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The Disjunctive Structure of Positive Rights under the European Convention on Human Rights

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Abstract

The European Court of Human Rights (ECtHR) has reiterated that states have discretion regarding what means to use to fulfil their positive obligations under the European Convention on Human Rights (ECHR). Given the "wide range of possible measures" that could be taken to ensure compliance with positive rights, these rights have a disjunctive structure since an omission has no definitive counterpart. This article examines how the ECtHR deals with the disjunctive structure of positive rights and how it addresses alternative protective measures that could have been extended. In order to identify the main points of contention, I first draw on legal-theoretical literature that has grappled with the structure of positive rights. I then examine what the Court actually does when it adjudicates positive obligation cases under qualified and unqualified rights. I analyse how and why the review endorsed in the ECtHR's judgments diverges from or converges with the theoretical model.

Keywords

European Convention on Human Rights (ECHR) – positive obligations – disjunctive structure of positive rights – proportionality

1 Introduction

There is little doubt that the European Convention on Human Rights (ECHR) imposes positive obligations upon states to ensure the rights enshrined

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therein.[1] In fact, the ECHR generates a whole gamut of such obligations to be applied in the light of the circumstances in which a particular right is invoked. In this context, the European Court of Human Rights (ECtHR or the Court) has clarified that

> the choice of means for ensuring the positive obligations under Article 2 [the right to life] is in principle a matter that falls within the Contracting State's margin of appreciation. There are a number of avenues for ensuring Convention rights, and even if the State has failed to apply one particular measure provided for by domestic law, it may still fulfil its positive duty by other means.[2]

Similarly, in relation to Article 3 (the right not to be subjected to torture, inhuman or degrading treatment), the ECtHR has stated that it is not its role "to replace the national authorities and to choose instead of them from among the wide range of possible measures that could be taken to secure compliance with their positive obligations".[3] Likewise, in the context of Article 8 (the right to

1 A positive obligation can be defined as "one whereby a state must take action to secure human rights". In contrast, a negative obligation "is one by which a state is required to abstain from interference with, and thereby respect, human rights". D. Harris, M. O'Boyle, E. Bates and C. Buckley, *Law of the European Convention on Human Rights* (Oxford University Press, Oxford, 2009) p. 18; see also W. Schabas, *The European Convention on Human Rights. A Commentary* (Oxford University Press, Oxford, 2015) p. 91. Some cases can be reviewed from the perspective of both negative and positive obligations, and sometimes the ECtHR refuses to explicitly indicate which of the two perspectives will be applied. The Court has repeatedly held that "the boundaries between the State's positive and negative obligations … do not lend themselves to precise definition". *Keegan* v. *Ireland*, 26 May 1994, ECtHR, Judgment, no. 16969/90, para. 49. This article does not scrutinize the Court's refusal to indicate whether the case will be reviewed from the perspective of negative or positive obligations. Neither does the article challenge the conceptualization of the case as one involving positive obligations.

2 *Cevrioglu* v. *Turkey*, 4 October 2016, ECtHR, Judgment, no. 69546/12, para. 55; *Fadeyeva* v. *Russia*, 9 June 2005, ECtHR, Judgment, no. 55723/00, para. 96; *Budayeva and Others* v. *Russia*, 20 March 2008, ECtHR, Judgment, no. 15339/02, paras. 134–135; *Öneryildiz* v. *Turkey* [GC], 30 November 2004, ECtHR, Judgment, no. 48939/99, para. 107; *Kolaydenko and Others* v. *Russia,* 28 February 2012, ECtHR, Judgment, no. 17423/05, para. 160; *Lambert and Others* v. *France* [GC], 5 June 2015, ECtHR, Judgment, no. 46043/14, para. 146.

3 *Eremia* v. *the Republic of Moldova*, 28 May 2013, ECtHR, Judgment, no. 3564/11, para. 50; *Bevacqua and S.* v. *Bulgaria*, 12 June 2008, ECtHR, Judgment, no. 71117/01, para. 82.

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private and family life)[4] and Article 11 (freedom of assembly and association),[5] it has been reiterated that states have different ways and means of meeting their positive obligations.

Accordingly, positive rights have a disjunctive structure since states have at their disposal different alternatives as to how to ensure the corresponding positive obligations.[6] In the context of a concrete case, these alternatives will have to be considered so that it can be eventually determined whether the state has failed to protect the applicant's rights. The Grand Chamber judgment in *O'Keeffe* v. *Ireland* can be used as an illustration. The applicant argued that the respondent state had failed to comply with its positive obligations under Article 3 since it had not ensured the prevention of sexual abuse of children by a school teacher. The applicant herself was a victim of these abuses. More specifically, she argued that if there had been better mechanisms for monitoring and reporting ill-treatment of children and a better system for dealing with complaints, there was a "real prospect" that the harm that she experienced would not have happened. The respondent state, on the other hand, highlighted the availability of reporting mechanisms and their effectiveness. The Grand Chamber did not assess the latter as sufficiently effective, since *inter alia* they did not encourage children and parents to complain about ill-treatment directly to the state authorities.[7] This assessment prompted five judges to dissent by questioning the value of the proposed alternatives: "… there is nothing to support the assumption that these parents would have complained more

4 *Hatton and Others* v. *United Kingdom* [GC], 8 July 2003, ECtHR, Judgment, no. 36022/97, para. 123; *Valiuliene* v. *Lithuania*, 26 March 2013, ECtHR, Judgment, no. 33234/07, para. 85.

5 *Plattform "Ärtze fur das Leben"* v. *Austria*, 21 June 1988, ECtHR, Judgment, no. 10126/82, para. 34.

6 A conceptual clarification is due here. The term "positive rights" refers to human rights that have corresponding positive obligations. Arguably, all rights trigger such obligations. However, when I use the term "positive rights" I refer only to this aspect of the right that triggers positive obligations, and I exclude the other aspect of the right that triggers negative obligations (the obligations upon the state to refrain from certain conduct). Respectively, when I used the term "negative right", I intend to exclude this aspect of the right that triggers positive obligations. In the text below, I also use the term "protective measures". Since states can resort to different measures to fulfill their positive obligations (see section 2.2 below), "protective measures" are understood as possible measures that states can use to fulfill their positive obligations. For the endorsement of the same definition of "positive rights", see M. Klatt, 'Positive Rights: Who Decides? Judicial Review in Balance', 13:2 *International Journal of Constitutional Law* (2015) pp. 354, 354.

7 *O'Keeffe* v. *Ireland* [GC], 28 January 2014, ECtHR, Judgment, no. 35810/09, para. 163–4.

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rigorously if 'encouraged' by further regulations and/or by the creation of a special body responsible for examining complaints about teachers".[8]

The above example demonstrates that it is difficult to assess compliance with positive obligations without due consideration of alternative measures of protection that could have been undertaken. At the same time, the assessment of alternatives can trigger a whole range of complex issues concerning their effectiveness and how calculations as to this effectiveness can be made. This complexity, as reflected in the case law of the ECtHR, lies at the heart of this article. Its main objective is to understand how the Court deals with the disjunctive structure of positive rights and how it tackles the alternative measures proposed by either the applicant or the state. This understanding is facilitated by the theoretical model of proportionality that has been built by Alexy and other constitutional law scholars as a framework within which the complex issues revolving around alternatives can be tackled.[9]

Despite the abundance of literature on positive obligations under the ECHR, this complexity has remained a blind spot. The existing literature on positive obligations is largely descriptive[10] or focused on particular subject areas of the case law.[11] While Xenos[12] and more recently Lavrysen[13] have come forward with more theoretical analysis that is useful, their contributions do not fully explore the problem of alternatives. Christoffersen, Gerards, Brems and Lavrysen have investigated the issue of alternatives in the context of negative obligations in relation to the application of the less restrictive means test. In certain aspects their investigation is of assistance for present purposes. While

8 Joint Party Dissenting Opinion of Judges Zupancic, Gyulumyan, Kalaydjieva, De Gaetano and Wojtyczek, para. 17.

9 My starting assumption is that the proportionality model has a central role in human rights law. See D. Beaty, *The Ultimate Rule of Law* (Oxford University Press, Oxford, 2004); M. Kumm, 'The Idea of Socratic Contestation and the Right to Justification', *Law and Ethics of Human Rights* (2010) p. 142. On the widespread endorsement of the proportionally model, see M. Kumm and M. Meister, 'Proportionality – a Benefit to Human Rights? Remarks on the ICON Controversy', 10:3 *International Journal of Constitutional Law* (2012) p. 687.

10 A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Oxford, 2004); J. Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights* (Council of Europe Publishing, Strassburg, 2007).

11 R. McQuigg, 'Domestic Violence as a Human Rights Issue: Rumor v. Italy', 26:4 *European Journal of International Law* (2016) p. 1009.

12 D. Xenos, *The Positive Obligations under the European Convention of Human Rights* (Routledge, Abingdon, 2011).

13 L. Lavrysen, *Human Rights in a Positive State* (Intersentia, Antwerp, 2016).

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they tend to focus on negative obligations and qualified rights,[14] here I address positive obligations under both qualified and unqualified rights. This wider scope of enquiry is necessary due to the different approaches to the structure of these two groups of rights, and the need to explain these differences in the context of positive obligations. To this end, I will focus on the positive obligations triggered under the substantive limbs of Articles 2, 3 and 8 of the ECHR.[15] Prominence is given to judgments delivered by the Grand Chamber. A cluster of Chamber judgment was also selected for analysis. The selection was made on the basis of references in the Grand Chamber judgments and my own observation of the case law from the last six years. While not exhaustive, the selection of case law on positive obligations is sufficiently representative to allow a meaningful answer to the question. To better frame the contribution of this article, it is also important to observe that generally the law on international responsibility for omissions, *i.e.* for failure to undertake actions or adopt certain conduct, is not well developed and there is a scarcity of relevant literature.[16] This article contributes to addressing this gap.

The consideration of alternative measures for ensuring the rights necessarily requires a foray into the structure of rights, and more specifically the analytical steps followed in the course of human rights law review. Section 2 thus draws on legal-theoretical and constitutional law literature that has grappled with the structure of positive rights. No argument is necessarily proposed that the ECtHR should follow the outlined theoretical model in the light of the ECHR's specificities as clarified in section 3. Still, consideration of how and why the review endorsed in the ECtHR judgments diverges from or converges with this model is valuable. The value lies *inter alia* in the framework for considering alternatives offered by the theoretical model. Having signposted the main theoretical issues and introduced the distinction between general and specific positive obligations (section 4), I proceed to analyse the case law by first focusing on the rights protected by Articles 2 and 3, where alternatives are relevant for the application of the test of reasonableness (section 5). I then

14 J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Brill Nijhoff, Leiden, 2009); J. Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', 11:2 *International Journal of Constitutional Law* (2013) p. 466; E. Brems and L. Lavrysen, 'Don't Use a Sledgehammer to Crack a Nut: Less Restrictive Means in the Case Law of the European Court of Human Rights', 15:1 *Human Rights Law Review* (2015) p. 139.

15 The procedural limb, *i.e.* the obligation upon the state to conduct criminal investigation, has been excluded from the analysis.

16 J. Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act', 28:4 *European Journal of International Law* (2017) 1133, p. 1135.

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focus on the right to private life, where alternatives are pertinent for the application of the fair balance test (section 6).

The ECtHR's case law is presented in its best light, despite the awareness that often the method of review adopted by the Court is haphazard, which is not conductive to coherence and clarity.[17] This deficiency has been clearly observed in relation to how the Court adjudicates positive rights.[18] The margin of appreciation doctrine, whose role will be explained in section 3 below, has also been subject to criticism due to its unprincipled application.[19] Yet these deficiencies are not an insurmountable obstacle in extracting some general principles from the case law and providing an account of what the Court actually does when it adjudicates positive obligation cases. The method employed here both reflects upon and explains the approach taken by the Court.

2 Theoretical Discussion

2.1 *The Principle-Like Character of Rights*

In his influential work *A Theory of Constitutional Rights,* Alexy builds a model upon the consideration that rights have a principle-like character.[20] As opposed to rules, principles are optimization requirements that demand that something be realized to the greatest extent possible, given the legal and factual possibilities.[21] A number of consequences flow from Alexy's model. The most immediate is the principle of proportionality. This principle with its sub-principles of suitability (rational connection between the purpose and the means restricting the right), necessity and proportionality *stricto sensu*

17 S. Greer, 'What's Wrong with the European Convention on Human Rights?', 30:3 *Human Rights Quarterly* (2008) 680, p. 697.

18 P. van Dijk, '"Positive Obligations" Implied in the European Convention on Human Rights: Are the States Still the 'Masters' of the Convention?', in M Castermans-Holleman, F. van Hoof and J. Smith (eds.), *The Role of the Nation-State in the 21-Century. Human Rights, International Organizations and Foreign Policy. Essays in Honour of Peter Baehr* (Kluwer Law International, Dordrecht, 1998) 17, p. 22; P. Thielbörger, 'Positive Obligations in the ECHR after the *Stoicescu* Case: A Concept in Search of Content?', *European Yearbook on Human Rights* (2012) p. 259, at p. 261.

19 J. Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights', 29:3 *Netherlands Quarterly of Human Rights* (2011) p. 324.

20 R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, Oxford, 2010) pp. 84–86.

21 Alexy, *supra* note 20, p. 47; R Alexy, 'Constitutional Rights, Balancing and Rationality', 16:2 *Ratio Juris* (2003) p. 131, at p. 135.

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logically follows from the nature of principles.[22] Another consequence is the wide conception of the definitional scope of the rights, *i.e.* when interpreting their meaning, various interests worthy of protection can be embraced. This implies that protection of the underlying interest is easily extended in principle. If a contrary approach were to be followed, there is a danger that protection would not even be afforded in cases where it could be relevant.[23] This wide conception of the definitional scope of the rights corresponds to the equally wide conception of the limits and the reasons justifying restrictions of rights.[24]

The principle-like character of rights has important implications for the structure of rights. In particular, it implies a bifurcation between the analysis of the definitional scope of the right (definitional stage) and the review of the justifications (the application stage).[25] This structure is reflected in the express limitation clauses of Articles 8–11 of the ECHR and implies a preliminary question as to what is *prima facie* protected by the right (the definitional stage of the analysis) and then, once the protective scope of the right has been released, what is definitely protected, taking into account the limitation clauses.[26]

This model applies to negative (defensive) rights. In relation to the rights to positive state action, Alexy observes that they invoke the most controversial questions of recent constitutional doctrine.[27] They trigger disagreements about the nature and function of the state, imply assessments of the state of society and invoke issues of distribution. Still, he maintains, "entitlements [rights to positive state actions], just like defensive rights, can have *prima facie*, or principled, character". As already explicated in relation to defensive rights (rights to non-interference), "if the action falls within the scope of the right and the limiting clause is not satisfied, the right-holder has a definitive right". Alexy adds that "[t]his applies as much to entitlements as it does to defensive rights".[28]

22 Alexy, *supra* note 20, p. 66.

23 *Ibid.*, p. 217.

24 *Ibid.*, p. 201.

25 J. Gerards and H. Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights', 7 *International Journal of Constitutional Law* (2009) p. 619.

26 See G. van der Schyff, *Limitation of Rights* (Wolf Legal Publishers, Oisterwijk 2005); G. van der Schyff, 'Interpreting the Protection Guaranteed by the Two-stage Rights in the European Convention on Human Rights: the Case for Wide Interpretation', in E. Brems and J. Gerards (eds.), *Shaping Rights in the ECHR. The Role of the European Court of human Rights in Determining the Scope of Human Rights* (Cambridge University Press, Cambridge, 2013) p. 65.

27 Alexy, *supra* note 20, p. 288.

28 *Ibid.*, p. 297.

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Similarly to Alexy, Barak also maintains that the structure of positive rights corresponds to that of negative rights.[29] Accordingly, the definition of positive rights, much like that of negative rights, has to be interpreted generously. As I will show in section 6 below, this proposition is followed by the Court, which has certain repercussions that will be explained. Without much effort to problematize the issue, Barak also adds that the legality requirement can be applied in the same way as in the context of negative rights: "[i]n order for the legislator's omission (in protecting the positive right) to be justified, this justification must be based upon a legal provision". As I will show in sections 5 and 6 below, this proposition is not necessary followed by the Court; the underlying reasons for this divergence will be addressed also.

Once the review moves to the application stage, it has to be demonstrated that the omission advances a proper purpose and that there is a rational connection between the omission and the purpose (the suitability requirement). Similarly, Barak maintains that the last two sub-tests of the proportionality review (necessity and proportionality *stricto sensu*) can be comparably applied to positive rights.[30]

In contrast to Barak, Möller posits that the suitability and necessity subtests cannot be relevant to positive rights. Möller argues that since in almost all circumstances the realization of these rights requires scare resources, "any limitation will always further the legitimate goal of saving resources and will be always suitable and necessary to the achievement of that goal". Möller clarifies that the first stages of the classic proportionality test are not helpful "in determining the content of resource-sensitive rights under conditions of scarcity".[31] He adds that the only meaningful test will be the balancing stage.

Indeed, as Möller suggests and as will be shown in more detail in sections 5 and 6, the ECtHR's approach is much less strict than the classic proportionality test as developed by Alexy and Barak. The implications of the principle theory for positive rights need to be also considered with greater care than what Alexy and Barak have advanced at a theoretical level. Specifically, more serious consideration needs to be given to the implications from the broad definitional scope and the triggering of positive obligations every time this scope is invoked. For now, these issues will yield place to further theoretical elucidations regarding the structure of positive rights.

29 A. Barak, *Proportionality. Constitutional Rights and their Limitations* (Cambridge University Press, Cambridge, 2012) pp. 429–434.

30 *Ibid*, pp. 429–434.

31 K. Möller, *The Global Model of Constitutional Rights* (Oxford University Press, Oxford, 2012) p. 179.

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A brief clarification regarding unqualified rights is due here. Since they are balancing-free norms, they are rules under the Alexy's model. However, there might be implied narrowing of the initial scope of the right.[32] Accordingly, some form of balancing at the definitional level might be unavoidable when deciding concrete cases. In this sense, they are not completely immune from balancing.[33] However, this is more relevant to circumstances that could involve a breach of negative obligations, where general interests might interfere at the definitional stage because not every use of state power is outright illegitimate.[34] When it comes to positive obligations corresponding to unqualified rights, little theoretical discussion has been generated and no model has been proposed. It is hard to sustain that these obligations are unqualified and thus immune to balancing and to the theoretical problems addressed in the next sections. However, in comparison with qualified rights, the structure of review followed by the ECtHR is characterized by some distinctiveness that will be addressed in section 5.

2.2 *The Disjunctive Structure of Positive Rights*

Despite the analogy, Alexy admits that there is a structural distinction between defensive rights and the rights to positive state action: "if there is a *command* to protect or support something, then not every act which represents or brings about protection or support is required".[35] There is thus a variety of ways to protect and different means for achieving certain ends. Alexy observes that if there is one single suitable protective or supportive act necessary to satisfy the protective right, then the structure of the protective right will match that of defensive rights.[36] If there is only one effective means, the state must adopt it, which appears to reflect straightforward situations. However, beyond these situations, positive rights have alternative and disjunctive structure. As opposed to the conjunctive structure of defensive rights, the alternative structure of positive rights means that an omission has no definitive counterpart.[37]

32 Alexy, *supra* note 20, p. 72.

33 S. Smet, 'The "Absolute" Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR', in Brems and Gerards (eds.), *supra* note 26, pp. 273, 275; Christoffersen, *supra* note 14, p. 84.

34 N. Mavronicola, '*Güler and Öngel v Turkey*: Article 3 of the European Convention on Human Rights and Strasbourg's Discourse on Justified Use of Force', 76:2 *Modern Law Review* (2013) 370, p. 382; M. Nowak 'Challenges to the Absolute Nature of the Prohibitions of Torture and Ill-Treatment', 23:4 *Netherlands Quarterly of Human Rights* (2005) 674, p. 678.

35 Alexy, *supra* note 20, p. 308.

36 *Ibid*, p. 309.

37 R. Alexy, 'On Constitutional Rights to Protection', 3 *Legisprudence* (2009) 1, p. 5.

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It can be argued, however, that there is a range of reasonable alternatives and it might be possible to advance a range of actions to protect the rights. Indeed, in the context of the concrete case adjudicated by the ECtHR, such a range of actions is proposed so that the alleged omission can become more cognizable (see sections and 5 and 6 below).

2.2.1 Comparison with Negative Rights and the Less Restrictive Means Test

The disjunctive nature of the means-end relationship, however, does not make positive rights fundamentally different from negative rights. Alexy observes that "[j]ust as a protective right requires the adoption of at least one means of protection, so defensive rights exclude the adoption of any means of destruction and adverse effect".[38] This requires some further elaboration. In the context of negative rights, the necessity test as a sub-test of the proportionality analysis asks whether any less intrusive means would achieve the same end. This is an empirical question of prognosis and causation.[39] The necessity test thus presupposes a comparison of different suitable means and an evaluation as to which is less restrictive from the perspective of the right.[40] The rationale behind the less restrictive means test is to prevent unnecessary restrictions when the general interests (as outlined in the limitation clauses *e.g.* Article 8(2) ECHR), can be equally well protected through other means. Although a means can be effective in terms of satisfying competing rights or public interests, it might be too intrusive given the availability of other less intrusive means.[41] There is thus a variety of means to protect public interests, and the necessity test presupposes choosing a less restrictive one from the perspective of the right affected.

38 Alexy, *supra* note 20, p. 308.

39 The test of necessity has to be distinguished from proportionality (in the narrow sense): "a measure may be the least intrusive means to achieve a certain end, and yet even the least intrusive measure may be too high a price to pay in terms of the interference with other legally recognized interests". Alexy, *supra* note 20, p. xxxi.

40 Christoffersen, *supra* note 14, p. 114; A. Sweet and J. Mathews, 'Proportionality Balancing and Global Constitutionalism', 47 *Columbia Journal of Transnational Law* (2008–2009) 72, p. 95; M. Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional justice', 3:2 *International Journal of Constitutional Law* (2004) 574, p. 580; Brems and Lavrysen, *supra* note 14, p. 142.

41 T. Gunn, 'Deconstructing Proportionality in Limitation Analysis', 19 *Emory International Law Review* (2005) 465, p. 495.

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A whole gamut of problems arises from the application of the less restrictive means test.[42] Arguably it has the potential to extinguish the exercise of legislative discretion when formulating laws and taking measures that limit rights.[43] For this reason, in Canadian constitutional law, for example, no hard-edged minimum impairment test is applied. No requirement is thus imposed that the *least* intrusive or best possible option must be chosen.[44] Rather,

> [t]he tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of *reasonable alternatives,* the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.[45]

In contrast to Canada where the least injurious means test has been relaxed, in Israel its application has been restricted. As Hickman explains, the test only applies where "there are alternative means available that better advance the objective of the law or decision in question, or where it will achieve the objectives equally as well".[46] In other words, no alternative would exist unless it is considered as effective as the means already adopted.[47] This relates to the lurking danger that the least drastic means test could be an assault against the state's purpose since the existing alternatives might be so impractical as not to afford the state any choice but to abandon its purpose.[48] In addition, decisions concerning alternatives and their effectiveness are taken from the

42 This test can be also framed as minimum impairment or less injurious/onerous means test.

43 It could be argued that even if the *least* restrictive means test is applied, there is still scope for the exercise of legislative discretion since it might be possible to choose between measures that impair rights to an identical degree.

44 T. Hickman, 'Proportionality: Comparative Law Lessons', 12:1 *Judicial Review* (2007) 31, p. 42; S. Choudhry, 'So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1', 34 *Supreme Court Review* (2006) 501, p. 507.

45 *Libman* v. *Quebec* (*Attorney General*), 8 October 1997, Supreme Court of Canada, Judgment [1997] 3 SCR 569, para. 58, emphasis added.

46 Hickman, *supra* note 44, p. 51.

47 Gratuitous interferences with individual rights will not be tolerated; if the means advanced by the state can be less onerous with no sacrifice of the ends pursued by the state, the less onerous means must be deployed. Barak, *supra* note 29, p. 321.

48 R. Bastress, 'The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria', 27 *Vanderbilt Law Review* (1974) 971, p. 1020.

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perspective of a particular applicant in the particular case; the alternatives, however, can have wide-ranging repercussions for other individuals and in this sense be multidimensional since a multitude of interests might be affected.[49] The search for alternatives requires choices well-suited to the interests of a multitude of parties, and not merely a choice most solicitous of the rights of the individuals in the particular case that is adjudicated.

The ECtHR itself does not consistently apply the less restrictive test to qualified rights in the context of negative obligations.[50] This is an approach that can be linked with its institutional settings[51] and the related application of proportionality in a holistic, general and compressed way, looking at all the events and factors together.

2.2.2 More Protective Alternative Criterion

When considering alternatives and assessing their contribution to the achievement of certain aims, further distinctions between positive and negative rights can be highlighted. In the context of negative rights, the following question is asked: which is the less restrictive alternative from the perspective of the individual right? In the context of positive rights, the question as to the alternatives could be potentially formulated as (i) which are the best protective alternatives from the perspective of the particular right? or (ii) which are the least exacting alternatives from the perspective of competing rights and general interests (*e.g.* least exacting in terms of budgetary calculations *etc.*)? The answer to these questions is prone to be contestable. These two questions represent two extremes of the effectiveness spectrum. If the *most* effective (best protective) alternative is required, this might lead to impossible financial costs and burdens on the state; therefore, this is not a feasible way to consider positive rights. If the question asked is which are the least exacting alternatives

49 An interference with a negative right can be justified not only by reference to its necessity in protecting certain common interests, but also by reference to its necessity in protecting individual positions of others. Similarly, a denial of a positive right can be justified by reference to the need to protect the rights of others. Alex, *supra* note 20, p. 309.

50 Brems and Lavrysen, *supra* note 14, p. 144; Gerards, *supra* note 14, p. 466; E. Brems, 'Human Rights: Minimum and Maximum Perspectives', 9:3 *Human Rights Law Review* (2009) 349, p. 363. For a judgment where the Court considered the availability of less restrictive means, see *Nada* v. *Switzerland* [GC], 12 September 2012, ECtHR, Judgment, no. 10593/08, para. 183. In *Hatton* v. *the United Kingdom*, 2 January 2001, ECtHR, Judgment, no. 36022/97, para. 97 (not followed by the Grand Chamber): "States are required to minimize, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights".

51 Christoffersen, *supra* note 14, p. 70.

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from the perspective of competing interests, this might lead to placing rights at lower level than general considerations, including financial concerns. Here, it can be also mentioned that one-side of the equation, namely the general interests, might be very abstract and difficult to grasp,[52] which further militates against setting a test of the least exacting alternatives from the perspective of general interests.

In the context of negative rights and the limitation analysis, no question is asked as to which are the least exacting alternatives from the perspective of the general interests (the proposed alternative, however, has to be as protective to general interests as the one already chosen by the state). The reason for not asking this question is that rights have priority.[53] In fact, if the above question were to be asked the whole idea of rights collapses.[54] Still, a less restrictive measure might have higher financial costs than alternative measures, and this certainly has an impact. As Brems and Lavrysen have observed, few people would accept that "there are no limits to the resources that must be mobilized in order to minimise an interference with a right".[55] They admit that financial and administrative costs can be taken into account; they invoke both "the

52 A. McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', 62 *Modern Law Review* (1999) p. 671, at p. 674. In the context of negative rights and the limitation analysis, the question whether the limitation pursues a legitimate purpose (public order, *etc.*) is easily answered in affirmative. It is rarely a problematic stage of the analysis. Although it need to be considered that when an objective is broadly framed (as the objectives framed in Articles 8–11 ECHR), it might be easier for the government to show that a measure limiting the right is suitable. However, it will make it more difficult for the government to show that other less-restrictive measure could not have been chosen.

53 This principle implies that Convention rights are in principle afforded greater weight than public interests. S. Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights', 23:1 *Oxford Journal of Legal Studies* (2003) p. 405, at p. 413. This principle does not exclude the possibility that in light of the nature and/or quantity of the public interests, they might outweigh the individual right. S. Greer, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate', 63 *Cambridge Law Journal* (2004) p. 412, at p. 417. See also L. Cariolou, 'The Search for an Equilibrium by the European Court of Human Rights', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Intersentia, Antwerp, 2008) p. 261. Convention rights should be granted presumptive, although no conclusive, priority over competing public and private interests.

54 This analysis might have to be nuanced when individual negative rights compete with another persons' negative right.

55 Brems and Lavrysen, *supra* note 14, p. 144.

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priority-to-rights-principle" and the principle of not imposing undue burden on the state.

Very similarly, in the context of positive rights, a moderate path needs to be found between effective alternatives for ensuring the right and not imposing unreasonable burden from the perspective of general interests. The question could then be shaped as to which are the *more* protective alternatives from the perspective of the particular right. Barak has formulated this question in the following way: "to satisfy the test, there should be no possible alternative which would fulfil the proper purposes to the same extent while providing better protection to the positive constitutional right".[56] Accordingly, not only do calculations in terms of more protective alternatives needs to be made, but also an assessment as to whether these fulfil the state objectives to the same extent. This latter is related to the suitability test. If very general and abstract aims are accepted, as has been the practice of the ECtHR, then it might be impossible to judge whether an alternative measure is equally effective from the perspective of the state interest (see section 6 below).

The central point here is that like positive rights, negative rights also presuppose consideration of alternatives and challenging questions of prognosis and causation. These considerations emerge in the course of the limitation analysis. In contrast, when the issue is formulated as one involving positive rights, the search for alternatives and the analysis of the means-end relation are not textually underpinned, and it can be expected to be less structured.[57] In addition, the search for alternatives might be more complicated since positive rights might imply more extensive plurality of means for their realization, as explicitly acknowledged by the ECtHR. Still, it can be contended that given the facts of a particular case, it is easier for the Court to determine whether certain measures are effective and if other alternative measures are more effective. In this sense, the circumstances of the case itself can be illuminating as to whether better and more effective alternatives are available and how the balancing is to be done. In sections 5 and 6, we shall see how the ECtHR approaches alternatives once confronted with the specific case and whether it searches for more protective alternatives, as the theoretical model demands.

56 Barak, *supra* note 29, p. 433.

57 On the issue of causation and its flexible application in the context of positive obligations, see V. Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the ECHR', 18:2 *Human Rights Law Review* (2018) p. 309.

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2.2.3 Application of the Balancing Test to Positive Rights

Having discussed how to approach alternatives in the disjunctive structure of positive rights, the final step in the human rights review exercise can be considered. In relation to this step, Barak suggests that the proportionality *stricto sensu* test requires that

> the more important the marginal protection of the positive constitutional right and the greater the chances of fulfilling that right, then the requirement that the marginal benefits to the public interest or to other constitutional right by avoiding the enactment of legislation should be more socially important and more urgent, and the probability of their occurrence greater.[58]

It follows that the more important the protection of the right is, the more robust public interest consideration is required to justify not extending protection. It can be also suggested that if the individual interest at stake is of high importance, less deference is owed to the state interests.[59] The more critical the governmental interest, the more important becomes any difference in effectiveness between the protective measure already undertaken (or the absence of such a measures) and the proposed alternative measure.[60] In sections 5 and 6 below, I will demonstrate how this logic is reflected in the practice of the Court and how it shapes its analysis.

2.3 *Epistemic Uncertainty*

The balancing exercise can be clouded by epistemological and empirical uncertainties. Alexy acknowledges the empirical problem of assessing the effectiveness of different measures. In this regard, it is useful to recall that Alexy distinguishes between "structural discretion" and "epistemic discretion". The structural discretion is related to the variety of means to achieve results and the discretion as to which means should be chosen to achieve effective protection and support. Structural discretion characterizes the balancing of

58 Barak, *supra* note 29, p. 434; see also Alexy, *supra* note 20, p. 309.

59 R. Bastress, 'The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria', 27 *Vanderbilt Law Review* (1974) p. 971, at p. 1029; Gerards, *supra* note 14, p. 476.

60 For this reasoning in the context of German constitutional law, see M. Grimm, 'The Protective Function of the State', in G. Nolte (ed.), *European and US Constitutionalism* (European Commission for Democracy through Law, 2003) 101, p. 108.

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competing principles.[61] The epistemic discretion is related to the empirical problem of effectivity and the difficulties in making prognosis of the effects of current measures in the future.[62] Epistemic discretion arises because the proportionality analysis might require engagement with contested empirical and normative issues. For example, there might be uncertain social science evidence. In addition, the accuracy of facts and the validity of assumptions might be contestable. It could be argued that these uncertainties are more severe in the context of positive rights; however, the distinction is one of degree. As Klatt and Schmidt have demonstrated, the adjudication of negative rights is equally fraught with structural and epistemic discretion.[63]

Since empirical uncertainty might be hard to dispel, Alexy proposes that "[t]he more heavily an interference with a constitutional right weights, the greater must be the certainty of its underlying premises".[64] In other words, the greater the interference with a right, the more empirically certain the successful realization of a competing collective goal must be. As Rivers further explains,

> [t]he more serious a limitation of rights is, the more evidence the court will require that the factual basis of the limitation has been correctly established, and the more arguments it will require that alternative, less intrusive, policy-choices are, all things considered, less desirable.[65]

Shifting back our attention to positive rights, the same logic can be applied. The graver the consequences from not extending protection and, accordingly, the more seriously the person is affected, the more empirical information will have to be submitted that extension of protection will be too burdensome for general interests. In addition, the empirical evidence substantiating an argument advanced by the state that a particular means of protection is ineffective, unreasonable or too burdensome will have to be more reliable. This

61 "As the least restrictive measure has not been adopted, the question whether it equally effectively achieves the objective of the challenged measure necessary entails a degree of speculation". Brems and Lavrysen, *supra* note 14, p. 145.

62 Alexy, *supra* note 20, pp. 388–425.

63 M. Klatt and J. Schmidt, 'Epistemic Discretion in Constitutional Law', 10:1 *International Journal of Constitutional Law* (2012) p. 69.

64 R. Alexy, 'The Wight Formula', in J. Stelmach, B. Bartoszek and W. Zaluski (eds.), *Studies in the Philosophy of Law: Frontiers of the Economic Analysis of Law* (Wolters Kluwer, Warsaw, 2007) p. 25.

65 J. Rivers, 'Proportionality and Variable Intensity of Review', 36 *Cambridge Law Journal* (2006) p. 174, at p. 205; see also Christoffersen, *supra* note 14, p. 191.

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logic has not been explicitly formulated in the Court's judgments; as I will show in section 5.3 below, the reliability of empirical findings might be questioned, but only "in cases of manifest arbitrariness and error".

The above review, centred on the importance of the interest invoked as a key consideration in the prognosis problem,[66] can be complemented by a graded system of review and proceduralising of the issue.[67] First, discretion can be given to the prognosis made by the legislator and the Court can scrutinize the fairness of the decision-making process. If this process is outright deficient (or if there is no such process at all), state responsibility can be established on these procedural grounds.[68] If the process is suspect in terms of its quality, it is more likely that the Court will venture into substantive balancing, including by considering empirical evidence. We will see this reflected in the ECtHR's case law below.

2.4 *Burden of Proof*

The issue of epistemic uncertainty is also intimately related to the burden of proof. As is generally accepted, the state carries the burden of proving that an interference was justified in pursuit of legitimate interests.[69] This is helpful only to a certain extent since it does not tackle the issue of the burden of proof in relation to the above epistemic uncertainties. One extreme is to suggest that the state should bear not only the onus of justification in upholding of rights-infringing measures, but also the risk of empirical uncertainty.[70] The other extreme is not to require of the government to furnish much of a factual record. A compromise could be struck between these extreme positions: if there is conflicting or inconclusive social science evidence, the government has to provide some factual basis for the measures (or the absence of such measures) and show that it has made an assessment to weigh the conflicting scientific evidence. The same logic could be extended to positive obligations cases. This logic is also in accordance with the above-mentioned procedural review that requires the state to show there has been a procedure for assessing evidence.

66 Alexy, *supra* note 20, p. 312.

67 K. Möller, *The Global Model of Constitutional Rights* (Oxford University Press, Oxford, 2012) p. 172.

68 E. Brems and L. Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights', 35:1 *Human Rights Quarterly* (2013) p. 176, at p. 189.

69 S. Greer, 'Balancing and the European Court of Human Rights: A Contribution to the Habermas – Alexy Debate', 63 *Cambridge Law Journal* (2004) p. 412, at p. 432.

70 S. Choudhry, 'So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1', 34 *Supreme Court Review* (2006) p. 501, at p. 524.

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The necessity test also raises issues concerning the burden of proof. It might be too difficult for a state to carry the burden of proving that its measure is better than any other possible method.[71] Although the state might have far superior access to data about alternatives and their effectiveness, a more sensitive approach might be preferable. Jeremy Gunn has suggested that the applicant could

> bear the burdens of first, going forward, and second, providing a *prima facie* case that there is one or more less restrictive alternatives that are practically available. At this point it would become appropriate to have the burden shift to the state to prove that the alternative proposed is not preferable to the statute at issue (for such reasons as costs of infringement of rights) or that the difference between the actual statue and the proposed alternative is *de minimis*.[72]

A similar approach could be applied to positive obligations cases: the applicant will have to come forward with a *prima facie* case that there are more protective measures, and these will have to be tested against alternatives (including inactions) as supported by the government. As shown below, the practice of the ECtHR reflects this approach.

2.5 *The Value of the Theoretical Discussion*

According to the theoretical model, both positive and negative rights invoke discussions about alternative measures that could better protect individual interests without imposing an unreasonable burden on competing interests. The model is, however, at a high level of abstraction, and it is therefore necessary to see how positive rights are adjudicated in practice, and whether and how the model is reflected in this practice. Can the model discipline the practice, or does it have problematic aspects? The case law of the ECtHR offers an excellent opportunity in this regard.

Before proceeding with the examination of the case law, a final clarification is due. While the theoretical discussion in section 2 strongly focused on the distinction between positive and negative rights, the subsequent analysis zooms in exclusively on positive rights as adjudicated by the ECtHR. How and why the Court makes the distinction between positive and negative obligations is thus not discussed in sections 5 and 6. To avoid any confusion, it needs

71 J. Rivers, 'The Presumption of Proportionality', 77:3 *Modern Law Review* (2014) p. 409.

72 T. Jeremy Gunn, 'Deconstructing Proportionality in Limitations Analysis', 19 *Emory International Law Review* (2005) p. 465, at pp. 495–496.

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to be highlighted here that the theoretical model, as outlined in section 2, has engaged profoundly with the distinction so that positive rights can be better explained and the analytical questions for their adjudication can crystalize with better clarity. Once this explanation and crystallization is achieved at this abstract theoretical level, I use them as a lens to review the case law addressing positive rights.

3 The Margins Delineated

An analysis of the Court's case law, and of the structure of positive rights developed therein, cannot ignore the role of the margin of appreciation doctrine. My objective is not to revisit the widely-known discussions about the doctrine; rather, for present purposes, it is important to introduce a distinction between the implications from the doctrine, on the one hand, and the choice of means for fulfilling positive obligations, on the other. This choice needs to be analytically demarcated from the margin of appreciation doctrine understood as a qualifier to the intensity of review exercised by the ECtHR as an international human rights court. This separation, however, does not mean that the applied intensity of review does not affect the stringency of the inquiry as to the existence of alternatives and as to how protective these should be.

The margin of appreciation, in its structural sense, implies that "the national authorities are better placed to make the assessment of the necessity and proportionality of measures" affecting rights.[73] As a consequence, the Court will not declare "a violation or will not fully scrutinize decisions made by national authorities for reasons having to do with the status of the ECHR as an international convention".[74] The margin of appreciation is thus more a matter of who takes the decision, rather than what this decision should be on its substance.[75] It is about limiting the intensity of review due to deference.

In practice, however, when the Court defers to the national authorities, it likely allows the national decision to stand, which can in turn be (arguably incorrectly) interpreted as if substantively the correct decision has been taken at

73 'ECtHR Background Paper, Subsidiarity: A Two-Sided Coin?', ECtHR, 30 January 2015, paras. 16 and 17.

74 G. Letsas, 'Two Concept of the Margin of Appreciation', 26:4 *Oxford Journal of Legal Studies* (2006) pp. 705, 707.

75 M. Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights', 48:3 *International and Comparative Law Quarterly* (1999) p. 638, at p. 640.

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the national level.[76] The structural restraint exercised by the Court in practice is thus viewed as having substantive repercussions since it implies in terms of public and political perceptions that the correct balancing between competing interests has been done at national level.

The margin of appreciation in its structural sense should not be confused with the choice of means for ensuring the rights as required by Article 1 of the ECHR. This choice implies a scope of discretion that is, in fact, *inevitable* even in the context of protection of constitution rights at the national level, which has also triggered the theoretical discussions outlined in section 2. References to margin in this context simply convey the idea that the Court does not dictate what concrete measures need to be taken for ensuring positive obligations. In the practice of the Court, however, this distinction is blurred. The term "margin" is used as a referent to both, which causes confusion.[77] A reason that might have partially sown the confusion is that the choice of protective means, and the related uncertainty as to what positive obligations require, invites and facilitates the exercise of judicial deference.[78] Accordingly, there is some excuse for this judicial uncertainty. Still, the two meanings of the margin need to be distinguished.

Due to the predominant focus on negative obligations, little discussion has been generated about this distinction in the context of positive obligations. Besides the general perception that the margin of appreciation in positive obligation cases is wider,[79] a more in-depth analysis had not been offered. To remedy this gap, the first question that needs to be asked is: in what way is the margin wider? If "margin" is understood to refer to the scope of means for ensuring the rights, it is indeed wider for reasons already explained in the

76 Brems, *supra* note 50, p. 349, at p. 353: "… the public and political perception of such an ECHR judgment [where the Court finds no violation since it grants a wide margin of appreciation] in practice is that of a Court clearance of a restrictive practice as such".

77 D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge, Abingdon, 2012) p. 64; J. Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights', 29:3 *Netherlands Quarterly of Human Rights* (2011) p. 324, at p. 334; S. Besson, 'Subsidiarity in International Human Rights Law – What is Subsidiary about Human Rights', 61:1 *The American Journal of Jurisprudence* (2016) p. 69, at p. 84; G. Letsas, 'The Margin of Appreciation Revisited: A Reponse to Follesdal', in A. Etinson (ed.), *Human Rights: Moral or Political?* (Oxford University Press, Oxford, 2018) p. 296.

78 Y. Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', 16:5 *European Journal of International Law* (2006) p. 907, at p. 910.

79 Lavrysen, *supra* note 13, p. 214.

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theoretical model outlined in section 2 above. As to the intensity of review, it is questionable whether generally the ECtHR is more deferential even in positive obligations cases involving qualified rights.[80] Accordingly, the formulation of the case as a positive obligation case does not necessarily lead to more structural deference.[81]

The second question that needs to be discussed is how the intensity of review by the ECtHR affects the assessment of the scope of the protective measures for ensuring positive rights and the choice of these measures. In the assessment whether adequate and sufficient measures have been taken, the Court can exercise different scrutiny. In this sense, the structural margin of appreciation can affect the stringency of the search for more protective alternative measures. It can also affect the stringency of the assessment as to how protective these measures should be. The intensity of review could be so low that the Court might not even search for more protective alternatives in the first place. In this sense, the structural margin can be perceived as a factor that affects the stringency of the positive obligations. Since the rigor with which the reasonableness and the fair balance tests are applied corresponds to the width of the margin of appreciation,[82] a narrow margin implies more attention to alternative, more protective measures. It also implies a heavier burden on the state to justify that the undertaking of more protective measures is unreasonable. A wide margin (*i.e.* less scrutiny by the ECtHR) implies more superficial enquiry about the availability of alternatives that might better protect the right.

A clarification is immediately due here. Similarly to what was elucidated above (*i.e.* the structural margin is more of a matter of who takes the decision, rather than what this decision should be on its substance), the stringency of positive obligations *per se* is not affected by the structural margin. In practice, however, a wide margin and limited international scrutiny leading to a finding of no violation of the ECHR may be received as an *ex post* confirmation of the domestic determination of the stringency of the obligation.[83]

80 R. Lawson, 'Positieve verplichtingen onder het EVRM: opkomst en ondergand van de "fair balance" test – Deel II', 20 *NJCM-bulletin* (1995) 727, p. 749; J. Gerards, *EVRM: Algemene beginselen* (Sdu Uitgevers, The Hague, 2011) p. 256.

81 See, for example, *Dubska and Krejzova* v. *the Czech Republic* [GC], 15 November 2016, ECtHR, Judgment, no. 28859/11 and 28473/12.

82 Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the ECHR* (Intersentia, Antwerp, 2002) p. 204.

83 Besson, *supra* note 77, p. 69, at p. 85.

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Finally, the structural margin might not figure at all in the reasoning. As I will clarify below, in many cases under Article 2 and 3, the margin of appreciation is not invoked. It also needs to be observed that a positive measure might be deemed unreasonable independently of the structural margin. At the same time, it also needs to be underscored that the degree of scrutiny exercised by the ECHR cannot constitute a justification for not taking a protective measure or for not taking a more protective measure at national level.

Despite the ECHR's structural specificities related to the margin of appreciation doctrine, the theoretical model outlined in section 2 cannot be deemed irrelevant. The model "shed[s] light on human and constitutional rights practice more generally",[84] including on the ECHR rights.[85] The debates in constitutional theory surrounding judicial review of legislation provide a helpful lens through which to view the work of the ECtHR. More specifically, the theoretical discussion prompts an enquiry into the following issues in the context of the ECHR. What is the structure of review followed in positive obligations cases in terms of definitional stage and application stage? How is the definitional scope of the rights construed and does this have repercussions for the application stage? How is proportionality applied in positive obligation cases? How are alternatives considered in this context? How does the Court deal with structural and epistemic discretion? How is the burden of proof distributed in terms of advancing alternatives and appreciating their effectiveness?

4 The Distinction between General and Specific Positive Obligations

The investigation of these questions necessitates the introduction of an important distinction that can be observed in the ECtHR's case law not mentioned above. In particular, the distinction between a *general* and a *specific* positive obligation needs to be noted. This distinction is not explicitly articulated in the judgments, but it can be reconstructed from the practice of the Court: although general positive obligations might be triggered, this might not necessarily mean that in the specific case the state has failed to fulfil a specific positive obligation. This raises the question as to when general positive obligations are triggered. The enquiry concerning the specific positive obligation

84 M. Kumm, 'Political liberalism and the structure of rights: on the place and limits of the proportionality requirement', in G. Pavlakos (ed.), *Law, Rights and Discourse – The Legal Philosophy of Robert Alexy* (Hart Publishing, Oxford, 2007) 136.

85 S. Greer, 'Balancing and the European Court of Human Rights: A Contribution to the Habermas – Alexy Debate', 63 *Cambridge Law Journal* (2004) p. 412, at p. 433.

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requires consideration of alternatives and balancing. These issues will be illuminated below. The basic analytical distinction between qualified and unqualified rights also shapes the answers to these questions; accordingly, the forthcoming analysis is structured based on it.

5 Unqualified Rights

5.1 *General Positive Obligations Are Triggered Automatically*

The ECtHR refers to Articles 2 and 3 as provisions enshrining "one of the basic values of the democratic societies making up the Council of Europe",[86] which implies that these are provisions intended to protect against severe forms of harm. The threshold of harm might pose definitional challenges that need to be tackled prior to the application stage of the analysis.[87] In relation to this stage, the Court has asserted that "[t]he positive obligations under Article 2 must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake".[88] Article 2 thus triggers *prima facie* positive obligations. Once the definition threshold is passed, positive obligations are automatically of relevance. At this higher level of abstraction, the Court has developed what positive obligations might require: criminalization of certain abusive conduct,[89] "a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life",[90] taking of protective operational measures[91] and certain procedural guarantees for ensuring the substantive aspect of the right.[92] Depending on the particular case, some of these have

86 *Mastromatteo* v. *Italy* [GC], 24 October 2002, ECtHR, Judgment, no. 37703/97, para. 67; *E and Others* v. *the United Kingdom*, 26 November 2002, ECtHR, Judgment, no. 33218/96, para. 88. The same qualification has been also used in relation to Article 4. See V. Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press, Cambridge, 2017) p. 281.

87 *Dordevic* v. *Croatia*, 24 July 2012, ECtHR, Judgment, no. 41526/10, paras. 90–96; *T.M. & C.M.* v. *The Republic of Moldova*, 28 January 2014, ECtHR, Judgment, no. 26608/11, paras. 40–42; *Brincat and Others* v. *Malta*, 24 July 2014, ECtHR, Judgment, no. 60908/11, para. 82.

88 *Center for Legal Resources on behalf of Valentin Câmpeanu* v. *Romania*, [GC], 17 July 2014, ECtHR, Judgment, no. 47848/08, para. 130.

89 *M.C.* v. *Bulgaria*, 4 December 2003, ECtHR, Judgment, no. 39272/98.

90 *Öneryildiz* v. *Turkey* [GC], *supra* note 2, para. 89.

91 *Osman* v. *United Kingdom* [GC], 28 October 1998, ECtHR, Judgment no. 23452/94.

92 E. Brems, 'Procedural Protection. An Examination of Procedural Safeguards Read into Substantive Convention Rights', in Brems and Gerards (eds.), *supra* note 26, 137.

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been tailored. For example, in the public-health sphere, the positive obligations under Article 2 require states to "make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of patients' lives".[93] This is a subset of the positive obligation of putting in place legislative and administrative framework to ensure the right to life. Some cases concern the quality of this legal framework in terms of level of protection,[94] its foreseeability,[95] clarity and precision;[96] others might concern its practical application and enforcement.[97]

Very similarly to Article 2, the Court has held that Article 1, together with Article 3, "requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including by private individuals".[98] Like Article 2, Article 3 thus triggers positive obligations as a matter of principle: once the definitional threshold is passed, these obligations are automatically set in motion. For example, in *O'Keefe* v. *Ireland,* the Court referred to the above-mentioned types of obligations, *i.e.* to criminalize, to put in place effective legislative and administrative framework, *etc.*, as forming the content of the positive obligations under Article 3.[99]

5.2 *Framing the Specific Positive Obligation*

The triggering of the *general* obligation to protect necessarily implies that there is a *specific* positive obligation the state has to fulfil, and the related expectation that the state explains what protective measures it has taken. This can be linked to the importance of the rights at stake (see section 2.3 above) and the imposition of a burden on the state to show that it has actually taken measures (see section 2.5 above). The specific obligation might not be the one invoked by the applicant since the state has a variety of ways to ensure the

93 *Lambert and Others* v. *France* [GC], 5 June 2015, ECtHR, Judgment, no. 46043/14, para. 140; *Lopes De Sousa Fernandes* v. *Portugal* [GC], 19 December 2017, ECtHR, Judgment, no. 56080/13, para. 166.

94 *Makaratzis* v. *Greece* [GC], 20 December 2004, ECtHR, Jugdment no. 50385/99, para. 62.

95 *Kolyadenko and Others* v. *Russia*, 28 February 2012, ECtHR, Judgment no. 17423/05, para. 185.

96 Lambert and Others v. France [GC], 5 June 2015, ECtHR, Judgment, no. 46043/14, para. 149.

97 *Cevrioglu* v. *Turkey*, 4 October 2016, ECtHR, Judgment, no. 69546/12, para. 62; *Iliya Petrov* v. *Bulgaria,* 24 April 2012, ECtHR, Jugdment, no. 19202/03, para. 59.

98 *E and Others* v. *the United Kingdom*, 26 November 2002, ECtHR, Judgment, no. 33218/96, para. 88; *Z. and Others* v. *United Kingdom* [GC], 10 May 2001, ECtHR, Judgment, no. 29392/95, para. 73.

99 *O'Keefe* v. *Ireland* [GC], 28 January 2014, ECtHR, Judgment, no. 35810/09, para. 148.

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right. Therefore, failure by the state to fulfil *any specific* measure does not necessarily lead to a finding of a violation.

The general positive obligation has a very open-ended nature. In contrast, the definitive positive obligation is tailored to the specific case. The available alternatives as to the measures that can be undertaken to ensure the right thus shrink against the background of the specific case and the arguments of the parties. When the scope of this specific obligation is determined, alternatives have to be weighed, general and competing interests taken into account.

The analytical distinction between the general positive obligation and the specific one is not clear cut since it depends on the level of abstraction. In its judgments, the Court formulates concrete positive obligations with different levels of abstraction. In addition, some of the above-mentioned general positive obligations are triggered under very concrete circumstances. For example, the positive obligation of taking protective operational measures is set in motion when the state authorities knew or ought to have known that a *particular identifiable* person was in danger.[100] This needs to be distinguished from the positive obligation of affording general protection to society through the adoption of relevant regulatory frameworks, which is at a much higher level of abstraction and needs to be concretized in the particular case.[101]

Some illustrations as to how the Court concretizes and thus frames the specific positive obligations will be useful. In *Öneryildiz* v. *Turkey,* the concrete obligation was framed as to whether the safety regulations in force in Turkey regarding the operation of household-refuse tips and the rehabilitation and clearance of slum areas were sufficient.[102] In *Budayeva and Others* v. *Russia,* the concrete obligation was framed pursuant to the proposal of the applicants as to the alternative protective measures that should have been taken: maintenance of mud-protection engineering facilities and warning infrastructure.[103] In *Budayeva and Others* v. *Russia*, all the suggested measures were in fact envisioned by the national land-planning and emergency relief policies, so the general theoretical problem about the indeterminacy of the measures for ensuring rights was to a certain extent resolved.[104]

100 *Osman* v. *United Kingdom* [GC], 28 October 1998, ECtHR, Judgment, no. 23452/94.

101 *Mastromatteo* v. *Italy* [GC], *supra* note 86, para.69; *Bljakaj and Others* v. *Croatia*, 18 September 2014, ECtHR, Judgment, no. 74448/12, para. 108.

102 *Öneryildiz v. Turkey* [GC], *supra* note 2, para. 97.

103 *Budayeva and Others* v. *Russia,* 20 March 2008, ECtHR, Judgment, no. 15339/02, para. 146.

104 *Ibid.,* paras. 136 and 137.

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The Court shapes its analysis differently in its various judgments in terms of how it frames the general and the concrete positive obligation. Three approaches can be delineated.

5.2.1 Formulation of the Specific Measure at the Beginning

In some of its judgments, the Court frames the concrete positive obligation in the beginning of its analysis and *then* assesses compliance. For example, in *Iliya Petrov* v. *Bulgaria* the concrete positive obligations were initially and specifically framed in the following way: "… the State has the obligation to mark electric facilities with high voltage. The Court has to assess whether the Bulgarian authorities have established adequate regulation regarding this activity".[105] It then went on to frame the positive obligation at an even more concrete level: "the Court has to assess whether the applicable legislation envisioned regular supervision [over the facilities] for the purpose of taking preventive measures in case of an omission or a signal about omission".[106]

5.2.2 Insertion of Qualifying Terms

A variation of the above approach can be observed in judgments where the concrete positive obligation is framed in the beginning but contains some qualifying terms. For example, in *Kolyadenko and Others* v. *Russia*, the Court asserted in the very beginning of the judgment that

> the authorities had positive obligations under Article 2 of the Convention to assess all the potential risks inherent in the operation of the reservoir, and to take practical measures to ensure the *effective protection* of those whose lives might be endangered by those risk.[107]

The insertion of qualifying terms like "effective protection" denotes uncertainty as to the initial standard against which the subsequent analysis is to be gauged.

105 *Iliya Petrov* v. *Bulgaria,* 24 April 2012, ECtHR, Judgment, no. 19202/03, para. 57 (translation by the author).

106 *Ibid.,* para. 59.

107 *Kolyadenko and Others* v. *Russia, supra* note 95, para. 166; *Öneryildiz* v. *Turkey* [GC], *supra* note 2, para. 97, emphasis added.

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5.2.3 Absence of a Formulation of the Specific Measure until the Very End

In other judgments, the Court does not initially frame the concrete positive obligation; rather, in abstract terms it determines that states have to build protective frameworks, and then assesses the different alternatives and their reasonableness. For example in *Lopes De Sousa Fernandes* v. *Portugal,* a case in which the applicant claimed that her husband died as a result of medical negligence, the Court framed its task as answering the question

> whether the authorities did what could reasonably be expected of them, and in particular whether they complied, in general terms, with their obligation to protect the physical integrity of the patient in question, especially by providing him with appropriate medical care.[108]

The question is thus framed at general level. Another example where the Court did not initially frame the concrete positive obligation is *Dordevic* v. *Croatia.* The enquiry was framed as whether "the relevant authorities took all reasonable steps in the circumstances of the present case to protect the first applicant [, who was a disabled child,] from such acts [*i.e.* ongoing harassment by children from the neighbourhood and the school]".[109]

5.3 *Assessment of Alternatives*

In harmony with the suggestion advanced in the theoretical model in section 2.5, the case law reveals that it is the applicant who proposes what alternatives measures could and should have been undertaken.[110] The Court expects the government to provide an explanation as why such measures were not taken.[111] The absence of such explanations can lead to adverse findings.

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108 *Lopes De Sousa Fernandes* v. *Portugal*, 15 December 2015, ECtHR, Judgment, no. 56080/13, para. 110.

109 *Dordevic* v. *Croatia*, *supra* note 87, para. 146; see also *Eremia* v. *The Republic of Moldova*, *supra* note 3, para. 58; *Sandra Jankovic* v. *Croatia*, 5 March 2009, ECtHR, Judgment, no. 38478/05, para. 46; *T.M. and C.M.* v. *The Republic of Moldova*, 28 January 2014, ECtHR, Judgment no. 26608/11, para. 45.

110 See, for example, *Dordevic* v. *Croatia, supra* note 87, where the measures proposed by the Court which could have been taken were very much the same as those proposed by the applicant.

111 See *Nencheva and Others* v. *Bulgaria*, 18 June 2013, ECtHR, Jugdment, no. 48609/06, para. 124, where the Court emphasized that Bulgaria did not come forward with any explanation as to why it had not taken any measures to prevent the death of the mentally disabled children; *Centre for Legal Resources on behalf of Valentin Câmpeanu* v. *Romania* [GC],

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In *Budayeva* v. *Russia* the Court observed that the state is expected to come forward and assert whether it had envisioned "other solutions to ensure the safety of the local population".[112] The burden here shifts to the government to show what other possible measures it has taken. In addition, the onus is on the government to explain how any protective measures undertaken were relevant and efficient in alleviating the harm sustained by the applicant.[113]

The state specifies the concrete protective measures that were taken and tries to demonstrate their effectiveness. For example, in *O'Keefe* v. *Ireland* the Court framed the concrete positive obligation as "whether the State's framework of laws, and notably its mechanism of detection and reporting, provided effective protection for children attending a National School against the risk of sexual abuse, of which risk it could be said that the authorities had, or ought to have had, knowledge in 1973".[114] As to the variety of possible means, the Court scrutinized the means invoked by the government, *i.e.* the reporting process and the system of school inspectors. It eventually concluded that there were no mechanisms of effective state control in place against the risk of sexual abuse of children.

In some positive obligation cases, the factual circumstances are such that it is clear what measures should have been undertaken. For example, in *Ilbeyi Kemaloglu and Meriye Kemaloglu* v. *Turkey,* a case about the child who froze to death after being left alone by the school authorities in a heavy snow storm, the Court observed that "by neglecting to inform the municipality's shuttle service about the early closure of the school, the domestic authorities failed to take measures which might have avoided a risk to the right to life of the applicants' son".[115] In *Mikayil Mammadov* v. *Azerbaijan,* the Court speculated as to what hypothetical steps could have been undertaken to protect the applicant's wife, who set fire to herself after state agents arrived at their home to evict them.[116]

In many positive obligation cases, the national legislation, standards and regulations serve as the benchmark against which alternatives are proposed

supra note 88, para. 140, where Romania failed "to fill in the gaps relating to the lack of relevant medical documents describing Mr Campeanu's situation prior to his death, and the lack of pertinent explanations as to the real cause of his death".

112 *Budayeva* v. *Russia*, *supra* note 2, para. 156.

113 *Kolyadenko and Others* v. *Russia, supra* note 95, para. 167.

114 *O'Keefe* v. *Ireland* [GC], *supra* note 7, para. 152.

115 *Ilbeyi Kemaloglu and Meriye Kemalogly* v. *Turkey,* 10 April 2010, ECtHR, Judgment, no. 19986/06, para. 41.

116 *Mikayil Mammadov* v. *Azerbaijan*, 17 December 2009, ECtHR, Judgment, no. 4762/05, para. 116 (no violation was found due to insufficient factual details).

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and assessed.[117] Many of these cases concern circumstances where the state has failed to follow its own laws and regulations. Although, the Court has made it clear that non-compliance with the national laws and standards is not a conclusive test, failures in this respect have a significant role in the analysis.

The subsidiary nature of the Court's role needs to be also taken into account in the framing of alternative measures that could have been undertaken. The indeterminacy of alternatives will be thus significantly ameliorated given that the case has been already litigated at national level and the domestic courts have already addressed these alternatives, including compliance with national laws and regulations. Comparative study of the national legislation and state practice can be also useful for proposing and assessing alternatives, and in asserting that certain arrangements are not inevitable.

As to the epistemic uncertainty of the determinations made at national level, the Court has stated that

> [e]xcept in cases of manifest arbitrariness and error, it is not its function to call into question the findings of fact made by the domestic authorities. This is particularly true in relation to scientific expert assessments, which by definition call for specific and detailed knowledge of the subject.[118]

However, the Court's sensitivity as to its subsidiary nature concerning assessment of scientific evidence does not result in total abdication of its supervisory function. For example, in *Wenner* v. *Germany*, it stated that it does not have to make a finding as to whether the applicant in fact needed drug substitution therapy (there was scientific controversy about the use of such therapy). The Court rather formulated its task as deciding

> whether the responded State has provided credible and convincing evidence proving that the applicant's state of health and the appropriate treatment were adequately assessed and that the applicant subsequently received comprehensive and adequate medical care in detention.[119]

117 *Gorovensky and Bugara* v. *Ukrain*, 12 January 2012, ECtHR, Judgment, no. 36146/05, paras. 39–40 (breach of positive obligations under Article 2 since a police officer, who shot two persons with his police gun, was issued with the gun in breach of the existing domestic regulations); *Keller* v. *Russia,* 17 October 2013, ECtHR, Judgment, no. 26824/04, para. 89.

118 *Lopes De Sousa Fernandes* v. *Portugal,* 15 December 2015, ECtHR, Jugdment, no. 56080/13, para. 109.

119 *Wenner* v. *Germnay*, 1 September 2016, ECtHR, Judgment, no. 62303/13, paras. 58 and 62.

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Accordingly, although the Court might not be in a position to assess alternatives due to scientific and epistemic uncertainties, it can still assess whether the decision-making body at national level has considered alternatives against the background of the existing scientific studies. This is in line with the graded system of review and the possibility for procedurizing the issue as discussed in section 2.4 above.

Finally, no test has been elaborated for measuring the effectiveness of the alternative measures.[120] No discussion is present in the case law as to whether the proposed alternative will, as suggested in section 2.2.2, serve general interests to the same extent as the measure already undertaken. This implies that the scope of the alternatives is not strictly restricted by this very criterion. The test of reasonableness, however, has a limitative function since the alternative protective measure cannot lead to unreasonable burden on the state.

5.4 *Assessing Compliance and the Test of Reasonableness*

Once the concrete positive obligation has been framed,[121] an assessment as to whether the state has complied with it follows. This is an assessment as to whether it is reasonable to impose such a concrete positive obligation on the state. In all its positive obligation cases under Article 2 and 3, the Court refers to the standard of reasonableness.[122] Based on various factors considered, including cost-effectiveness and management of resources,[123] the Court assesses reasonableness. It also refers to another standard *i.e.* the "impossible and disproportionate burden" test.[124] It has held that positive obligations must not impose such a burden. This refers to the choices that have to be made in

120 In the context of policing operations where lethal force is used against individuals by state agents, the Court observes that it is difficult to separate positive and negative obligations and examines whether the operation "was planned and control by the authorities so as to minimise, *to the greatest extent possible*, recourse to lethal force and human losses, and whether *all feasible precautions in the choice of means and methods* of a security operation were taken". *Finogenov and Others* v. *Russia,* 20 December 2011, ECtHR, Judgment, no. 18299/03, para. 208. In this context, the Court enquires into alternatives for safeguarding life that are more protective and effective "to the greatest extent possible". However, this enquiry is restricted to the context of policing operations.

121 As clarified in section 4.2, if the concrete positive obligation is not framed from the beginning, then the whole analysis collapses into the consideration of reasonableness.

122 *Centre for Legal Resources on behalf of Valentin Câmpeanu* v. *Romania* [GC], *supra* note 88, para. 132.

123 *Watts* v. *United Kingdom*, 4 May 2010, ECtHR, Decision, no. 53586/09, para. 90.

124 *Öneryildiz* v. *Turkey* [GC], *supra* note 2, para. 107.

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terms of priorities and resources.[125] No clarification has even been offered as to whether the tests of reasonableness and "impossible and disproportionate burden" are intended to refer to different factors in the assessment. Rather, both seem to point in the same direction: a measure will not be reasonable if it imposes an impossible and disproportionate burden. The Court has also utilized a third standard by holding that the positive obligations under Articles 2 and 3 are to be interpreted in such a way as "not to impose an excessive burden on the authorities".[126] Excessiveness does not appear to refer to something different from unreasonableness and disproportionate burden.

It is important to clarify that whenever the reasonableness of a measure is at issue, the availability of alternative methods of proceeding or alternative measures is germane. It is difficult to assess the reasonableness of a measure if alternative measures are not included in the analysis. Therefore, the assessment of alternatives is not a separate step in the analysis but rather integrated in the reasonableness assessment.

More often than not, the test of reasonableness is mentioned in passing, and it is hard to assess its importance. Sometimes, reasonableness is simply mentioned at the end and one is left to wonder how it is linked with the previous analysis. Usually, various factors are invoked for assessing the reasonableness of the concrete positive obligation without elaboration as to the weight ascribed to each. The test can be thus characterized as fluid and flexible. Despite this obscurity, which is in a way justifiable due to the variety of concrete factual circumstances that might arise in different cases, some important factors are discernible.

5.4.1 Knowledge and Foreseeability

In *Budayeva* v. *Russia*, the Court held that

> [t]he scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation.[127]

125 Originally, the "impossible and disproportionate burden" test was developed in relation to the positive obligation of taking protective operational measures. However, in its current practice the Court refers to this test in a general fashion.

126 *Cevrioglu* v. *Turkey*, *supra* note 2, para. 52.

127 *Budayeva and Other* v. *Russia*, *supra* note 2, paras. 136–137; *Kolyadenko and Others* v. *Russia*, *supra* note 95, para. 161.

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The origin of the threat relates to the issue of foreseeability and more specifically to the fact that naturally occurring phenomenon might be less foreseeable than man-made disasters. In such circumstances, it might be less reasonable to expect the state to prevent harm. The susceptibility to mitigation also relates to reasonableness and in particular to the question as to how reasonable it is to expect that the risk can be mitigated.

The interdependence between the test of reasonableness, on the one hand, and the knowledge about and foreseeability of harm, on the other, finds further support in *Öneryildiz* v. *Turkey.* A decisive factor for the assessment of the circumstances of the case was whether the state had information that the inhabitants of the slum were faced with a threat to their physical integrity.[128] Similarly, in *Kolyadenko and Others* v. *Russia*, when assessing the concrete positive obligation, the Court first determined that "irrespective of the weather conditions, they [the national authorities] should have foreseen the likelihood as well as the potential consequence of releases of water from the reservoir".[129] Knowledge about harm or potential harm is of significance because it would be unreasonable to ask whether the state has fulfilled a concrete positive obligation if the state did not know or could not foresee the harm.[130] At the same time, the more knowledge the state has and the more capabilities to foresee harmful events, the more reasonable it is to impose concrete positive obligations and to frame these in more demanding terms.

5.4.2 Domestic Legality and Authorization

If the concrete positive obligation invoked is in fact a measure that the national authorities themselves have decided to undertake but failed, then it is easier to establish that the failure was unreasonable. In *Kolyadenko and Others* v. *Russia,* having considered various factors, the Court was convinced "… that

128 *Öneryildiz* v. *Turkey* [GC], *supra* note 2, para. 98; see also *Budayeva and Others* v. *Russia, supra* note 2, para. 148; *Centre for Legal Resources on Behalf of Valentin Cameanu* v. *Romania* [GC], *supra* note 88, para. 143; *Nencheva and Others* v. *Bulgaria*, 18 June 2013, ECtHR, Judgment, no. 48609/06, paras. 121–122.

129 *Kolyadenko and Others* v. *Russia, supra* note 95, para. 165.

130 See *Dordevic* v. *Croatia*, 24 July 2012, ECtHR, Judgment, no. 41526/10, para. 144, where once knowledge was established, the Court proceeded with assessment of the reasonableness of the measures. *Hiller* v. *Austria,* 22 November 2016, ECtHR, Judgment, no. 1967/14, (the applicant's son committed suicide after escaping from a psychiatric hospital which let him have walks without supervision) is an example of a case where the majority determined that the national authorities could not foresee that the patient would escape and commit suicide. Since the escape and the suicide were not foreseeable, the Court did not continue to examine whether overall the measures taken to protect him were reasonable.

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no impossible or disproportionate burden would have been imposed on the authorities in the circumstances of the present case if they had complied with their own decision …".[131]

Likewise, when the state itself has authorized a certain activity, it is easier to establish that the imposition of a concrete positive obligation meant to ensure that no harm is inflicted in the course of this activity is reasonable. For example, in *Cevrioglu* v. *Turkey,* after reiterating that "an excessive burden must not be placed on the authorities", the Court nevertheless deemed it reasonable

> to expect the respondent State to have put in place an effective mechanism for the inspection of construction sites *for which it issues permits*, having regard to the gravity of the potential dangers that may emanate from unsafe construction sites, particularly where such sites are located in highly populated residential areas.[132]

5.4.3 Multidimensional Consequences

The test of reasonableness presupposes consideration of competing interests. These could be the general interests of society, including budgetary considerations, or interests of other members of the society. The latter was particularly apparent in *Mastromatteo* v. *Italy*,[133] where an issue under consideration was whether the national regulatory framework regarding prison leave was deficient and as a consequence of any defects, the prisoners who subsequently killed the applicant's son should have been allowed prison leave. A major factor for assessing the system as adequate was that it served the general interest of social integration of prisoners. Similarly, competing interests were an important consideration in *Z. and Others* v. *United Kingdom* where the Court referred to "the important countervailing principle of respecting and preserving family life".[134] This implies that the positive obligations under Article 3 cannot extend to the unreasonable limit of splitting families by taking children into care so that these children can be protected. Therefore, as suggested in section 2.2.1, the Court considers the multidimensional consequences and the multitude of interests that might be affected when assessing the reasonableness of alternative measures.

131 *Kolyadenko and Others* v. *Russia, supra* note 95, para. 183.

132 *Cevrioglu* v. *Turkey*, *supra* note 2, para. 66, emphasis added.

133 *Mastromatteo* v. *Italy* [GC], *supra* note 86.

134 *Z. and Others* v. *United Kingdom* [GC], *supra* note 98, para. 74.

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5.5 *The Margin of Appreciation*

The Court has linked the test of reasonableness and the assessment of alternatives with the margin of appreciation. In *Öneryildiz* v. *Turkey,* it observed that

> … an impossible and disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources; this results from the *wide margin of appreciation* States enjoy, as the Court has previously held, in difficult social and technical spheres such as the one in issue in the instant case.[135]

It is not entirely clear what the function of the margin of appreciation is here, or what it adds to the test of reasonableness and the scope of discretion that states inevitably enjoy in terms of means for fulfilling their positive obligations (see section 3 above). In some positive obligations cases under Articles 2 and 3, the Court never refers to the margin[136] nor specifies its scope.[137] It can be therefore safely assumed that the references to margin simply mean diversity of avenues for ensuring Convention rights and not structural deference.

5.6 *Consideration of Alternatives under Unqualified Rights*

At the general level, the Court has developed the following types of positive obligations: the obligation to criminalize, to adopt effective regulatory framework, to take protective operational measures and to adopt national procedures. These are triggered automatically once the definitional threshold is passed, which can be related to the grave forms of harm that Articles 2 and 3 are meant to protect against. Once the analysis proceeds to the specific positive obligation, complications arise, and it is hard to find a lucid analytical structure. Some of the elements in the theoretical model discussed in section 2 are reflected in the case law (*i.e.* initial expectation that the applicant comes forward with a proposal as to alternative protective measures, expectation that the state explains the effectiveness of any protective measures that it has undertaken procedurising the issue). However, sometimes, the Court does not

135 *Öneryildiz* v. *Turkey* [GC], *supra* note 2, para. 107; *Kolaydenko and Others* v. *Russia*, *supra* note 95, paras. 160 and 183; *Budayeva and Others* v. *Russia*, *supra* note 2, paras. 134–135.

136 *Centre for Legal Resources on behalf of Valentin Câmpeanu* v. *Romania supra* note 88.

137 *Ilbeyi Kemaloglu and Meriye Kemaloglu* v. *Turkey*, 10 April 2012, ECtHR, Judgment, no. 19986/06, para. 37; *Lambert and others* v. *France* [GC], 5 June 2015, ECtHR, Judgment, no. 46043/14, para. 144; *Ciechonska* v. *Poland*, 14 June 2011, ECtHR, Judgment, no. 19776/04, para. 65.

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even frame from the outset the concrete positive obligation, *i.e.* the concrete measures that could have been undertaken; instead, its analysis is rather abstract in discussing the different alternatives and their reasonableness. Despite this absence of structure, some determinants that shape the assessment of alternatives and their reasonableness can be clearly extracted. These include domestic legality, knowledge about the harm, foreseeability of the harm, source of the harm, state authorization of the harmful activity and the multidimensional consequences of any measures.

6 Qualified Rights

As already suggested in section 2, Article 8 of the ECHR, with its bifurcated structure, channels the analysis into two steps: whether the definitional threshold has been triggered through an interference with the applicant's private life and whether this interference can be justified. The practice of the Court reveals that a similar structure of review is followed in positive obligations cases.[138] Some important specificities and alternations, however, need to be initially highlighted. Contrary to what Barak has proposed as a theoretical model (see section 2.1 above), the test of legality is not a conclusive test. The Court has noted that "[t]here are different avenues to ensure 'respect for private life', and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means".[139] Equally importantly, the challenged omission might be precisely the absence of national regulatory frameworks.[140] In this context, it makes little sense to check state responsibility against an initial and conclusive standard of domestic legality. Instead, and very similarly to the approach under Articles 2 and 3, domestic legality could be an important factor when the fair balance test is considered.

138 The Court sometimes refuses to categorize the case as involving positive or negative obligations. It will be beyond the scope of this article to assess this refusal. I do not challenge the qualification of the case as a positive obligation case for the purposes of this article.

139 *Fadeyeva* v. *Russia,* supra note 2, para. 96. If we bring this reasoning to its logical conclusion, it means that even if an omission is contrary to national law and is contributive to harm, this *per se* is not sufficient for finding a violation of the ECHR. As argued by L. Lavrysen, this approach is problematic from the perspective of the rule of law principle. He proposes that non-compliance with the national law should be a conclusive test for finding a failure to fulfil positive obligations under Article 8. Lavrysen, *supra* note 13.

140 *A., B. and C.* v. *Ireland* [GC], 16 December 2010, ECtHR, Judgment, no. 25579; *Sari and Colak* v. *Turkey*, 4 April 2006, ECtHR, Judgment, nos. 42596/98 and 42603/98, para. 37.

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As to the suitability element, *i.e.* the legitimate purposes in Article 8(2), the Court has confirmed that these are of relevance in the context of positive obligations. It has never confirmed, however, that *only* these legitimate aims can be invoked as justifications for failures of take protective actions. It has held that these aims "*may* be of certain relevance",[141] a formulation which implies more leeway for the state to identify the aims.[142] At the same time, however, this freedom might not be very consequential since these purposes are very general and abstract in the first place and they do not play a particularly restrictive role in the case law on negative obligations either. Therefore, as suggested by Möller, the suitability test plays a questionable role (see section 2.1 above). This has repercussions for the necessity test since the task whether the alternative proposed measures is equally effective to serve general interests cannot be performed (see section 2.2.2 above).

Having introduced these initial clarifications, I investigate below the structure of review followed in positive obligation cases under Article 8 and identify additional distinctive features.

6.1 *Merging the Definitional and the Application Stages*

Due to the indeterminacy of the notion of private life,[143] the Court first decides whether positive obligations can be generally triggered in the light of the particular case. Therefore, not every claim under Article 8 automatically triggers positive obligations at general level. These might have to be initially justified. There is thus a tendency to conflate the definitional threshold analysis with the analysis of whether positive obligations are triggered in the first place. Accordingly, the Court might be faced from the beginning with multiple tasks of appreciation: it decides on the definitional threshold of Article 8 and the related importance of the sphere of private life at stake in the case, and on whether the case should trigger positive obligations. A balancing test might thus determine both whether the claim falls within the definitional limits of private life, and whether there are any positive obligations in this context.

In Article 8 cases, the Court has used the standard expression that "the object of Article 8 is essentially that of protecting the individual against arbitrary

141 *Maurice* v. *France* [GC], 6 October 2005, ECtHR, Judgment, no. 11810/03, para. 114.

142 See, for example, *Hristozov and Others* v. *Bulgaria*, 13 November 2012, ECtHR, Judgment, nos. 47039/11 and 358/12, para. 122, where the public interests were much more widely construed that what Article 8(2) ECHR might appear to suggest.

143 G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, Oxford, 2007) pp. 126–130; Dissenting Opinion of Judge Lemmens to *Otgon v. the Republic of Moldova*, 25 October 2016, ECtHR, Judgment no. 22743/07.

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interference by the public authorities".[144] As a consequence, negative obligations are presented as having a primary role. This rhetoric is hard to accept, however, since positive obligations have been widely developed in the case law under Article 8. Rather what the Court seems to imply is caution. The reason for this restraint is that private life is an indeterminate concept that potentially covers any aspect of human life and accordingly positive obligations might extend indeterminately.

The Grand Chamber judgment in *Aksu* v. *Turkey* can be used as an illustration. At the heart of the applicant's complaint were three publications containing remarks and expressions that reflected anti-Roma sentiment, and the allegation that the state had failed to protect the applicant's private life by not banning them. The Court reiterated its standard assertion that

> there *may* be positive obligations inherent in the effective respect for private life. These obligations *may* involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.[145]

It went on to express caution by observing that "[u]nder Article 8, States have *in some circumstances* a duty to protect the moral integrity of an individual from acts of other persons [emphasis added]". It then assessed what was at issue in the case and how the applicant's complaint fitted within the definitional scope of Article 8: "what is at stake in the present case is a publication allegedly affecting the identity of a group to which the applicant belonged, and thus his private life".[146] Subsequently, it asserted that positive obligations were applicable to the case, and then framed the concrete positive obligations as whether "the Turkish courts ought to have upheld the applicant's civil claim awarding him a sum in respect of non-pecuniary damage and banning the distribution of the book".[147] In its analysis the Court thus bundled definitional issues with issues about the scope of the positive obligation. It conflated the question whether there was harm falling within the scope of Article 8 with the question whether there was a positive obligation triggered in the first place.

Roche v. *UK* illustrates this further. The Court took into account two circumstances to conclude that a positive obligation arose in the case. First, the

144 *Söderman* v. *Sweden* [GC], 12 November 2013, ECtHR, Judgment, no. 5786/08, para. 78.

145 *Aksu* v. *Turkey* [GC], 15 March 2012, ECtHR, Judgment, no. 4149/04, para. 59, emphasis added.

146 *Ibid.*, para. 60.

147 *Ibid.*, para. 61.

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alleged omission (*i.e.* withholding of information from the applicant) sufficiently affected the applicant's interests to engage the definitional threshold of Article 8. Second, no pressing reason was asserted by the state for withholding the information. Under these circumstances,

> a positive obligation arose to provide an "effective and accessible procedure" enabling the applicant to have access to "all relevant and appropriate information" which would allow him to assess any risk to which he had been exposed during his participation in the tests.[148]

The definitional and the application stage of the analysis were thus merged.[149]

6.2 *Balancing of Interests for Triggering of Positive Obligations at General Level*

Independently from the definitional stage, balancing of interests might be also used as a tool when answering the question whether positive obligation should be generally triggered in the case. In Article 8 cases, the Court has asserted that "the notion of 'respect' as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned" and added that

> [i]n determining whether or not a positive obligation exists, regard must also be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention.[150]

Balancing is thus sought at the level of general positive obligations. The importance of the applicant's interests and more specifically the extent to which these bear close and immediate link with private life, together with any countervailing public interests, are factors in determining whether positive obligation arises at general level.

148 *Roche* v. *United Kingdom* [GC], 19 October 2005, ECtHR, Judgment, no. 32555/96, para. 162.

149 See also Christoffersen, *supra* note 14, pp. 95, 106.

150 *Christine Goodwin* v. *United Kingdom* [GC], 11 July 2002, ECtHR, Judgment, no. 28957/59, para. 72; *Roche* v. *United Kingdom* [GC], *supra* note 148, para. 157; *Babylonova* v. *Slovakia*, 20 June 2006, ECtHR, Judgment, no. 69146/01, paras. 51–52; *Harroudj* v. *France*, 4 October 2012, ECtHR, Judgment, no. 43631/09, para. 47.

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Fadeyeva v. *Russia,* a judgment that can be distinguished for its clear analytical structure, provides an example.[151] A review consisting of three analytical steps was followed. First, the Court examined the definitional question by accepting that "the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention". In contrast to *Roche* v. *UK*, therefore, competing interests were not part of the definitional analysis. Rather, the definitional threshold required consideration of the causation between the pollution and the applicant's health. However, competing interests were inserted as relevant considerations in the second analytical step, where the Court responded to the question whether positive obligations should be triggered in the first place. This enquiry was framed as one of reasonableness: "[i]n these circumstances, the Court's first task is to assess whether the State could reasonably be expected to act as to prevent or put an end to the alleged infringement of the applicant rights". Two considerations were of relevance for assessing whether it was reasonable to impose positive obligations: the state had control over the factory by imposing certain regulations and supervising their implementation, and it knew about the environmental impact caused by the factory. This led the Court to conclude that "[t]he combination of these factors shows a sufficient nexus between the pollutant emissions and the State to raise an issue of the State's positive obligation under Article 8 of the Convention". Finally, it remained for the Court to determine "whether the State, in securing the applicant's rights, has struck a fair balance between the competing interests of the applicant and the community as a whole, as required by paragraph 2 of Article 8", an assessment which pertains to the concrete positive obligation (see section 6.4 below).

6.3 *Avoidance of Structural Determinations*

Should the Court's approach, which implies application of the fair balance test at the definitional stage (as revealed in section 6.1 above) and for the purpose of generally triggering positive obligations (as revealed in section 6.2 above), be defended or rejected? The approach is a clear departure from the theoretical model outlined in section 2.1 (that demands bifurcation between the definitional and the application stages of the analysis), and has been criticized. Gerards and Lavrysen, censuring the Court, have argued in favour of an identical approach to the definitional stage irrespective of the nature of the obligations

151 The same structure was followed in *Dubetska and Others* v. *Ukraine*, 10 February 2011, ECtHR, Judgment, no. 30499/03, paras. 105–124.

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(positive or negative) that a case raises.[152] Lavrysen's stance is that if a protected interest is disturbed, "the authorities are under a *prima facie* positive obligation to 'protect' or 'fulfil' the individual's right".[153] If this position is followed, Article 8 will easily trigger positive obligations in general. If these are set into motion, this necessarily implies that there is a concrete positive obligation that has to be fulfilled. In light of the broad definitional scope of Article 8, this can make the human rights review task of the Court close to unmanageable.

Accordingly, the endorsement of the normative position that the definitional scope of Article 8 is wide (see section 2.1 above) leads to a wide range of positive measures that might be demanded from states. An applicant thus can invoke a variety of concrete measures that should have been taken to ensure his/her rights.[154] As a counterbalance, however, the wide scope implies an extensive range of alternative measures that can be proposed by the government for ensuring rights. Accordingly, although it might be easy for the applicant to propose various measures, it might be equally easy for the state to propose different measures. From an institutional perspective, however, the negative consequence is that the Court might have to examine all these alternatives emerging in various cases. This in itself might be unmanageable and, at the end of the day, of questionable value in light of the trivial interests that might be involved.

Even though the Court's approach is in contrast with the theoretical model, there are additional arguments in its support. Given the wide meaning of

152 Even in negative obligation cases, the Court does not follow a strict demarcation between definitional and application stages. J. Gerards and H. Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights', 7:4 *International Journal of Constitutional Law* (2009) p. 619; L. Lavrysen, 'The Scope of Rights and the Scope of Obligations. Positive Obligations', in Brems and Gerards (eds.), *supra* note 26, 169.

153 Lavrysen, *supra* note 13.

154 The Court has responded to this danger by introducing the "direct and immediate link" requirement that demands that the concrete positive measure invoked by the applicant has to be sufficiently narrowly defined. If it is too broad and indeterminate, then the causal link between the harm sustained by the applicant and the measure sought from the state might be too tenuous. See *Botta* v. *Italy,* 24 February 1998, ECtHR, Judgment, no. 21439/93, para. 33; *Maurice* v. *France* [GC], 6 October 2005, ECtHR, Judgment, no. 11810/03, para. 115; *Sari and Colak* v. *Turkey*, 4 April 2006, ECtHR, Judgment, nos. 42596/98 and 42603/98, para. 34; *A., B. and C.* v. *Ireland* [GC], *supra* note 140, para. 248; *Hämäläinen* v. *Finland* [GC], 16 July 2014, ECtHR, Judgment, no. 37359/09, para. 66. As opposed to *Botta* v. *Italy*, *supra* note 154, where the "direct and immediate link" requirement was applied at the definitional stage of the analysis, in *A.. B. and C.* v. *Ireland* and *Hämäläinen* v. *Finland* it is invoked at the application stage. See also *Draon* v. *France* [GC], 6 October 2005, ECtHR, Judgment, no. 1513/03, para. 106.

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private life, if any case touching upon interests related to private life were to trigger positive obligations, a situation might occur where our ability to explain how rights are distinct from other (less important) interests might be undermined.[155] At this juncture, however, it has to be also acknowledged that even if positive obligations are triggered at general level, this does not necessarily mean that the state will be found in breach of the ECHR for failure to fulfil them. Any negative implications associated with inflation of rights can be thus resolved at the level of the concrete positive obligations, where the fair balance test is applied. Still, the problem of wide-range triggering of positive obligations any time an issue falls within the definitional parameters of Article 8 will persist.

Efforts to understand the Court's approach must also include a reflection upon the nature of the assessment involved at the different analytical stages (namely, whether the applicants' interests fall within the definitional scope of private life, whether general positive obligations can be triggered, and what the specific positive obligation is). An argument can be made that when definitional balancing is applied, and when general positive obligations are established, more general rules pertaining to the rights are framed. In contrast, when balancing is applied to determine the scope of the concrete positive obligation, it is of more of an *ad hoc* nature since it is tailored to the particular circumstances of the case. There are therefore differences as to the level of abstraction. Definitional balancing and framing of general positive obligations is characterized by a higher level of abstraction. Accordingly, when they are used the Court makes more structural and general determinations.[156] By mixing definitional balancing with balancing at the application stage where the concrete positive obligation needs to be delimited, and by applying balancing to determine whether positive obligations are triggered in general, the Court tries to avoid these structural determinations. In this way, it can tailor its findings as much as possible to the specific case and can preserve more room for manoeuvre for future cases.[157]

155 For this distinction see J. Gerards, 'Fundamental Rights and Other Interests. Should it Really Make a Difference?', in Brems (ed.), *supra* note 53, pp. 655–690; J. Gerards, 'The Prism of Fundamental Rights', 8 *European Constitutional Law Review* (2008) p. 173, at p. 178.

156 For a useful discussion of the distinction between definitional balancing and *ad hoc* balancing in the context of the Canadian Charter see S. Peck, 'An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms', 25:1 *Osgoode Hall Law Journal* (1987) p. 1, at pp. 27–28.

157 For a more general discussion of how and why the Court aims to preserve room for maneuver, see J. Christoffersen, 'Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?', in J. Christoffersen and M. Madsen (eds.), *The European Court*

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Finally, there are many cases in which the Court is quite explicit that the definitional threshold of Article 8 has been met,[158] and this provision triggers positive obligations at general level without resorting to balancing at these stages of its analysis.[159] For example, it has held that "Article 8 includes for parents a right that steps be taken to reunite them with their children and an obligation on the national authorities to facilitate such reunion".[160] Therefore, there are areas in the case law where the Court has not eschewed structural determinations.

6.4 *The Specific Positive Obligation*

As with the above disparity concerning the role of the fair balance test, variations can be observed as to how the concrete positive obligation is framed and where it is framed in the structure of the analysis. I have identified three approaches that correspond to those distinguished in section 4.2 in the context of unqualified rights.

6.4.1 Formulation of the Specific Measure at the Beginning

In some cases, the Court formulates the concrete positive obligation at the beginning of the analysis, and proceeds with an assessment whether its fulfilment will impose disproportionate burden. For example, in *Hämäläinen* v. *Finland,* the concrete obligation was framed as to whether the state had to "provide an effective and accessible procedure allowing the applicant to have her new gender legally recognized while remaining married".[161] The issue in this case was not the quality of the procedure in terms of its effectiveness and accessibility but whether such a procedure should generally exist in the first place. Likewise, in *A., B. and C.* v. *Ireland* the Court asked whether "there is a positive obligation on the State to provide an effective and accessible procedure allowing the third applicant to establish her entitlement to a lawful

of Human Rights between Law and Politics (Cambridge University Press, Cambridge, 2011) 181, p. 183.

158 *Di Sarno and Others* v. *Italy*, 10 January 2012, ECtHR, Judgment, no. 30765/08, para. 108 (the municipal authorities failed to provide an adequate system of garbage collection).

159 It also needs to be acknowledged that there are judgments where the Court avoids the questions whether Article 8 is applicable and whether it generally triggers positive obligations. For example, in *Draon* v. *France* [GC], *supra* note 154, paras. 110–111, the Court simply observed that irrespective of the answers to these questions, the situation that the applicant complained of does not constitute a breach of Article 8.

160 *Kuppinger* v. *Germany*, 15 April 2015, ECtHR, Judgment, no. 62198/11, para. 100.

161 *Hämäläinen* v. *Finland* [GC], *supra* note 154, para. 64.

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abortion".[162] Similarly to *Hämäläinen* v. *Finland,* the problematic issue in *A. B. and C.* v. *Ireland* was the absence of any domestic procedure. In *S.H. and Others* v. *Austria*, the concrete positive obligation was framed as whether the state had "to permit certain forms of artificial procreation using either sperm or ova from a third party".[163] In these examples, the finding that there is such a concrete positive obligation amounts to the finding that this obligation has been breached (*e.g. A., B. and C.* v. *Ireland*).

6.4.2 Insertion of Qualifying Terms in the Formulation of the Concrete Positive Obligation

Another cluster of cases can be identified where the Court frames its enquiry as a polar question at the beginning (as in the previously identified category), however, the finding of a failure to fulfil the concrete positive obligation is dependent on such qualifiers as effectiveness and adequacy. For example, in *Söderman* v. *Sweden* the Court set its task to examine whether "Sweden had an *adequate* legal framework providing the applicant with protection against the concrete actions of her stepfather and will, to this end, assess each of the remedies allegedly available to her [emphasis added]". At no point does the Court clarify how adequacy is to be measured. In the absence of more concrete criteria for defining the required adequacy of the protection to be afforded by the legal framework, it is difficult to make a comparison between the existing measures (that might have been undertaken) and undefined adequate measures (that should have been undertaken). This prompted Judge Kalaydjieva to dissent in *Söderman* v. *Sweden*, and observe that

> in the absence of criteria defining the required 'acceptable level of protection' in specific terms, a comparison between the failed and the undefined remedies will inevitably lead to dissatisfaction 'notwithstanding the respondent State's margin of appreciation' in this area.

6.4.3 Absence of a Formulation of the Specific Measure until the Very End

In some judgments, the Court does not even frame the concrete positive obligation until the very last paragraph of its reasoning, where it concludes whether a fair balance has been struck. An example to this effect is *Odievre* v. *France,*

162 *A., B. and C.* v. *Ireland* [GC], *supra* note 140, para. 246.

163 *S.H. and Others* v. *Austria* [GC], 3 November 2012, ECtHR, Judgment, no. 57813/00, para. 88; see also *Oliari and Others* v. *Italy*, 21 July 2015, ECtHR, Judgment, nos. 18766/11 and 36030/11, para. 164.

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where the applicant complained that she could not obtain more information about her biological mother. In its reasoning, the Court initially restated the standard assertion that Article 8 may require measures designed to secure private life. These measures were not concretized from the outset in the light of the particular case. At the end, the Court concluded that the French legislation had struck a fair balance without overstepping the margin of appreciation afforded. When this structure of review is applied, it is assumed that the concrete positive obligation has been fulfilled and its scope does not extend so far as to allow granting the applicant access to information about her biological mother.

The latter implication prompted seven judges to dissent and to propose that this result should not have been reached: "[i]n more concrete terms, the Court is not required to examine whether the applicant should, by virtue of her rights under Article 8, have been given access to the information regarding her origins". The dissenters suggested that the concrete positive obligation should have been rather framed as whether the French legal system itself allowed balancing of competing interests.[164] If this avenue were to be followed, then the determination whether the applicant is entitled to the positive measure of gaining access to the information that she wanted can be eschewed by the Court and left for the domestic authorities. The dissenters thus suggested framing the concrete obligation as one of a procedural nature.[165]

6.5 *The Margin of Appreciation*

The answer to the question whether the state has a concrete positive obligation is contingent on the "fair balance" test, which implies striking a balance between competing interests.[166] The test implies assessment of alternatives: it would be difficult to evaluate whether a fair balance has been struck if alternatives to the measures adopted, and the solutions advanced by the state, are not considered. The crucial question here is how scrutinizing the Court is in terms of searching for and assessing alternatives.

As already clarified in section 3, the level of judicial scrutiny is determined by the margin of appreciation doctrine. Notably, in *Hatton* v. *United Kingdom,*

164 Join Dissenting Opinion of Judges Wildhaber, Bratza, Bonello, Loucaides, Barreto, Tulkens and Pellonoää, para. 6 in *Odievre* v. *France* [GC], 13 February 2003, ECtHR, Judgment, no. 42326/98.

165 Such a procedural path was, for example followed in *Dickson* v. *United Kingdom* [GC], 4 December 2007, ECtHR, no. 44362/04, para. 85.

166 *Hatton and Others* v. *The United Kingdom* [GC], *supra* note 4, para. 98; *A., B. and C.* v. *Ireland* [GC], *surpa* note 140, para. 247.

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where this level was set low, indicating a wide margin, the Court held that its supervisory function, "being of a subsidiary nature, is limited to reviewing whether or not *the particular* solution adopted can be regarded as striking a fair balance".[167] This signals that the Court will not probe into alternatives. This was framed in even clearer terms in *S.H. and Others* v. *Austria*:

> The Court accepts that the Austrian legislature could have devised a different legal framework for regulating artificial procreation that would have made ovum donation permissible. It notes in this regard that this latter solution has been adopted in a number of member States of the Council of Europe. However, the central question in terms of art 8 of the Convention *is not whether a different solution might have been adopted by the legislature that would arguably have struck a fairer balance*, but whether, in striking the balance at the point at which it did, the Austrian legislature exceeded the margin of appreciation afforded to its under that Article.[168]

The implication of the above is that the availability of a different solution that might be more solicitous to individual interests, and even more considerate of general interests, might not lead to a finding that the state has failed to fulfil its positive obligations under the ECHR. There might be a better alternative to ensure the right (without any added costs to competing general interests), but the one already adopted, although not as protective as the first, might suffice against the ECHR standards *as supervised by the ECtHR*.

Arguably, the approach alters with the shift in the level of judicial scrutiny. This is confirmed by the judicial practice, since more protective alternative analysis has not been *explicitly* rejected in judgments where the margin was not determined to be wide.[169] In these judgments, it can be expected that states still enjoy the inevitable discretion in terms of choosing protective measures (section 3 above). At the same time, however, it can be also anticipated that the assessment whether a 'fair balance' has been struck includes a consideration of more protective measures.

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167 *Hatton and Others* v. *United Kingdom* [GC], *ibid.*, para. 123, emphasis added.

168 *S.H. and Others* v. *Austria* [GC], *supra* note 163, para. 106, emphasis added; see also *Hristozov and Others* v. *Bulgaria,* 13 November 2012, ECtHR, Judgment, nos. 47039/11 and 358/12, para. 125; *Evans* v. *United Kingdom* [GC], 10 April 2007, ECtHR, Judgment, no. 6339/05, para. 91.

169 *A., B. and C.* v. *Ireland* [GC], *supra* note 140, paras. 249–66.

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6.6 *Factors in the "Fair Balance" Test*

The factors that determine how the "fair balance" test is applied in the concrete case were articulated in *A., B. and C.* v. *Ireland*:

> … the importance of the interest at stake and whether 'fundamental values' or 'essential aspects' of private life are in issue; and the impact on the applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system …[170]

Although the Court has not explicitly framed a test similar to the one expressed in the theoretical model – *i.e.* the more important the protection of the right is, the more robust public interest considerations will be required to justify not extending protection (see section 2.3 above) – it could be argued that this interrelationship is implied in the judgments.[171] Irrespective of the application of this reciprocity, the above quotation reveals that Article 8 has a core, and once this core is negatively affected, more protective alternatives are easier to justify.

The other two factors mentioned in the above quotation are assigned similar importance, and on many occasions are decisive. For example, the discordance between social reality and the law was crucial in the determination that Italy has a positive obligation to adopt a legal framework providing for the recognition and protection of same-sex unions.[172] Inconsistencies of domestic practices can have a vital role in the Court's approach to epistemic uncertainty (see section 2.4 above). For example, in *Dubetska and Others* v. *Ukraine*, after reiterating that regard will be given primarily to the findings of the domestic authorities in terms of unsafe levels of pollution and environmental impact assessments, the Court added that it "cannot rely blindly on the decisions of the domestic authorities, especially when they are *obviously inconsistent or contradict each other*".[173]

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170 *Ibid.*, para. 248; *Hämäläinen* v. *Finland* [GC], *supra* note 154, para. 66.

171 This is further supported by the clearly articulated relationship between the margin of appreciation and the importance of the interest at stake: "Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted". *Hämäläinen* v. *Finland* [GC], *surpa* note 154, para. 67.

172 *Oliari and Others* v. *Italy*, 21 July 2015, ECtHR, Judgment, nos. 18766/11 and 36030/11, para. 173.

173 *Dubetska and Others* v. *Ukrain,* 10 February 2011, ECtHR, Judgment, no. 30499/03, para. 107, emphasis added.

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Another factor of relevance in the fair balance test is the existence of procedural safeguards at national level. *Dickson* v. *the United Kingdom* is a case in point: a breach of positive obligations was found since the national procedure concerning access to artificial insemination by prisoners "excluded any real weighing of the competing individual and public interests, and prevented the required assessment of the proportionality of a restriction, in any individual case".[174] *Gaskin* v. *the United Kingdom* is also illustrative since the Court concluded that the system allowing access to personal records is "only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent".[175] This procedural path functioning within the framework of the fair balance test can be distinguished from another procedural path that can be observed in the case law. The latter implies imposition of a positive obligation under Article 8 of developing national procedures, which appears to be independent from, or applied in parallel with, the fair balance test in some judgments.[176]

In assessing the quality of national procedures, the Court has developed different procedural safeguards (effectiveness, impartiality, participation, motivation, *etc.*) that might have to be incorporated.[177] An additional safeguard that might also be of relevance when evaluating the quality of national procedures is whether the national decision-making process itself has assessed more protective alternatives.

6.7 *Consideration of Alternatives under Qualified Rights*

Clear divergences from the theoretical model can be observed. First, there are judgments in which the definitional and the application stages are conflated. In light of the explanations as to why such merging might be preferred by the Court (*i.e.* avoidance of structural determinations), it could be argued that the model outlined in section 2 does not adequately appreciate the complications arising from the broad definition of private life in the context of positive

174 *Dickson* v. *United Kingdom* [GC], *supra* note 165, para. 85.

175 *Gaskin* v. *the United Kingdom,* 7 July 1989, ECtHR, Judgment, no. 10454/83, para. 49.

176 *Hatton and Others* v. *United Kingdom* [GC], *supra* note 4, para. 99 and 129; *Taskin and Others* v. *Turkey*, 10 November 2004, ECtHR, Judgment, no. 46117/99, para. 115. See also *Tysiac* v. *Poland*, 20 March 2007, ECtHR, Judgment, no. 5410/03, para. 113: "While Article 8 contains no explicit procedural requirements, it is important for effective enjoyment of the rights guaranteed by this provision that the relevant decision-making process is fair and such as to afford due respect of the interests safeguarded by it".

177 See E. Brems, 'Procedural Protection. An Examination of Procedural Safeguards Read into Substantive Convention Rights', in Brems and Gerards (eds.), *supra* note 26, p. 137.

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obligations. Second, no conclusive test of legality and suitability is applied. Third, and similarly to the revelations regarding unqualified rights, there are disparities in the judgments in terms of both how the concrete positive obligation is framed and where it is framed in the structure of the analysis. In contrast, however, to unqualified rights, it can be expected that these discrepancies are more consequential in the context of Article 8. As explained, general positive obligations under Article 8 are not triggered automatically, and therefore these variations denote further uncertainty as to whether the case triggers positive obligations in the first place and how these can be formulated. Finally, if the Court exercises judicial restraint, in this way allowing a wide margin of appreciation, it signals that no violation of ECHR will be found even if there are more protective alternatives that serve general interests equally well.

7 Conclusion

The adjudication of positive obligations raises complex issues involving different components that the Court often does not easily and clearly articulate. Reviewing its practice through the lenses of the theoretical model outlined at the outset, however, helps to explain what the Court actually does to detect divergences and convergences and to understand the reasons behind these. Equally importantly, the identification of the distinctive features of the practice, in comparison with the model, can help assess whether they amount to weakness and what strengthening strategies might be proposed. As this article has shown, however, such an assessment needs to consider the limitations of the theoretical model itself when it comes to how rights generate positive obligations. The model for reviewing compliance with negative rights can arguably be applied to positive rights. However, the actual practice also shows the limits of the model in the context of positive obligations in terms of certain problematic aspects to which the practice has responded, these being the lack of conclusive legality test, the limited role of the suitability test, the lack of a separate more protective alternative test and rather the submergence of this test in a general and fluid reasonableness and fair balance assessment.

The model distinguishes the pivotal role of the interest at stake in the balancing exercise. In the ECtHR's practice, the importance of the interests shapes the whole structure of review from the outset. As a consequence, unqualified rights automatically trigger general positive obligations, which also implies that there are necessary concrete protective measures that the state has to undertake. This initially shapes the issue of alternatives because the starting point is that there *must* be a concrete protective measure that the

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state is under obligation to undertake in the concrete case. The assessment of this measure in terms of reasonableness includes consideration of different factors: compliance with domestic legality, knowledge about the harm, foreseeability of the harm, source of the harm, state authorization of the harmful activity and the multidimensional consequences of the measure.

In contrast, when the Court addresses qualified rights, it is confronted from the beginning with multiple tasks of appreciation: it will have to decide on the definitional threshold of Article 8, the related importance of the sphere of private life at stake in the case and whether the latter generally justifies triggering of positive obligations. Overall, this makes positive obligations under Article 8 less predictable. A possible explanation for this conflation of the different stages of review is the avoidance of structural determinations and tailoring of judgments as much as possible to the specific facts. Another distinguishing feature of positive obligations cases under Article 8 is the exercise of judicial restraint, which has led to the explicit rejection of a more protective alternative test. This is of concern because the perceived implication is a minimalistic human rights review, which would exclude or discourage more ambitious human rights agendas.[178] To counter this perception, I have clarified that the implications from this judicial restraint should not be confused with the stringency of the positive obligations *per se*. While the Court might refrain from finding a violation of ECHR due to judicial deference even if there are more protective alternative measures, the substantive balancing still needs to be done at national level, and this must include consideration of more protective alternatives.

In relation to both types of rights (unqualified and qualified), divergences can be observed in both how the concrete positive obligation is framed and where it is framed in the structure of the analysis. Three approaches can be identified: formulation of the specific positive measure from the beginning of the analysis, followed by an assessment whether it has been complied with; insertion of qualifying terms, such as 'adequate' or 'effective', in the formulation of the required positive measure, which makes the review less predictable; and no initial framing of the concrete positive obligation, but rather more abstract determination that states have to build protective frameworks, followed by an assessment of different alternatives and their reasonableness. The third approach appears to be most unpredictable.

178 See also in Brems, *supra* note 50, p. 349.

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