policy-maker should be given special weight.<sup>52</sup> The ECtHR merely ascertains whether states do not overstep their margin of appreciation. It functions as a supervisor to the national balancing of individual interests with the interests of society at large.<sup>53</sup> The obligation to strike a fair balance must be interpreted in a way that does not impose an impossible or disproportionate burden on national states.<sup>54</sup> Therefore, the margin of appreciation of states is even wider when they are faced with socio-economic challenges, because they are then tasked with assessing which priorities must be followed in allocating limited state resources.<sup>55</sup> Thus, it comes as no surprise that the ECtHR rules that states are in a better position to balance all interests relating to their healthcare system.<sup>56</sup> For that reason the ECtHR shows reluctance to recognise implicit obligations to provide healthcare in individual cases – notwithstanding systemic failure<sup>57</sup> – safe for exceptional<sup>58</sup> circumstances.<sup>59</sup> The court has set a high bar for state action to attain a sufficient level of severity for it to generate implicit obligations.<sup>60</sup> Seldom does a case reach that threshold.<sup>61</sup> In a truer sense the ECtHR has not so much deduced positive socio-economic rights from the ECHR, rather it has laid out the outer boundaries of the margin of appreciation for states.<sup>62</sup> Only when those boundaries are manifestly

<sup>46</sup> *Kutepov and Anikeyenko v Russia*, supra note 43, para. 62.

<sup>47</sup> *Budina v Russia*, supra note 43.

<sup>48</sup> *Nitecki v Poland*, supra note 20.

<sup>49</sup> *Belgian language case*, Decision of 23 June 1968, nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, para. 10; *Hatton and others v United Kingdom*, Decision of 8 June 2003, no. 36022/97, para. 97; Y. Haeck et al., *Handboek EVRM* (2005), I, pp. 179–181; A. Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 *HRLR*, no. 4, p. 561; S. Smis et al., *Handboek Mensenrechten. De internationale bescherming van de rechten van de mens* (2011), pp. 229–231. See also Art. 1, Council of Europe, 'Protocol no. 15 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)', *Council of Europe Treaty Series* 24 June 2013, no. 213.

<sup>50</sup> See S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (2000), p. 55.

<sup>51</sup> *James and others v United Kingdom*, Decision of 21 February 1986, no. 8793/79, para. 46; *Osman v United Kingdom*, supra note 16, para. 116.

<sup>52</sup> *Hatton and others v United Kingdom*, supra note 49, para. 97.

<sup>53</sup> *Evans v United Kingdom*, Decision of 10 April 2007, no. 6339/05, para. 75; *Dickson v United Kingdom*, Decision of 4 December 2007, no. 44362/04, para. 70; *Hristozov and others v Bulgaria*, supra note 16, para. 117; Gerards, supra note 13, p. 281; Da Lomba, supra note 14, pp. 53–54; Goffin, supra note 13, p. 90.

<sup>54</sup> See also *Osman v United Kingdom*, supra note 16, para. 116; E. Wicks, 'The Right to Life and Conflicting Interests' (2010), p. 217 ff; Xenos, supra note 18, 145 ff and 171.

<sup>55</sup> *James and others v United Kingdom*, supra note 51, para. 46; *Sentges v The Netherlands*, supra note 27; *Pentiacova and others v Moldova*, supra note 13; *Stec and others v United Kingdom*, Decision of 12 April 2006, nos. 65731/01 and 65900/01, para. 53; Palmer, supra note 18, p. 405; Da Lomba, supra note 14, pp. 54–55; Goffin, supra note 13, p. 90. See also *Burden v United Kingdom*, Decision of 29 April 2008, no. 13378/05, para. 60.

<sup>56</sup> *Pentiacova and others v Moldova*, supra note 13; *Shelley v United Kingdom*, Decision of 4 January 2008 (dec.), no. 23800/06; *Hristozov and others v Bulgaria*, supra note 16, para. 119. See also Da Lomba, supra note 14, 55.

<sup>57</sup> See *Lopes de Sousa Fernandes v Portugal*, supra note 13, para. 195. See also *Shelley v United Kingdom*, *ibid*.

<sup>58</sup> In *D. v United Kingdom* the ECtHR itself speaks of 'very exceptional circumstances' (supra note 40, para. 54).

<sup>59</sup> A. den Exter, 'Litigating Health Care Access in the Netherlands: Challenging International Treaty Law', in A. den Exter (ed.), *International Health Law. Solidarity and Justice in Health care* (2008), p. 68; L. Clements & A. Simmons, 'European Court of Human Rights, Sympathetic Unease', in M. Langford (ed.), *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (2008), p. 418; Da Lomba, supra note 14, p. 53.

<sup>60</sup> Gerards, supra note 13, pp. 282 and 285.

<sup>61</sup> O'Conneide, supra note 13, p. 584; Gerards, supra note 13, p. 282; Da Lomba, supra note 14, p. 55.

<sup>62</sup> See also Gerards, supra note 13, p. 285.

trespassed, does a positive obligation to healthcare arise. The hesitant attitude of the court is in line with earlier case law on socio-economic rights, certainly when implicit obligations can have far-reaching financial implications.<sup>63</sup> It is of the opinion that the European Social Charter provides a more suitable and flexible protection of social rights.<sup>64</sup>

The wide margin of appreciation in healthcare policy is crucial in understanding whether lifestyle differentiation in healthcare is allowed under the ECHR. However, its nature is unpredictable, causing it to fall prey to criticism.<sup>65</sup> The margin of appreciation is fundamentally dependent on the circumstances of the particular case and influenced by several factors.<sup>66</sup> In section 2.3.2 the margin of appreciation is tied in with the prohibition of discrimination, which ensures equal access to healthcare. In the conclusion (section 4) a synthetic figure visualises what influences the margin.

## **2.2 Right to protection of property (Article 1, Additional Protocol I to the ECHR)**

One of the foundations of the right to healthcare is the right to social and medical assistance. Accordingly, Article 1 of Additional Protocol (AP) I to the ECHR could limit a more selective healthcare policy. This article provides for the protection of property. If the reimbursement of pharmaceuticals is to be viewed as 'property', it falls under that article's scope. The ECtHR stresses in its case law that the protection of property yields no right to acquire property. The ECHR in no way limits the freedom of states to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme.<sup>67</sup> Once more, this is the consequence of the wide margin of appreciation granted to states in socio-economic matters.<sup>68</sup> If, however, a state does decide to create such a scheme, it must do so in a manner which is compatible with Article 14 of the ECHR as the legislation enforcing that scheme must be regarded as generating a right to property that falls within the ambit of Article 1 of AP 1 to the ECHR.<sup>69</sup> It is of no importance whether benefits are conditional or not on the prior payment of contributions. If an individual invokes Article 1 of AP 1 to the ECHR in conjunction with Article 14 of the ECHR to complain about a denial of a particular benefit on a discriminatory ground, the ECtHR tests whether, save for that condition of entitlement, the applicant would have had a right, enforceable under domestic law, to receive the benefit in question.<sup>70</sup> Interestingly, the court considers the possibility of discrimination to be of great weight in the assessment of proportionality under Article 1 of AP 1 to the ECHR.<sup>71</sup> Even though, once again, a wide margin of appreciation is afforded to states in this matter, the prohibition of discrimination acts as an ultimate boundary.<sup>72</sup>

It should be noted that a benefit does not constitute 'property' in the sense of Article 1 of AP 1 to the ECHR if the right to this benefit is conditional and the individual does not fulfil its conditions.<sup>73</sup> Also, there is no state interference if the beneficiary no longer fulfils the conditions because of external circumstances.<sup>74</sup>

<sup>63</sup> K. Henrard, *Mensenrechten vanuit international en nationaal perspectief* (2008), pp. 161–162.

<sup>64</sup> *Botta v Italy*, Decision of 24 February 1998, no. 21439/93, para. 28.

<sup>65</sup> See the authors and judges referred to in P. Agha, *The European Convention of Human Rights between law and politics. The margin of appreciation and its normative significance in the case law of the European Court of Human Rights (dissertation UAntwerpen)* (2014), p. 95, notes 19 and 20.

<sup>66</sup> Haeck & Vande Lanotte, *supra* note 36, pp. 210–211.

<sup>67</sup> *Stec and others v United Kingdom*, *supra* note 55, para. 52; *Rasmussen v Poland*, Decision of 28 April 2009, no. 38886/05, para. 71; *Grudić v Serbia*, Decision of 17 April 2012, no. 31925/08, para. 72; *Khoniakina v Georgia*, Decision of 19 June 2012, no. 17767/08, para. 71; *Kolesnyk and others v Ukraine*, Decision of 3 June 2014, nos. 57116/10, 74847/10 and 10642/11, para. 81; *Fakas v Ukraine*, Decision of 3 June 2014 (dec.), no. 4519/11, para. 33; *Sukhanov and Ilchenkoehrm v Ukraine*, Decision of 26 June 2014, nos. 68385/10 and 71378/10, para. 31; *Bélané Nagy v Hungary*, Decision of 13 December 2016, no. 53080/13, para. 82.

<sup>68</sup> See *Stec and others v United Kingdom*, *supra* note 55, para. 52.

<sup>69</sup> *Stec and others v United Kingdom*, Decision of 6 June 2005 (decision on admissibility), nos. 65731/01 and 65900/01, paras. 54–55; *Rasmussen v Poland*, *supra* note 67, para. 71; *Grudić v Serbia*, *supra* note 67, para. 72; *Khoniakina v Georgia*, *supra* note 67, para. 71; *Kolesnyk and others v Ukraine*, *supra* note 67, para. 81; *Fakas v Ukraine*, *supra* note 67, para. 33; *Sukhanov and Ilchenkoehrm v Ukraine*, *supra* note 67, para. 31; *Bélané Nagy v Hungary*, *supra* note 67, para. 82; A. Simon, 'Les prestations sociales non contributives dans la jurisprudence de la Cour Européenne des Droits de l'Homme. A propos de l'arrêt *Stec* et autres c. le Royaume-Uni (6 juillet 2005)' (2006) 17 *RTDH*, no. 67, p. 653; Schabas, *supra* note 36, p. 972.

<sup>70</sup> *Stec and others v United Kingdom*, *ibid.*, para. 55.

<sup>71</sup> *Kjartan Ásmundsson v Iceland*, Decision of 12 October 2004, no. 60669/00, para. 43.

<sup>72</sup> See amongst others *Stec and others v United Kingdom*, *supra* note 55, para. 52.

<sup>73</sup> *Prince Hans-Adam II of Liechtenstein v Germany*, Decision of 12 July 2001, no. 42527/98, para. 82–83; *Rasmussen v Poland*, *supra* note 67, para. 71; *Moksal v Poland*, Decision of 15 September 2009, no. 10373/05, para. 40.

<sup>74</sup> *Bellet, Huertas and Vialatte v France*, Decision of 17 April 1999 (dec.), nos. 40832/98, 40833/98 and 40906/98, para. 5; *Rasmussen v Poland*, *supra* note 67, para. 71; *Richardson v United Kingdom*, Decision of 10 April 2012 (dec.), no. 26252/08, para. 17; *Bélané Nagy v Hungary*, *supra* note 67, para. 86.

Once an individual has entered into and forms part of a social security system (even a compulsory one), it is not necessarily excluded that the system can be changed either as to the conditions of eligibility of payment or as to the quantum of the benefit.<sup>75</sup> The ECtHR accepts that amendments to social security legislation may be adopted in response to societal changes and evolving views on the categories of persons who require assistance, as well as to the evolution of individual situations.<sup>76</sup> However, in that case it is possible to speak of state interference as the change in the beneficiary's situation is not brought about by external circumstances, but by changes in the law or its implementation.<sup>77</sup> Therefore, states that suspend or diminish a benefit, must justify this interference under Article 1 of AP 1 to the ECHR.<sup>78</sup> The justification should be lawful, should pursue a legitimate aim in the public interest and should be reasonably proportionate to the aim sought to be realised.<sup>79</sup> Again, states that pursue the general interest must strike a fair balance with the interests of the individual. The requisite balance will not be found if the individuals concerned have to bear an excessive burden.<sup>80</sup> This justification is intertwined with the justification of state interference in the private life of individuals. Thus, reference can be made to section 3.1.2.

### 2.3. Prohibition of discrimination

#### 2.3.1. General principles

Article 14 of the ECHR determines that the enjoyment of the rights and freedoms set forth in the convention must be secured without discrimination. This is no autonomous prohibition of discrimination. Discrimination presents itself only in the enjoyment of one of the rights of the ECHR or its additional protocols.<sup>81</sup> In contrast, the Twelfth Additional Protocol contains a similar<sup>82</sup> prohibition of discrimination, which does not require recourse to a substantial convention right, but can be invoked against every difference in treatment under a national legal system.<sup>83</sup> The ECtHR interprets the notion of discrimination in both articles identically.<sup>84</sup>

For a difference in treatment to amount to discrimination it is required that a person who claims discrimination finds him/herself in a sufficiently similar position as those who are treated in a more favourable manner.<sup>85</sup> According to established case law a difference in treatment between persons in a similar or analogue situation is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim, or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.<sup>86</sup>

<sup>75</sup> *Carson and others v United Kingdom*, Decision of 16 March 2010, no. 42184/05, paras. 85–89; *Richardson v United Kingdom*, supra note 74, para. 17; *Damjanac v Croatia*, Decision of 24 October 2013, no. 52943/10, para. 86; *Bélané Nagy v Hungary*, supra note 67, para. 88.

<sup>76</sup> *Wieczorek v Poland*, Decision of 8 December 2009, no. 18176/05, para. 67; *Bélané Nagy v Hungary*, supra note 67, para. 88.

<sup>77</sup> *Grudić v Serbia*, supra note 67, para. 77; *Bélané Nagy v Hungary*, supra note 67, para. 86.

<sup>78</sup> *Kjartan Ásmundsson v Iceland*, supra note 71, para. 40; *Rasmussen v Poland*, supra note 67, para. 71; *Wieczorek v Poland*, supra note 76, para. 57; *Valkov and others v Bulgaria*, Decision of 25 October 2011, nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, para. 84; *Richardson v United Kingdom*, supra note 75, para. 17; *Khoniakina v Georgia*, supra note 67, para. 69; *Grudić v Serbia*, supra note 67, para. 72; *Bélané Nagy v Hungary*, supra note 67, para. 84.

<sup>79</sup> *Lakićević and others v Montenegro and Serbia*, Decision of 13 December 2011, nos. 27458/06, 37205/06, 37207/06 and 33604/07, paras. 59–60 and 62; *Khoniakina v Georgia*, supra note 67, para. 72.

<sup>80</sup> *Sporrong and Lönnroth v Sweden*, Decision of 23 September 1982, nos. 7151/75 and 7152/75, paras. 69–74; *The Holy Monasteries v Greece*, Decision of 9 December 1994, nos. 13092/87 and 13984/88, paras. 70–71; *Moksal v Poland*, supra note 73, paras. 52 and 64; *Khoniakina v Georgia*, supra note 67, para. 70.

<sup>81</sup> J. Ipiopoulos-Strangas, 'Soziale Grundrechte', in D. Merten & H.-J. Papier (eds.), *Handbuch der Grundrechte in Deutschland und Europa* (2010), VI/1, p. 319, para. 44; J.-F. Renucci, *Droit européen des droits de l'homme* (2012), p. 168; Velu & Ergec, supra note 36, p. 142, para. 139. See for the rare occasions that a certain degree of autonomy is attributed to Art. 14 of the ECHR, Haec & Vande Lanotte, supra note 36, pp. 142–144; Velu & Ergec, supra note 36, pp. 144–146, paras. 141–144.

<sup>82</sup> Council of Europe, *Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe Treaty Series 4 November 2000, No. 177, para. 33; O. Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (2003), p. 40; B. Rainey et al., *The European Convention on Human Rights* (2014), p. 592.

<sup>83</sup> Art. 1, AP XII to the ECHR; Council of Europe, supra note 82, para. 21; Rainey et al., *ibid.* The Twelfth Additional Protocol has not been ratified in Belgium, thus lacking legal force in this country.

<sup>84</sup> *Sejdić and Finci v Bosnia and Herzegovina*, Decision of 22 December 2009, nos. 27996/06 and 34836/06, para. 55; *Ramaer and van Willigen v The Netherlands*, Decision of 23 October 2012 (dec.), no. 34880/12, paras. 88–91; *Pilav v Bosnia and Herzegovina* Decision of 9 June 2016, no. 41939/07, para. 40.

<sup>85</sup> See *Marckx v Belgium*, Decision of 13 June 1979, no. 6833/74, para. 32; *Fredin v Sweden*, Decision of 18 February 1991, no. 12033/86, para. 60; *Burden v United Kingdom*, supra note 55, para. 60; Arnardóttir, supra note 82, pp. 10–11 and 38–39; Rainey et al., supra note 82, p. 579.

<sup>86</sup> *Belgian language case*, supra note 49, para. 10; *Gaygusuz v Austria*, Decision of 16 September 1996, no. 17371/90, para. 42; *Larkos v Cyprus*, Decision of 18 February 1999, no. 29515/95, para. 29; *D.H. and others v Czech Republic*, Decision of 13 November 2007,

### 2.3.2. Margin of appreciation

States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.<sup>87</sup> *Ad nauseam*, this margin is usually wide when it comes to general measures of economic or social strategy so that the ECtHR will generally respect the legislature's policy choice unless it is manifestly without reasonable foundation.<sup>88</sup> The ECtHR accepts that the economic well-being of a state is in principle a legitimate aim for difference in treatment.<sup>89</sup> However, criteria that favour persons with a certain health status may in no way appear arbitrary.<sup>90</sup> Also, general economic measures must comply with the requirements of proportionality.<sup>91</sup> In this regard the ECtHR emphasises its subsidiary role when reviewing legislative discretion. As an international forum, it cannot place its own views before that of the national authorities. The separation of powers prohibits the judicial branch from assessing whether other policy choices are more opportune, allowing only for a marginal review.<sup>92</sup> Therefore, the availability of alternative options to the chosen legislative solution does not in itself render measures unjustified.<sup>93</sup> Nevertheless, alternatives are not completely without importance as they can expose the unreasonableness of those measures.<sup>94</sup> Also, the ECtHR does often search for less stringent available measures when comparing with other countries in the search of a European consensus (see further on).<sup>95</sup>

Mention must be made of dissenting opinions in the ECtHR concerning the wide margin of appreciation in socio-economic matters under Article 14 of the ECHR. In the case *Stummer v Austria* a majority ruled that a difference in treatment between detainees and non-detainees concerning the eligibility for pension benefits did not constitute discrimination.<sup>96</sup> A number of judges disagreed with that conclusion and lamented the weight that the majority grants to the economic arguments of the Austrian government.<sup>97</sup> Their criticism was that the importance attached to the margin of discretion in socio-economic matters is detrimental to fundamental rights. A more strident criticism can be found in *Lopes de Sousa Fernandes v Portugal*. The dissenting opinion under this case, which concerned the 'right to healthcare' under Article 2, reproached the ECtHR for seemingly forgetting the principle of effectiveness (*effet utile*) of human rights protection, which limits the margin of appreciation of states. It noticed a lack of consistency in the context of socio-economic matters, where the ECtHR tackles certain problems head on, whilst evading others. Therefore, it urged the court to consistently resolve legal dilemmas both at the macro level, with respect to the allocation of scarce resources between health and other legitimate sectors within the state, and at the micro level, with respect to the realisation of the competing healthcare claims of individuals, on the basis of a *pro persona* approach

no. 57325/00, para. 196; *Burden v United Kingdom*, supra note 55, para. 60; *British Gurkha Welfare Society and others v United Kingdom*, Decision of 15 September 2016, no. 44818/11, para. 62.

<sup>87</sup> *Karlheinz Schmidt v Germany*, Decision of 18 July 1994, no. 13580/88, para. 24; *Van Raalte v The Netherlands*, Decision of 21 February 1997, no. 20060/92, para. 39; *Stec and others v United Kingdom*, supra note 55, para. 51; *Kozak v Poland*, Decision of 2 March 2010, no. 13102/02, para. 91; *Velu & Ergec*, supra note 36, p. 150, para. 151.

<sup>88</sup> See e.g. *Connors v United Kingdom*, Decision of 27 May 2004, no. 66746/01, para. 82; *Stec and others v United Kingdom*, supra note 55, para. 52; *Runkee and White v United Kingdom*, Decision of 10 May 2007, no. 42949/98, para. 36; *Burden v United Kingdom*, supra note 55, para. 60. The Belgian Supreme Court, when assessing the legitimacy of the public interest invoked by the state, takes into account that a wide margin of discretion is available to the legislature when drawing up social, economic and fiscal objectives (GwH 22 October 2008, no. 139/2008, B.11.2; GwH 7 July 2011, no. 125/2011, B.4.1; GwH 24 May 2012, no. 66/2012, B.4.1; GwH 20 December 2012, no. 165/2012, B.9; GwH 7 March 2013, no. 34/2013, B.8.1; GwH 26 September 2013, no. 122/2013, B.8; GwH 30 April 2015, no. 50/2015, B.9). The policy choices required when allocating public funds to those objectives are, therefore, chiefly a matter of the legislature's discretion. The court can only reject such a policy choice, as well as the motives underlying it, if it is based on a manifest error or if it is manifestly unreasonable (GwH 17 September 2009, no. 143/2009, B.5; GwH 10 October 2012, no. 118/2012, B.6.2; GwH 13 June 2013, no. 83/2013, B.4.3; GwH 25 September 2014, no. 134/2014, B.7; GwH 5 March 2015, no. 25/2015, B.6; GwH 7 May 2015, no. 54/2015, B.7).

<sup>89</sup> *Sidabras and Džiautas v Lithuania*, Decision of 27 July 2004, nos. 55480/00 and 59330/00, para. 55. The Belgian Constitutional Court considers that if the state's public funds bear an unreasonably heavy burden, the state must be able to mitigate such a situation if the consolidation of public finances or a deficit in the social security system so require (GwH 12 June 2014, no. 90/2014, B.5; GwH 10 July 2014, no. 103/2014, B.6.2).

<sup>90</sup> *G.N. and others v Italy*, Decision of 1 December 2009, no. 43134/05, para. 129.

<sup>91</sup> *R. Sz. v Hungary*, Decision of 2 July 2013, no. 41838/11, para. 54; *Guberina v Croatia*, Decision of 22 March 2016, no. 23682/13, para. 73.

<sup>92</sup> J. Vande Lanotte *et al.*, *Belgisch Publiekrecht* (2015), 1, p. 362.

<sup>93</sup> *James and others v United Kingdom*, supra note 51, para. 51.

<sup>94</sup> The Belgian Constitutional Court considers that if the measures chosen by the legislature can have far-reaching consequences, whilst other realistic, credible and relevant alternatives would not have such extensive consequences, it can but establish that it has no reason to conclude that the choice made by the legislature is reasonably justified, should the latter fail to substantiate its policy with a pertinent reasoning, see GwH 15 March 2007, no. 39/2007, B.14.

<sup>95</sup> Vande Lanotte *et al.*, supra note 92, pp. 362–363.

<sup>96</sup> *Stummer v Austria*, Decision of 7 July 2011, no. 37452/02.

<sup>97</sup> *Stummer v Austria*, *ibid.*, joint partly dissenting opinion of judges Tulkens, Kovler, Gyulumyan, Spielmann, Popović, Malinverni and Pardalos, para. 3.

to the right to healthcare.<sup>98</sup> These dissenting voices call for the court to dare to pick up the gauntlet in socio-economic matters, rather than hiding behind the national margin of appreciation. It remains to be seen whether those dissenting opinions find their way into the majority view.

In any case, an interesting point of thought formulated by Newdick can be cited to counter the opposing views. He urges the provision of healthcare to be viewed as a system of institutional ethics that recognises the need for hard choices between competing demands and tries to respond to the difficulties of resource allocation in a fair, equal and consistent way.<sup>99</sup> Thus, a distinction must be made between procedural and substantive rights, with emphasis on the former in resource allocation to ensure promoting equality between people, rather than the liberty of individuals. This coincides with the distinction that can be made in state obligations under, for example, the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 2 of the ICESCR allows for the progressive realisation of its rights, taking the limitations of the economic reality into account. The ICESCR acknowledges that the full realisation of all rights on short notice is impossible.<sup>100</sup> This does not, however, mean that it contains no immediately binding obligations of result. One core obligation is the prohibition of discrimination. Thus, the equality between persons is the base line of the ICESCR, similar to Newdick's view. In addition, states must strive to achieve the full realisation of the rights recognised, which means that in an ideal world resource allocation is no excuse to deny a person their rights. Therefore, ideally the abstract approach to healthcare policy makes way for a *pro persona* approach, advocated for by the dissenting judges in the aforementioned cases, in particular *Lopes de Sousa Fernandes v Portugal*.

Besides this legal *effet utile* argument, it is interesting to consult other disciplines that reflect on the affordability of human rights. Economic theorists propose the thesis that their effective implementation fosters economic growth, so that they must be seen as a social investment rather than as an economic cost.<sup>101</sup> Importantly, these theorists focus mainly on civil and political rights, which can be shown to have a positive effect on economic growth. A willingness of states to concede certain powers is a hallmark of stable regimes, which attract investors. One can expect however that socio-economic rights also positively affect growth, because they increase life expectancy and human capital and diminish economic inequality, which in turn feeds back into the stability of states. Nonetheless, empirical evidence is lacking.<sup>102</sup>

Apart from the context of socio-economic matters as such, the existence of European consensus is also relevant to the margin of appreciation, as it narrows the discretion of individual states.<sup>103</sup> The Council of Europe actively encourages its Member States to take public measures against smoking.<sup>104</sup> The European Union (to which 28 of the 47 Member States of the Council of Europe belong) too discourages smoking.<sup>105</sup> Moreover, several of the Member States are party to the Framework Convention on Tobacco Control of the World Health Organization.<sup>106</sup> This shows international support for the battle against the use of tobacco products, which the ECtHR will take into consideration. However, it should be noted that lifestyle differentiation in healthcare as such cannot rely upon the same obvious political like-mindedness. In the European Union, for example, social security is a competence that is not attributed to the European Union,

<sup>98</sup> *Lopes de Sousa Fernandes v Portugal*, supra note 13, partly concurring, partly dissenting opinion of judge Pinto de Albuquerque, para. 59.

<sup>99</sup> C. Newdick, 'Solidarity, Rights and Social Welfare in the NHS – Resisting the Tide of Bioethics?', in A. den Exter (ed.), *International Health Law. Solidarity and Justice in Health care* (2008), p. 94.

<sup>100</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, available at: <www.refworld.org/docid/4538838e10.html> (last visited 11 September 2019), para. 9; Sepulveda, supra note 12, p. 312.

<sup>101</sup> D. Farber, 'Rights as Signals', (2002) 31 *J. Legal Stud.*, p. 98; S. Koob et al., *Human Rights and Economic Growth an Econometric Analysis of Freedom and Participation Rights* (2017), p. 54.

<sup>102</sup> See K. Marslev & H.-O. Sano, *The Economy of Human Rights. Exploring Potential Linkages between Human Rights and Economic Development* (2016), p. 3, in particular p. 13 ff.

<sup>103</sup> *Petrovic v Austria*, Decision of 27 March 1998, no. 20458/92, para. 38; *Novruk and others v Russia*, Decision of 15 March 2016, nos. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14, para. 99; F. Edel, *The prohibition of discrimination under the European Convention of Human Rights* (2010), p. 118; Renucci, supra note 81, p. 165.

<sup>104</sup> Council of Europe, Resolution 1286 (2002) on campaigning against passive and active smoking – daring to innovate and step up public health protection measures.

<sup>105</sup> This is evidenced by the Tobacco Products Directive, which makes warning labels on tobacco products mandatory, and the recommendation by the European Council to the Member States to protect their citizens against second-hand smoke. See Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, *OJ L* 29 April 2014, no. 127, pp. 1–38; Council Recommendation of 30 November 2009 on smoke-free environments, *OJ C* 5 December 2012, no. 296, pp. 4–14.

<sup>106</sup> World Health Organization, WHO Framework Convention on Tobacco Control, UN: Genève 21 May 2013, <www.who.int/fctc/text\_download/en/> (last visited 11 September 2019).

but which remains a matter of national policy. It is up to the Member States to lay down the foundations of their social security schemes.<sup>107</sup> A comparison with Belgium's neighbouring states shows that only in Germany does the personal responsibility of individuals have a general influence on the benefits they may expect to receive in the context of a mandatory health insurance or legal basic health insurance. In The Netherlands, Luxemburg and France no similar general provision exists. German legislation unequivocally limits the principle of solidarity at the basis of its social security. The German state expects all insured individuals to take up their share.<sup>108</sup> The *Sozialgesetzbuch* stipulates that health insurance funds may, to a certain extent, hold individuals responsible for harmful behaviour to themselves.<sup>109</sup> It wishes to avoid abuse of the communal solidarity.<sup>110</sup> If one consciously exposes oneself to certain explicitly enumerated activities, the result is that one takes part in a non-covered risk.<sup>111</sup> The connection between solidarity and personal responsibility is not viewed as a blank cheque to leave individuals out in the cold, but, conversely, as an acknowledgment of personal autonomy and the right to self-determination.<sup>112</sup> In a more general sense the Belgian Constitution stipulates that everyone has a right to certain socio-economic rights, such as a right to healthcare, in accordance with the related duties.<sup>113</sup> The Constitutional Court acknowledged that the legislature may impose obligations in order to gain access to those rights,<sup>114</sup> in order to achieve a dignified life for all citizens.<sup>115</sup>

### 2.3.3. Grounds of discrimination

The articles on discrimination list a few explicit grounds but are in no way exhaustive.<sup>116</sup> Their wording speaks of grounds 'such as' and of the ground 'other status'. Therefore, other discrimination grounds than the 'traditional' examples in the articles exist. The ECtHR does not convey a clear message regarding those possible grounds.<sup>117</sup> Sometimes, it interprets 'other status' generously, at other times it applies a stricter view. In *Kjeldsen, Busk Madsen and Pedersen v Denmark* 'other status' is a broad notion that refers to each personal characteristic by which persons or groups of persons are distinguishable from each other.<sup>118</sup> On the basis of that interpretation, non-traditional grounds such as 'geographic location',<sup>119</sup> 'professional status',<sup>120</sup> 'ownership'<sup>121</sup> and 'health'<sup>122</sup> have been recognised as possible grounds of discrimination. However, the ECtHR changed its tune in *Springett and others v United Kingdom*.<sup>123</sup> In contrast to the principal grounds of discrimination, such as sex or race, the personal characteristic upon which the applicants relied is not innate. Moreover, it does not relate to a core personal belief or choice in a person's life, in contrast to 'religion' or 'political belief'. This strict interpretation narrows the notion of discrimination. Only the fundamental characteristics of a person are to be viewed as grounds of discrimination. Those are the traits that are either innate or that are so characteristic for human social life that they are inextrica-

<sup>107</sup> See M. Fuchs, 'Einführung', in M. Fuchs (ed.), *Europäisches Sozialrecht* (2013), p. 38; G. Van Limberghen, 'Sociale zekerheid en zesde staatsvorming: een Europeesrechtelijk perspectief', (2015) *BTSZ*, p. 422.

<sup>108</sup> Art. 1, Sozialgesetzbuch Fünftes Buch vom 20 Dezember 1988, *BGBI.* I, p. 2.477.

<sup>109</sup> Art. 52, para. 2 Sozialgesetzbuch Fünftes Buch vom 20 Dezember 1988, *BGBI.* I, p. 2.477.

<sup>110</sup> M. Nebendahl, 'SGB V § 52 Leistungsbeschränkung bei Selbstverschulden', in A. Spickhoff (ed.), *Medizinrecht* (2014), para. 1; R. Waltermann, 'SGB V § 52 Leistungsbeschränkung bei Selbstverschulden', in S. Knickrehm et al. (eds.), *Kommentar zum Sozialrecht* (2017), para. 1.

<sup>111</sup> D. Krauskopf, 'SGB V § 52 Leistungsbeschränkung bei Selbstverschulden', in R. Wagner & S. Knittel (eds.), *Soziale Krankenversicherung, Pflegeversicherung* (2008), para. 9.

<sup>112</sup> SG Berlin 10 December 2013, S 182 KR 1747/12, *BeckRS* (2014), 65961.

<sup>113</sup> Art. 23, gecoördineerde Grondwet van 17 februari 1994, *BS* 17 February 1994, p. 4.054.

<sup>114</sup> GwH 10 July 2008, no. 101/2008, B.33.2; GwH 27 July 2011, no. 135/2011, B.8.3.2; GwH 18 January 2012, no. 7/2012, B.19.2; GwH 5 March 2015, no. 24/2015, B.27.2; GwH 21 May 2015, no. 67/2015, B.10.2.

<sup>115</sup> GwH 27 July 2011, no. 135/2011, B.8.3.2.

<sup>116</sup> *Engel and others v The Netherlands*, Decision of 8 June 1976, nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, para. 72; *Rasmussen v Denmark*, Decision of 28 November 1984, no. 8777/79, para. 34; Haec & Vande Lanotte, supra note 36, p. 144; Velu & Ergec, supra note 36, p. 166, para. 167; Schabas, supra note 36, p. 572.

<sup>117</sup> J. Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights', (2013) 13 *HRLR*, no. 1, pp. 104–105.

<sup>118</sup> *Kjeldsen, Busk Madsen and Pedersen v Denmark*, Decision of 7 December 1976, nos. 5095/71, 5920/72 and 5926/72, para. 56.

<sup>119</sup> *Magee v United Kingdom*, Decision of 6 June 2000, no. 28135/95, para. 50.

<sup>120</sup> *Van Der Musselle v Belgium*, Decision of 23 November 1983, no. 8919/80, para. 41.

<sup>121</sup> *James and others v United Kingdom*, supra note 51, para. 74.

<sup>122</sup> *Kiyutin v Russia*, Decision of 10 March 2011, no. 2700/10, para. 56.

<sup>123</sup> *Springett and others v United Kingdom*, Decision of 27 April 2010 (dec.), nos. 34726/04, 14287/05 and 34702/05.

bly intertwined with the identity of a person.<sup>124</sup> A similar interpretation can be found in *Peterka v Czech Republic*, in which the ECtHR ruled that a ground of discrimination only falls under 'other status' if it is sufficiently analogue to the explicit grounds of discrimination, meaning it must be similarly innate or largely independent of personal choice.<sup>125</sup> In more recent case law, the court reconnected with its broad interpretation. In *Clift v United Kingdom* the court considered both viewpoints, before preferring the broad interpretation.<sup>126</sup> That trend is continuing in recent case law.<sup>127</sup> Building on this interpretation, smoking behaviour constitutes a distinguishing characteristic, prone to be considered under the prohibition of discrimination.<sup>128</sup> This reasoning can be extended to other grounds that form the basis of lifestyle differentiation.

Despite the foregoing, the strict interpretation of 'other status' is not without influence. The explicit grounds of discrimination represent traditional, 'suspect'<sup>129</sup> grounds.<sup>130</sup> Those are historical grounds given shape by international jurisprudence and state practice, which require a heightened degree of attention for difference in treatment based on those grounds which is highly likely to be unjustified.<sup>131</sup> A history of marginalisation and political and social exclusion of groups of the population casts its shadow upon them.<sup>132</sup> When a difference in treatment on such a ground comes into play, the ECtHR plays closer attention to its justification. The court requires that its aim answers to particularly serious reasons.<sup>133</sup> Thus, it limits the margin of appreciation, which it explicitly contrasts with the wide margin of appreciation in socio-economic matters.<sup>134</sup> Moreover, the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the particular circumstances.<sup>135</sup> Therefore, the gravity of a personal characteristic influences the evaluation of the margin of appreciation.<sup>136</sup> When a personal characteristic is more dependent of (subjective) personal will than of (objective) innate traits or traits that belong to the core of human personality, the margin of appreciation enlarges.<sup>137</sup> Conversely, a difference in treatment based on the suspect grounds

<sup>124</sup> S. Sottiaux, *Grondwettelijk recht* (2016), p. 404.

<sup>125</sup> *Peterka v Czech Republic*, Decision of 4 May 2010 (dec.), no. 21990/08.

<sup>126</sup> *Clift v United Kingdom*, Decision of 13 June 2010, no. 7205/07, paras. 55–58 and notably para. 59.

<sup>127</sup> *Valkov and others v Bulgaria*, supra note 78, para. 115; *Novruk and others v Russia*, supra note 103, para. 90; *Khamtokhu and Aksenchik v Russia*, Decision of 24 January 2017, nos. 60367/08 and 961/11, para. 61. In other cases the ECtHR refers to the broad interpretation of *Kjeldsen, Busk Madsen and Pedersen v Denmark*, without, however, explicitly embracing it. In one line of case law the court merely refers to other cases where the ground of discrimination in dispute has already been accepted. It is unclear whether the reference is to be viewed as tacit consent of the broad interpretation or solely as a restriction of the grounds of discrimination to 'acquired' grounds, see *Bah v United Kingdom*, Decision of 27 September 2011, no. 56328/07, paras. 36 and 45; *Carvalho Pinto de Sousa Morais v Portugal*, Decision of 25 July 2017, no. 17484/15, para. 45. In another line of case law, the court mentions the broad interpretation without concretely applying its principles to the case at hand, see *B. v United Kingdom*, Decision of 14 February 2012, no. 36571/06, paras. 54 ff. See also Gerards, supra note 117, pp. 109–110.

<sup>128</sup> For this reason, by way of example, a court of appeal in England and Wales scrutinised the justification of a difference in treatment between the patients of a psychiatric ward, who are not allowed to smoke, and the detainees of a prison, who are allowed to smoke, see *R (N)/Secretary of State for Health*, EWCA Civ 795, paras. 55–59, Court of Appeal (Civil Division) 24 June 2009, C1/2008/1307.

<sup>129</sup> See *British Gurkha Welfare Society and others v United Kingdom*, supra note 86, para. 88; *Carvalho Pinto de Sousa Morais v Portugal*, supra note 127, para. 45.

<sup>130</sup> There are a few grounds of discrimination which the ECtHR deems suspicious, see J. Gerards, 'Art. 14 EVRM', in J. Gerards et al. (eds.), *Sdu©ommentaar EVRM. Deel 1 – Materiële bepalingen* (2014), p. 1202 for a list and pp. 1202–1218 for the reason why they are branded suspicious.

<sup>131</sup> *Guberina v Croatia*, supra note 91, para. 73; A. Bayefsky, 'The principle of equality or non-discrimination in international law', (1990) 11 *HRLJ*, nos. 1–2, p. 19.

<sup>132</sup> See Edel, supra note 103, p. 118.

<sup>133</sup> *Schuler-Zraggen v Switzerland*, Decision of 24 June 1993, no. 14518/89, para. 67; *Burghartz v Switzerland*, Decision of 22 February 1994, no. 16213/90, para. 27; *Karlheinz Schmidt v Germany*, supra note 87, para. 24; *Van Raalte v The Netherlands*, supra note 87, para. 39; *S.L. v Austria*, Decision of 9 January 2003, no. 45330/99, para. 37; *Kozak v Poland*, supra note 87, para. 92; Bayefsky, supra note 131, pp. 18–19; Schabas, supra note 36, pp. 574–575; Sottiaux, supra note 124, pp. 407–408.

<sup>134</sup> *Stec and others v United Kingdom*, supra note 55, para. 52; *Runkee and White v United Kingdom*, supra note 88, para. 36; *Hämäläinen v Finland*, Decision of 16 June 2014, no. 37359/09, para. 109; Bayefsky, supra note 131, pp. 18–19; Schabas, supra note 36, pp. 574–575; Sottiaux, supra note 124, pp. 407–408. See also *Bah v United Kingdom*, supra note 127, para. s47.

<sup>135</sup> *Kozak v Poland*, supra note 87, para. 92.

<sup>136</sup> In *Bah v United Kingdom*, the ECtHR notes that the nature of the status upon which differential treatment is based, weighs heavily in determining the scope of the margin of appreciation (supra note 127, para. 47).

<sup>137</sup> O. Arnadóttir, 'The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights', (2014) 14 *HRLR* 2014, no. 4, p. 655.

is almost inherently unjustified.<sup>138</sup> It follows that a certain hierarchy is formed with stronger and weaker grounds of discrimination.<sup>139</sup>

In great part the grounds that form the basis of lifestyle differentiation rank low in that hierarchy. Smoking behaviour can serve as an example. A smoking habit requires a conscious decision to use tobacco products for the first time. In that regard it is certainly a weak ground of discrimination, independent of the circumstances of one's birth and one's social surroundings. However, the subsequent element of addiction makes it more difficult to assess how consciously a person chooses to continue smoking. The physical dependence on tobacco products catches many people in its web, who would rather quit smoking.<sup>140</sup> In part this is explained by genetic predisposition, which is beyond one's control.<sup>141</sup> In that respect, smoking behaviour shows similarities with innate characteristics. This begs the question to what extent the ECtHR should take individual susceptibility into account to determine how fundamental a trait (e.g. being a smoker, being an amateur of extreme sports...) is as a building block in the formation of a person's character. To what extent, for example, are skiers who break their leg on the slope themselves to be blamed for their personal inclination to seek thrills? The ECtHR's case law suggests that such a *pro persona* approach is rejected, at least in healthcare policy (see also the dissenting opinion in *Lopes de Sousa Fernandes v Portugal*, supra note 98). A reason why the margin of discretion is so wide in socio-economic matters is the challenge for states to balance the competing needs of one, two or a small group of individuals with the needs of others and the general collective (see e.g. *Sentges*). The ECtHR recognises the inherent difficulty of this task, therefore adopting a more abstract, general outlook on human rights protection. Its scrutiny shifts towards a marginal appreciation of state measures, so that it only steps in when those measures are manifestly in breach of the ECHR.

A related challenge is the question to what extent freedom of individual choice as such, which enables a person to act on his or her personal susceptibility to certain behaviour, is fundamental for a person to lead a worthwhile life. Hence, it is connected to the right to self-determination. Therefore, this question is picked up on in the next section.

### 3. Right to self-determination

#### 3.1. Self-determination

##### 3.1.1. Right to smoke

Many international human rights treaties contain a right to protection of private life, as does the ECHR in Article 8. This right presents itself as particularly suitable as a shield against mandatory conditions to healthcare because it prohibits unjustified interference by states in the private lives of their citizens. An inherent part of this right is the right to personal autonomy or self-determination. Article 8 of the ECHR does not mention this aspect explicitly.<sup>142</sup> The ECtHR originally did not read a right to self-determination as such in the text of the article, yet acknowledged that it contained an important guiding principle for interpreting the rights of the convention.<sup>143</sup> Gradually this view shifted towards an independent right.<sup>144</sup> It encompasses the ability to conduct one's life in a manner of one's own choosing, including the opportunity to pursue activities perceived to be of a physically harmful or dangerous nature for the individual concerned.<sup>145</sup> Article

<sup>138</sup> Schabas, supra note 36, p. 574.

<sup>139</sup> O. De Schutter, *The prohibition of discrimination under European human rights law. Relevance for the EU non-discrimination directives – an update* (2009), pp. 15–16; Arnardóttir, supra note 137, pp. 655–656.

<sup>140</sup> For the addictive nature of tobacco products, see US Department of Health and Human Services, *The health consequences of smoking: nicotine addiction: a report of the Surgeon General* (1988). Cessation numbers in smoking populations that indicate the wish to quit their habit, are low. See <[www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/cessation/quitting/](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/cessation/quitting/)> (last visited 11 September 2019). See also S. Dube et al., 'Cigarette smoking among adults and trends in smoking cessation – United States, 2008', (2009) 58 *MMWR Morb Mortal Wkly Rep*, pp. 1227–1232.

<sup>141</sup> Studies show that genetic predisposition accounts for 50–70% of the risk of addiction to tobacco products. See the quoted studies in N. Benowitz, 'Nicotine Addiction', (2010) 362 *N Engl J Med*, no. 24, p. 2300; I. McLaughlin et al., 'Nicotine Withdrawal', in D. Balfour & M. Munafo (eds.), *The Neuropharmacology of Nicotine Dependence* (2015). See also A. Edwards et al., 'A population-based twin study of the genetic and environmental relationship of major depression, regular tobacco use and nicotine dependence', (2011) *Psychol Med*, no. 41, pp. 395–405.

<sup>142</sup> M. Levinet, 'La notion d'autonomie personnelle dans la jurisprudence de la cour européenne des droits de l'homme', (2009) 1 *Droits*, no. 49, p. 3.

<sup>143</sup> *Pretty v United Kingdom*, Decision of 29 April 2002, no. 2346/02, para. 61; *K.A. and A.D. v Belgium*, Decision of 17 February 2005, nos. 42758/98 and 45558/99, para. 83; Levinet, *ibid*.

<sup>144</sup> *Tysiac v Poland*, supra note 13 para. 107; *Evans v United Kingdom*, supra note 53, para. 71; Levinet, supra note 142, p. 12.

<sup>145</sup> *Pretty v United Kingdom*, supra note 143, para. 66; *K.A. and A.D. v Belgium*, supra note 143, para. 83; *Jehovah's Witnesses v Russia*, Decision of 10 June 2010, no. 302/02, paras. 135–136; P. De Hert & S. Guthwirth, 'De seks is hard maar seks (dura sex sed sex). Het arrest K.A en A.D. tegen België', (2005) 26 *Panopticon*, no. 3, p. 6, para. 11.

8 of the ECHR protects the autonomy of each individual to choose a lifestyle of their liking, regardless of how much this deviates of any social conventions. To a certain extent the right to self-determination contains a 'right to intoxication'.<sup>146</sup> As evidenced by the many international treaties combatting substance abuse, however, this right is not absolute. State interference restraining the right to self-determination is possible within the limits of the ECHR.

### 3.1.2. Interference in smoking behaviour

States can interfere with the personal autonomy of their citizens and authoritatively constrain their behaviour. States are allowed to protect citizens against their own potentially harmful behaviour.<sup>147</sup> For instance, the obligation to wear a motorcycle helmet does not infringe the freedom of religious expression,<sup>148</sup> nor does the duty to wear a seatbelt violate the right to private life.<sup>149</sup> Article 8(2) of the ECHR provides that such interference is allowed in the interest 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. Limitations are justified if they are in accordance with the law and are necessary in a democratic society for the protection of one of the objectives set out above. The general interest and the rights of others limit the freedom of personal autonomy.<sup>150</sup>

Opposite the individual freedom of smokers stand the international obligations of states that require them to actively discourage smoking behaviour and promote good health in their citizens. Those positive obligations stand at odds with the negative obligation to refrain from interfering with the private life of citizens, without it being decidedly clear when one should take the upper hand. This is a challenge recognised by the ECtHR.<sup>151</sup> The UN Committee on Economic, Social and Cultural Rights, which monitors the implementation of the ICESCR by its parties, too acknowledges that the lifestyle of citizens can have an important influence on personal health and substantially hamper states' obligations. State parties can, therefore, not be held accountable for the personal behaviour of the citizen, so that the right to health must be interpreted as an obligation to provide equal access to healthcare (an obligation of means), rather than achieving good health in all citizens (an obligation of result).<sup>152</sup>

How is this tension to be resolved in the matter at hand? A first question to be answered is, whether lifestyle differentiation relates to one of the objectives set out in Article 8(2) of the ECHR. First, this limb mentions the 'protection of health'. General smoking bans are permitted on the basis of the goal to attain the protection of health of non-smoking individuals whose health suffers from second-hand smoke. Indeed, the ECtHR has ruled that forced exposure to passive smoking can amount to inhuman and degrading treatment.<sup>153</sup> However, smoking behaviour does not necessarily afflict others. Lifestyle differentiation can force smokers to alter their behaviour in the surroundings of their private sphere, where perhaps only their own health deteriorates. This begs the question whether the aim of protecting the individual's own health too is included in said objective. In principle the ECtHR accepts that it does.<sup>154</sup> Whether this acceptance can be extended to the context of smoking behaviour was the question at stake in a British case on the prohibition of the possession and use of tobacco products in a Scottish state owned psychiatric ward. The prohibition was contested on the basis of Articles 8 and 14 of the ECHR. The lower court ruled against the prohibition, arguing that even though Article 8 permits state interference, it is not a warrant for 'lifestyle fascism',<sup>155</sup> the Court of Appeal considered the ban to serve a legitimate aim not only to protect the health of personnel, but

<sup>146</sup> Term derived from D. Vanheule, 'Recht op roes: genieten maar met mate?', in UFSIA (ed.), *Over zichzelf beschikken? Juridische en ethische bijdragen over het leven, het lichaam en de dood* (1996), pp. 355–385.

<sup>147</sup> See *Laskey, Jaggard and Brown v United Kingdom*, Decision of 19 February 1997, nos. 21627/93, 21628/93 and 21974/93.

<sup>148</sup> *X. v United Kingdom*, Decision of 12 July 1978 (dec.), no. 7992/77; E. Brems, 'Article 14', in *A commentary on the United Nations Convention on the Rights of the Child* (2006), p. 36; K. Lemmens et al., 'Mensenrechtelijke aspecten van het rookverbod', in I. Samoy & E. Coutteel (eds.), *Het rookverbod uitbreiden? Juridisch onderzoek, casussen en aanbevelingen* (2016), p. 70.

<sup>149</sup> *X. v Belgium*, Decision of 13 December 1979 (dec.), no. 8707/79; Velu & Ergec, *supra* note 36, p. 668, para. 660.

<sup>150</sup> Vanheule, *supra* note 146, p. 358.

<sup>151</sup> See *Tysiac v Poland*, *supra* note 13, para. 109–111.

<sup>152</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, available at <[www.refworld.org/docid/4538838d0.html](http://www.refworld.org/docid/4538838d0.html)> (last visited 11 September 2019), para. 9.

<sup>153</sup> *Florea v Romania*, Decision of 14 September 2010, no. 37186/03, para. 60–61; *Eleftheriadis v Romania*, Decision of 25 January 2011, no. 38427/05, para. 50–55.

<sup>154</sup> *Acmanne and others v Belgium*, Decision of 10 December 1984 (dec.), no. 10435/83.

<sup>155</sup> *Charles McCann v The State Hospitals Board for Scotland*, CSOH 143, para. 52, Outer House, Court of Session 27 August 2013, P1265/12.

also the health of the patients themselves.<sup>156</sup> The ruling comes, however, with a caveat: the Court of Appeal indicated that it is not of the opinion that Article 8 of the ECHR applies because of the extraordinary circumstances of compulsory treatment and heightened state control, which inhibits the assimilation of a psychiatric ward with the freedom one enjoys in the comfort of one's own home. Moreover, the ban also served to protect the health of state personnel, not only the patients. Nevertheless, the reasoning of the court is of interest. In particular, the court considered it would be surprising that those tasked with the management of health services would not be allowed to implement the smoke-free policies advocated by the government. A second objective that Article 8(2) of the ECHR mentions is the economic well-being of the state and the rights of others. In healthcare matters the ECtHR has accepted as a legitimate aim the economic well-being of the state and the interest of other care-users.<sup>157</sup> The sustainability of provision of care to the community at large can trump personal interests, if a fair balance so requires.

Furthermore, states are granted a margin of appreciation to determine what is necessary in a democracy. Case law clarifies that the necessity implies a 'pressing' social need.<sup>158</sup> States are free to determine what those needs are and how they meet them under the subsidiary supervision of the ECtHR.<sup>159</sup> Their margin is not boundless, but depends on the importance of the right for the individual. The margin will tend to be narrower when a right is at stake that is crucial to the individual's effective enjoyment of key rights.<sup>160</sup> Only weighty reasons can justify interfering with a particularly important and intimate aspect of an individual's identity.<sup>161</sup> In absence of a European consensus the margin will be wider, particularly when a case is morally or ethically sensitive.<sup>162</sup> One restriction to the margin of appreciation is that courts sceptically examine the 'freedom of choice' that is left to citizens by states to alter their behaviour, which may be an interference in disguise.<sup>163</sup> This is of particular importance to lifestyle differentiation in healthcare. A state may not make the advantages an individual can freely choose or renounce dependent on the sacrifice of fundamental human rights. One fundamental human right may not be weighed against another. Choosing for a right to reimbursement of a pharmaceutical may require individuals to give up their right to self-determination. Whether such a consequence is justified under the ECHR is once again dependent on the length to which the ECtHR views the behaviour in question as a key aspect of an individual's character.

A final remark in this respect is that social perception can weigh in on the discussion of how fundamental the right to choose certain behaviour is for an effective enjoyment of the rights protected by the ECHR.<sup>164</sup> Changing societal views may lead to the margin of appreciation of states to widen or, conversely, narrow. This explains the ambivalent attitude to the right to intoxication, where certain substances such as hard drugs are fiercely cracked down upon, whilst other stimulating substances such as alcohol are leniently tolerated.<sup>165</sup> For smoking behaviour, for example, it seems that the absolute freedom to smoke without consequences is on the decline. Even though the number of smokers in the world is still sizeable, the many public measures combatting smoking behaviour suggest that freedom is no longer as paramount as it once was. In light of social perception, a caveat should be kept in mind when it comes to lifestyle differentiation. In its general comment on the right to health, the UN Committee on Economic,

<sup>156</sup> *Charles McCann v The State Hospitals Board for Scotland*, CSIH 71, para. 96, Second Division, Inner House, Court of Session 12 August 2014, P1265/12.

<sup>157</sup> *McDonald v United Kingdom*, supra note 31, para. 53 and 57.

<sup>158</sup> *Handyside v United Kingdom*, Decision of 19 December 1976, no. 5493/72, para. 48; *Dudgeon v United Kingdom*, Decision of 22 October 1981, no. 7525/76, para. 51; *Coster v United Kingdom*, Decision of 18 January 2001, no. 24876/94, para. 104; *Connors v United Kingdom*, supra note 88, para. 81; *Marper and S. v United Kingdom*, Decision of 4 December 2008, nos. 30562/04 and 30566/04, para. 101; *Couderc and Hachette Filipacchi Associés v France*, Decision of 10 November 2015, no. 40454/07, para. 92.

<sup>159</sup> *Couderc and Hachette Filipacchi Associés v France*, *ibid.*

<sup>160</sup> *X. and Y. v The Netherlands*, Decision of 26 March 1983, no. 8978/80, para. 24; *Christine Goodwin v United Kingdom*, supra note 35, para. 90; *Connors v United Kingdom*, supra note 88, para. 82; *Evans v United Kingdom* supra note 53, para. 77; *Dickson v United Kingdom*, supra note 53, para. 78; *Marper and S. v United Kingdom*, supra note 158, para. 102.

<sup>161</sup> *X. and Y. v The Netherlands*, *ibid.*; *Christine Goodwin v United Kingdom*, supra note 35, para. 90; *Connors v United Kingdom*, supra note 88, para. 82; *Evans v United Kingdom* supra note 53, para. 77; *Dickson v United Kingdom*, supra note 53, para. 78; *Marper and S. v United Kingdom*, supra note 158, para. 102.

<sup>162</sup> *Connors v United Kingdom*, supra note 88, para. 82; *Evans v United Kingdom* supra note 53, para. 77; *Dickson v United Kingdom*, supra note 53, para. 78; *Marper and S. v United Kingdom*, supra note 158, para. 102.

<sup>163</sup> O. De Schutter, *International Human Rights Law* (2014), p. 499.

<sup>164</sup> See for a discussion on how public opinion can influence decision making by national constitutional and international human rights courts, W. Leys, 'De Marge van Appreciatie en de Wet van de Luidste. Terughoudendheid in de rechtspraak van het Europees Hof van de Rechten van de Mens verklaard aan de hand van speltheoretische logica', (2015–16) 52 *Jura Falconis*, no. 2, 290 ff.

<sup>165</sup> Vanheule, supra note 146, pp. 383–384.

Social and Cultural Rights explicitly states that healthcare should be accessible to all, especially the most vulnerable or marginalised sections of the population.<sup>166</sup> Thus, selective conditions may not result in the healthcare system itself fostering marginalisation. In this regard reference can be made to the suspect grounds, which are born from a long history of marginalisation and political and social exclusion of certain groups of the population.<sup>167</sup> Here too, however, it can be argued that the 'strong', innate suspect grounds should be distinguished from the 'weak' grounds, which are more influenced by personal choice.

### 3.2. Waiver of right to healthcare

The common law legal systems know the adage '*volenti non fit iniuria*' in private law matters. This doctrine states that if one knowingly and voluntarily places oneself in a position where harm might result, one is not able to bring a claim for compensation of the damage that results from that position.<sup>168</sup> In civil law legal systems contributory negligence by the victim results in the latter not being able to claim full compensation.<sup>169</sup> Does a similar principle apply to the relationship between a state and its citizens if a citizen consciously exposes himself to harmful behaviour? In other words, can the state invoke the personal responsibility of the citizen to justify not fulfilling positive obligations to provide healthcare to the individual?

As discussed, the right to self-determination is not absolute since state interference is possible. That relative nature of the right suggests the individual itself can waive this right.<sup>170</sup> It is certain that fundamental rights can be waived according to several courts, as ruled, for example, by the Court of Justice of the European Union<sup>171</sup> concerning the Charter of Fundamental Rights of the European Union and by the ECtHR<sup>172</sup> concerning the ECHR. However, their case law is mainly focused on the right to a fair trial, where a waiver of the rights of defence is possible.<sup>173</sup> As regards other rights, case law is less perspicuous. Some rights are so fundamental to the democratic order that a waiver is excluded.<sup>174</sup> It is unclear, however, which rights are susceptible to waiver.<sup>175</sup> The current case law of the ECtHR provides no basis for deriving a general right to waiver.<sup>176</sup> Therefore, for each right of the ECHR a separate analysis is required in order to conclude whether waiver is possible.

As the ECHR contains no right to healthcare by itself, a waiver of this 'right' must fall under one of the explicitly formulated rights. In this case such a waiver seems to be an expression of the right to self-determination. The personal behaviour of, for example, smokers, leads to them not (or no longer) fulfilling the conditions for reimbursement. An analysis of the waiver of the right to healthcare, is therefore an analysis under Article 8 of the ECHR.

As the positive obligations to healthcare of states was largely shaped by the obligation to provide for care of detainees, the case law concerning waiver of this positive obligation is coloured by this context. The ECtHR has ruled that the behaviour of a detainee is a relevant factor in the assessment of the obligation, provided that the health risk created predominantly arises from that behaviour.<sup>177</sup> The use of contaminated

<sup>166</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, available at <[www.refworld.org/docid/4538838d0.html](http://www.refworld.org/docid/4538838d0.html)> (last visited 11 September 2019), para. 12.

<sup>167</sup> Edel, *supra* note 103, p. 118.

<sup>168</sup> C. Warren, "'Volenti Non Fit Injuria' in Actions of Negligence", (1895) 8 *Harv. L. Rev.* no. 8, p. 459.

<sup>169</sup> T. Vansweevelt & B. Weyts, *Handboek buitencontractueel aansprakelijkheidsrecht* (2009), p. 171; S. Stijns, *Verbintenissenrecht* (2013), *ibid.*, p. 45.

<sup>170</sup> See J. Aal, 'Waiver of human rights', (2010) 28 *NJHR*, pp. 304–305.

<sup>171</sup> Case C-62/90, *Commission v Germany*, [1992] ECLI:EU:C:1992:169, para. 23; Case C-44/94, *Fishermen's Organizations and others*, [1995] ECLI:EU:C:1995:325, para. 55; Case C-28/05, *Dokter and others*, [2006] ECLI:EU:C:2006:408, para. 75; Case C-394/07, *Gambazzi* [2009] ECLI:EU:C:2009:219, para. 29; Case C-619/10, *Trade Agency v Seramico Investments*, [2012] ECLI:EU:C:2012:531, paras. 52 and 55; Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, [2013] ECLI:EU:C:2013:107, para. 49.

<sup>172</sup> *Deweere v Belgium*, Decision of 27 February 1980, no. 6903/75, para. 49; *Le compte, Van Leuven and De Meyere v Belgium*, Decision of 23 June 1981, nos. 6878/75 and 7238/75, para. 59; *Melin v France*, Decision of 22 June 1993, no. 12914/87, para. 25; *Poitrimol v France*, Decision of 23 November 1993, no. 14032/88, para. 31; *Dvorski v Croatia*, Decision of 20 October 2015, no. 25703/11, para. 100.

<sup>173</sup> Lemmens *et al.*, *supra* note 148, p. 72.

<sup>174</sup> For example the right to personal liberty contained in Art. 5 of the ECHR. See *De wilde, Ooms and Versyp v Belgium*, Decision of 18 June 1971, nos. 2832/66, 2835/66 and 2899/66, para. 65; Haeck & Vande Lanotte, *supra* note 49, pp. 151–152.

<sup>175</sup> P. Frumer, *La renonciation aux droits et libertés. La convention Européenne des droits de l'homme à l'épreuve de la volonté individuelle* (2001), p. 28; Haeck & Vande Lanotte, *ibid.*, p. 152.

<sup>176</sup> Lemmens *et al.*, *supra* note 148, p. 71.

<sup>177</sup> Lemmens *et al.*, *ibid.*, p. 72.

needles<sup>178</sup> or refusal of treatment,<sup>179</sup> therefore, influences the margin of appreciation of states.<sup>180</sup> In those circumstances detainees themselves create a situation of which they know it is hazardous, in contrast to the situation where they are unwillingly subjected to degrading and inhuman circumstances by the government.<sup>181</sup> The consideration of the ECtHR limits the importance of the question whether waiver of rights by the individual is possible. It is dealt with under the doctrine of margin of appreciation.

The previous case law cannot be transposed as such to other contexts because of the peculiar situation of detainees. Nevertheless, outside prison walls the case *Jehovah's Witnesses v Russia* sheds a light on possible waiver under Article 8 of the ECHR. According to the ruling in that case, states do not breach their positive obligations to provide care when they do not medically treat citizens who refuse such treatment.<sup>182</sup> On the contrary, as long as the rights of third persons are not endangered, they violate the right to self-determination of those citizens should they force treatment upon them. In this case too the consideration by the ECtHR revolves around the margin of appreciation. Rather than a waiver of right, the court rules that the (harmful) behaviour of the individual is a factor in the balancing of interests that states must make whenever they limit the rights of Article 8.<sup>183</sup> For lifestyle differentiation this means that as long as, for example, smokers do not endanger the rights of others (which is a reason to impose smoking bans in publicly accessible places), a state must take their wish to lead such a lifestyle into account.

## 4. Conclusion

### 4.1. In general

Everyone has a fundamental right to healthcare. This is no different for the smoker. Moreover, to its core belongs the principle of equality, which in principle inhibits lifestyle differentiation in access to healthcare. Therefore, a state that wishes to combat smoking behaviour through its healthcare system must justify a distinction with well-founded reasons. Although both the health of the individual and the financial health of the state are legitimate aims, states must strike a fair balance between the individual interest and the competing interest of society at large (see **Figure 1**). The ECtHR supervises that balancing act, which is a key part of the ECHR and underlies the tensions mentioned in the introductory paragraph. It grants a wide margin of appreciation to states when they are faced with socio-economic challenges, because they are then tasked with assessing which priorities must be followed in allocating limited resources. The ECtHR rules that states are in a better position to balance all interests relating to their healthcare system than an international court. Therefore, the ECtHR seems to adopt an abstract outlook on human rights protection in healthcare rather than a *pro persona* approach, although dissenting opinions can be heard, which urge the court to step up to the challenge in this difficult area of human rights protection. Accordingly, the court respects policy choices unless they are manifestly unreasonable or ostensibly unfounded. The following figure collects some of the explanatory factors for the wide margin of appreciation. It collects the different 'rights' that can be part of the equation in the balance between the individual freedom of citizens and the protection of the general interest by states.

An important restriction to the margin of appreciation is in place. State measures must be proportionate to the aim sought to be realised. The fulcrum in scrutinising that proportionality is the gravity to choose to participate in a certain lifestyle for the effective enjoyment of the rights guaranteed by the ECHR (see **Figure 2**). For example, the more fundamental the ECtHR deems the freedom to smoke for personal development, the weightier the reasons need to be which are necessary to distinguish smokers from non-smokers, to treat them differently in healthcare and to interfere in their personal life. Conversely, the standard to justify a differentiation becomes lighter when that trait is deemed more dependent on personal choice. This explanatory factor (the 5<sup>th</sup> in the list in **Figure 1**) can thus greatly widen or narrow the margin of appreciation.

<sup>178</sup> *Shelley v United Kingdom*, supra note 56.

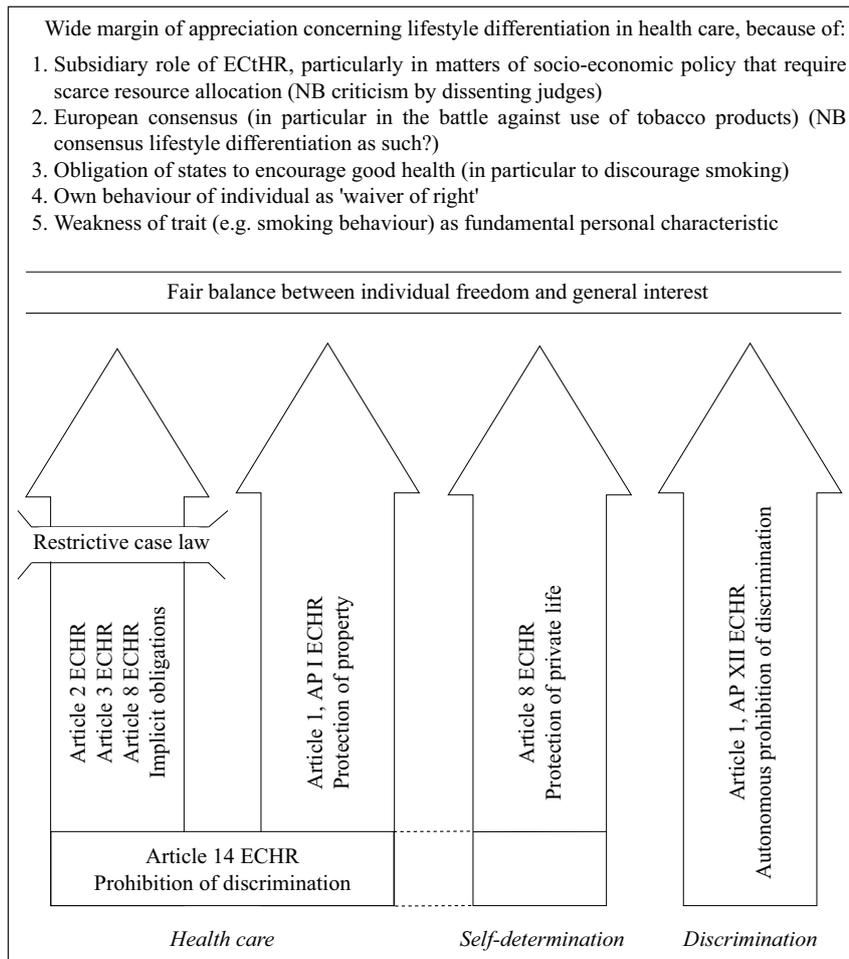
<sup>179</sup> *De Varga-Hirsch v France*, Decision of 9 May 1983 (dec.), no. 9559/81; *R., S., A. and C v Portugal*, Decision of 15 March 1984 (dec.), no. 9911/82; *B. v Germany*, Decision of 10 March 1988 (dec.), no. 13047/87.

<sup>180</sup> Lemmens et al., supra note 148, p. 72.

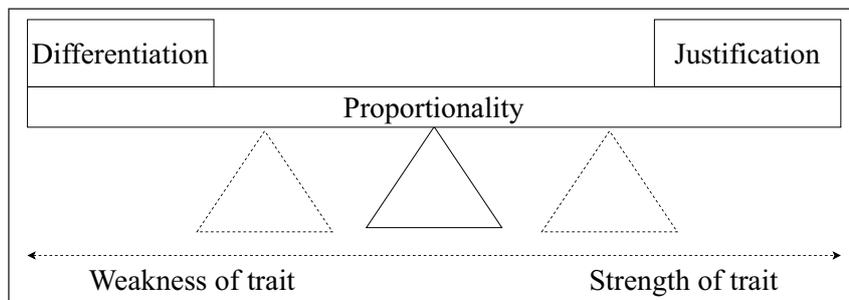
<sup>181</sup> *Shelley v United Kingdom*, supra note 56; *Nowosjki v Poland*, Decision of 29 November 1995 (dec.), no. 26756/95. See also *McFeeley and others v United Kingdom*, in which the detainees in a 'dirty protest' refused to wear the prison uniform. As the prison refused to provide alternative clothing, the detainees were forced to either wear soiled clothes or walk around unclothed. As their conditions were self-imposed, the ECtHR ruled that it followed that they alone must bear responsibility for the choice they have made (*McFeeley and others v United Kingdom*, Decision of 15 May 1980 (partly dec.), no. 8317/78, para. 54–55).

<sup>182</sup> *Jehovah's Witnesses v Russia*, supra note 145.

<sup>183</sup> Lemmens et al., supra note 148, pp. 72–73.



**Figure 1:** Synthesis of wide margin of appreciation.



**Figure 2:** Proportionality test with personal characteristic as fulcrum.

**4.2. Belgian measure put to the test**

Now that the outlines of possible lifestyle differentiation are drawn *in abstracto*, the Belgian initiative can be assessed as a concrete example to complete this contribution. That initiative makes the reimbursement of a pharmaceutical (Ofev) used to treat a lung disease (idiopathic pulmonary fibrosis, IPF) conditional on not smoking for at least six months prior to and during treatment.

The previous sections have made clear that states are in principle allowed to rely on lifestyle differentiation if the general interest so requires. In healthcare matters the ECtHR has accepted as a legitimate aim the economic well-being of the state and the interests of other care-users. The ECtHR, adopting a subsidiary position, allows a wide margin of discretion to states to balance competing interests, particularly in socio-economic matters. This section, therefore, focusses more on the proportionality test, which acts as a failsafe in that balancing act. The scrutiny adopted by the ECtHR regarding that test will probably be less severe when it comes to smoking behaviour, as it is a weaker trait (thus, the fulcrum in **Figure 2** is

positioned to the left). Personal susceptibility, which can come into play regarding nicotine addiction, seems to be rejected by the court as only dissenting opinions advocate for a more *pro persona* approach.

Concerning the distinction itself, it is clear that smoking and non-smoking patients who suffer from the same disease find themselves in sufficiently similar situations, as both require the same pharmaceutical to combat the same symptoms. The distinction seems objective as it is based on a clear difference between both categories, namely the inhalation of tobacco products. It also seems pertinent as it is said that IPF is worsened by the inhalation of tobacco smoke. However, the Belgian initiative uses the presence of the chemical nicotine in the bloodstream as a yardstick to differentiate between both categories of patients. That presence is not an adequate means to make the distinction envisaged by the Belgian initiative. After all, the inhalation of tobacco products is not the only way in which nicotine can enter the bloodstream. Other possible sources can be the chewing or snuffing of tobacco, the use of electronic cigarettes and reliance on healthcare products used in nicotine replacement therapy, which aid in the cessation of smoking. Thus, ironically, the smoking patient who tries to quit his/her habit might still be barred from reimbursement as those later products release low and controlled quantities of nicotine, without the other harmful substances found in tobacco. Hence, the distinguishing criterion is not pertinent in this case, because it catches all tobacco products.

Concerning proportionality, the following three issues can be raised:

- i. The loss of reimbursement is absolute when nicotine is detected in the bloodstream. The smoking patient loses the whole benefit. This begs the question whether the smoking patient does not lose, at least *de facto*, his/her right to good health when confronted with a costly treatment of his/her disease, as is the case with the Belgian initiative. In the case of a highly disabling disease such as IPF, where it is difficult for the smoker to earn his/her own income, the loss of reimbursement can be the difference between being treated and not. Should the loss not be partial, rather than total? In this respect the judgment in *Nitecki v Poland*, discussed above, comes to mind. At least, it can be questioned whether the total loss should not be gradually incurred when the patient incrementally fails to meet certain 'buffer'-measures. It is conceivable that a state mandates certain measures ranging from less to more intrusive, such as an obligation to undergo psychological addiction therapy or to switch to nicotine replacement therapy products, as conditions for full reimbursement. Those measures do not inexorably 'punish' the smoking patient as the current initiative does, but support the smoker in optimising his/her care. Importantly, the weakness of this argument lies in the marginal review on policy choices by the legislature granted to the judiciary branch, which prohibits it from assessing whether alternatives are more opportune. Only when the chosen measures are manifestly unreasonable in the light of other, equally valid, alternatives can the ECtHR take those alternatives into account.<sup>184</sup>
- ii. A second issue is the blanket character of the Belgian initiative. The mere presence of nicotine in the bloodstream is enough for the revocation of the reimbursement. No distinction is made between different values of that chemical. Thus, chain-smokers and smokers who use tobacco products less frequently are treated identically. The Belgian initiative requires smoking patients to be smoke-free for at least six months. That period raises the question whether the smoker who consciously attempts to stop smoking, but relapses with a single cigarette in that period should be tarred with the same brush as the heavy smoker, considering the consequences.
- iii. Finally the total loss of reimbursement might not be proportionate to the actual diminished efficacy of the pharmaceutical. A study found that the efficacy of the active substance of the pharmaceutical is independent of smoking status, when compared to the overall population.<sup>185</sup> According to the American Food and Drug Administration (FDA) the exposure to the active substance is 21% lower in current smokers compared to ex- and never-smokers, which can in fact hinder the efficacy thereof.<sup>186</sup> However, the FDA indicates that that effect is not sufficient to warrant a dose adjustment. Hence, if a smoking patient requires no greater amount of the pharmaceutical than a non-smoking patient yet has to pay more for it because he/she cannot rely on

<sup>184</sup> See in this regard the case-law of the Belgian Supreme Court, *supra* note 94.

<sup>185</sup> U. Costabel et al., 'Efficacy of nintedanib in idiopathic pulmonary fibrosis across prespecified subgroups in INPULSIS' Am', (2016) *American Journal of Respiratory and Critical Care Medicine*, no. 193, p. 184.

<sup>186</sup> FDA, *Drug product label: Ofev. Reference ID:3643917* (2014), available at <[www.accessdata.fda.gov/drugsatfda\\_docs/label/2014/205832s000lbl.pdf](http://www.accessdata.fda.gov/drugsatfda_docs/label/2014/205832s000lbl.pdf)> (last visited 11 September 2019), p. 10.

reimbursement, then the smoking patient bears a disproportionate financial burden. A counter-argument which can be raised is that continued smoking perpetuates and worsens the disease itself, which in concrete cases might require more frequent dosages.

Ultimately, only the ECtHR can render a conclusive verdict on the Belgian initiative. The hypothetical position of the court can, however, be predicted cautiously on the basis of its jurisprudence. Because of the wide margin of discretion, here enlarged by the weakness of smoking behaviour as a fundamental characteristic, and the ECtHR's reluctance to recognise a positive obligation to provide health care, national states stand in a strong position to differentiate on the basis of smoking behaviour. However, the blanket ban on the presence of nicotine in the bloodstream in combination with an absolute loss of reimbursement in the light of the actually diminished efficacy of the pharmaceutical raises issues of proportionality.

### Competing Interests

The author declares that he has no financial and non-financial interests that could undermine the objectivity, integrity and value of this publication. He has no relationship with any of the organisations mentioned throughout the publication.

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