Beyond Acts and Omissions — Distinguishing Positive and Negative Duties at the European Court of Human Rights

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Abstract
The article examines methods of distinguishing positive and negative duties within the provisions of the European Convention of Human Rights as applied by the European Court of Human Rights. It highlights problems with tying positive duties to acts and negative duties to omissions, and sets out a supplemental delineation method when those problems lead to systematic classification errors: duties sort as positive if they have the capacity for multiple fulfilment options and negative if they only allow one fulfilment option. These delineation criteria allow for a more consistent reconstruction of case law and point to a causal mechanism for alleged asymmetries in proportionality review and margins of appreciation. Lastly, there are revisionary implications for human rights scholarship. Judgments have been sorted as positive rights cases because they feature a requirement that states commit to legislative amendment, yet performative acts of amendment may be continuous with underlying negative duties.

Keywords Positive and negative duties · Doing and allowing harm · Structural asymmetry · Proportionality · Margin of appreciation

Introduction

Regarding positive duties\(^1\) within the European Convention on Human Rights (ECHR), two observations can be made with relative certainty. The first is that the European Court of Human Rights (ECtHR) has identified positive duties

\(\text{\(\text{\textsuperscript{1}}\)}\) The more prevalent term in human rights literature is ‘obligation’, while ‘duty’ predominates in the legal theoretical and philosophical contributions that I will employ. The two can be treated as synonymous.

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within virtually every provision of the Convention (Lavrysen 2016, p. 4). Scholars see this burgeoning jurisprudence as evidence of a deep transformation, from a human rights order primarily concerned with constraints on state actions to one hallmarked by extensive performative duties (Starmer 2001, p. 159; Klatt 2011, p. 692; Lazarus 2015, p. 436; Lavrysen 2016, p. 3; Stoyanova 2020, p. 634). The second observation is that the distinction between positive and negative duties is not normatively inert. The significance of the distinction stems, in part, from its supporting role in debates concerning the relative priority of duties (Thomson 1990, p. 161; O’Neill 2005; Smet 2013, p. 490; Zucca 2017, p. 107), whether the recognition of indeterminate positive duties dilutes human rights protection (Pitkänen 2012, p. 550; Brems and Lavrysen 2015, p. 149), and whether the recognition of positive duties empowers unelected courts at the expense of democratic institutions and national autonomy (Böckenförde 1990, p. 28; Letsas 2007, p. 72; Alexy 2009a, p. 4; Young 2012, pp. 134–135; Gardbaum 2018, pp. 243–6). Using the positive/negative distinction as a pillar in normative discourse has also led to criticism that it cannot support the required weight. Since the effective realisation of a human right requires a diverse range of active measures and forbearances, so critics argue, sorting human rights into a binary framework can only breed confusion (Shue 1996, p. 53; Koch 2005, p. 83; Fredman 2008, pp. 65, 92, 100; Ashford 2009, p. 94). Throughout, and despite predictions that the distinction would eventually fade from relevance (Van Dijk 1998, p. 27; Lavrysen 2013, p. 166), the language of positive and negative duties continues to be actively employed both in the literature and by the Court.

Add these trends together and it would appear that a significant change has come upon ECHR law and, by extension, the global human rights order in which the European court plays a leading role. Notably, this development has taken place against the backdrop of growing concerns about the legitimacy of international human rights courts. In the pursuit of practical and effective rights, teleological methods of interpretation can trigger controversy by broadening the reach of human rights law and requiring courts to make determinations that traditionally fall within the purview of national authorities (Helfer and Alter 2013, p. 481; Leitjen 2018, p. 7; Möller 2012, p. 6; Sadurski 2015, p. 413). This dilemma of effectiveness — of balancing effective human rights protection against judicial overreach — is general to human rights adjudication. However, and for reasons this article attempts to clarify, the dilemma is seen as particularly vital when positive rights and their companion duties are concerned (Fredman 2008, p. 92; Lavrysen 2013, p. 172; Klatt 2015, p. 357).

How pronounced is the positive turn in ECHR law? And what does the evolution of positive duties mean for the legitimacy of the ECtHR and other human rights courts? Rather than addressing these questions directly, the article deals with the conceptual tools that are needed in order to answer. For it is only by accurately discerning the duties at stake in individual judgments that the supposed shift in human rights adjudication can be quantified, its effects examined, and its normative import evaluated. We require, in short, a sorting method. It is therefore surprising, given the broad engagement with human rights along the positive/negative axis, that so little attention has been devoted to the conceptual...
problem of delineation. The ECtHR, too, has declined to develop a general theory of the positive duties within the Convention. Scholars have noted this reticence and claimed that it makes judicial review haphazard and incoherent (Xenos 2012, p. 3–4; Stoyanova 2020, p. 634). Yet such criticism cuts both ways. Without reliable delineation criteria, doctrinal commentary on positive and negative duties in ECHR law runs a similar risk. Inflating or underestimating the count of positive rights cases can lead to inconsistent analyses. The article addresses this challenge by examining the legal theoretical premises of delineation methods used in the literature, highlighting key limitations, and suggesting an alternative approach when those limitations lead to systematic classification errors. ECtHR case law has been chosen as the focal point of this examination because no other regional human rights court has gone further in developing the content of positive duties, nor been subject to more criticism for the manner in which it has done so.

The article proceeds as follows: I first examine how attempts to tie positive duties to state action and negative duties to state inaction can lead to classification errors. I then describe a supplemental delineation method developed by Robert Alexy (2009a) and Matthias Klatt (2011), which sorts positive and negative duties according to their asymmetrical structure. Put simply, positive duties are distinguished from negative duties by their capacity for multiple fulfilment options. The following sections detail how this delineation method grants a deeper understanding of legal duties and allows for a more charitable and consistent reconstruction of ECtHR precedent. I outline how the structural asymmetry impacts the Court’s assessment of proportionality and margins of appreciation. I then re-examine the evidentiary basis for claims that positive duties are growing more prominent in ECHR law. The analysis focuses on a selection of cases — including Marckx, Keegan, and Cossey — that are portrayed as significant in the positive turn. I argue that the performative duties that feature in these judgments can be construed as a response to, and continuous with, underlying negative duties, thus challenging their status as positive rights judgments and their purported bearing on ECtHR jurisprudence.

### The Limitations of the Act/Omission Distinction

#### Identifying Delineation Methods

The present aim is to sharpen the tools used to identify positive and negative duties in legal scholarship. An immediate challenge, then, is that scholars rarely spell out the legal theoretical basis for classifying duties in a judgment as positive or negative (Xenos 2012, p. 28). Insofar as there is a standard method of delineating duties,
it may instead be rooted in their respective definitions. A positive right entitles the right-holder to have the duty-bearer do some act, while a negative right entitles the right-holder to have the duty-bearer refrain from doing an act. In the context of ECHR law, positive duties are those «requiring member states [...] to take action» (Harris et al. 2018, p. 24; Mowbray 2004, p. 2). Violation occurs when a required active measure is not taken. The conduct required by negative duties is that of state inaction or, rather, non-interference with the rights of the Convention (Harris et al. 2018, p. 24; Lavrysen 2016, p. 11). Violation occurs through active interference.

In Hohfeldian terms, these are both claim-rights, to be distinguished according to the active or passive nature of their companion duties (Hohfeld 1964, pp. 39, 60). Note how this usage of the term ‘duty’ reflects the aggregate nature of human rights provisions: their fulfilment requires compliance with many lesser duties, which in turn correlate with distinct, lesser rights (Mowbray 2004, p. 224; Brems and Gerards 2013, p. 173–4; Hurd and Moore 2018, p. 47). I return to the composite structure of human rights below.

Thus a positive rights case may be identified when the Court classifies an operative duty in the judgment as positive, or when the judgment is otherwise interpreted as concerning a requirement to take active measures to protect and fulfil rights (Lavrysen 2016, pp. 9–11; Xenos 2012, pp. 27–28). Examples of cases identified in this manner concern the duty to actively protect demonstrators from violent counter-protests under Article 11 ECHR,3 to intervene against domestic violence under Article 2,4 or to take children into state care under Article 3.5 The same approach also yields a finding of numerous positive framework duties, meaning duties to take regulatory and administrative steps towards making human rights under the ECHR effective. Examples include a duty to regulate police use of firearms under the right to life in Article 2,6 or to establish a mechanism for investigating suspicions of forced prostitution under Article 4.7 Another notable example is the seminal positive rights case of X and Y,8 where the inability for parents to file a sexual assault complaint on behalf of a mentally incompetent child was considered a violation of Article 8 ECHR.

Clearly, doctrinal accounts benefit from being able to provide an accurate tally of the positive duties that have been read into the Convention. Yet tracking such duties may also have broader significance. The developing jurisprudence can be framed as evidence of a transformation in ECHR law, reflecting growing expectations that member states ‘undertake positive measures to safeguard and enhance the basic rights embodied in the Convention’ (Mowbray 2004, pp. 229–230; see also Klatt 2011, p. 692; Leijten 2018, pp. 5–9; Starmer 2001, p. 159). On some accounts, the development of positive duties within the ECHR has been part of a shift away from

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3 Fáber v Hungary [2012] ECHR 1648.
4 Kurz v Austria [2021] [GC] ECHR 508.
5 Z and Others v The United Kingdom (2002) [GC] 34 EHRR 97.
6 Makaratzis v Greece (2005) 41 EHRR 49 para. 57, 71.
7 S.M. v Croatia (2020) [GC] (App 60,561/14) para. 306.
8 X and Y v The Netherlands (1985) 8 EHRR 235.
a conception of human rights as a bulwark against state intrusion and towards one requiring states to actively ‘supply what is needed for an individual to fully enjoy her human rights’ (Fredman 2008, pp. 1, 74–75; Lavrysen 2016, pp. 3, 307). For reasons noted above, such perceived shifts are bound to be contentious. For the present purposes, however, it is not necessary to take any normative sides. Regardless of one’s views on the role of adjudication, attempts to draw conclusions about the development of ECHR law on the basis of individual judgments require a reliable and consistent method of identifying the duties at stake.

If positive and negative duties could be consistently tied to acts and omissions, there would be no need for further conceptual analysis or alternative delineation methods. The first task, therefore, is to examine why tracking state actions and omissions may not provide an accurate reflection of the operative positive and negative duties in an ECtHR judgment. Two main sources of classificatory error present themselves. The first is practical and stems from the difficulty of identifying key acts or omissions in factually complex cases. The second is conceptual and stems from situations where the link between active state measures and positive duties is severed. Let us examine these challenges in turn.

**Isolating Positive and Negative Duties in Factually Complex Cases**

The problem of isolating key acts and omissions in complex cases is clearly reflected in case law. In cases regarding complex operations carried out by state security forces, for instance, the Court has found it ‘difficult to separate the State’s negative obligations under the Convention from its positive obligations’.\(^9\) Identifying salient acts and omissions is also difficult in cases with long and convoluted histories. Consider as an example the famous Grand Chamber decision in *Hatton*.\(^10\) The applicants were residents near Heathrow airport who alleged that the noise disturbance caused by night flights amounted to a violation of their right to private life pursuant to Article 8 ECHR. Night flights had originally been subject to restrictions on the total number of take-offs and landings. In 1993, after several studies on the health effects of noise pollution and economic effects of flight restrictions, this system was replaced by a scheme assigning a quota count to each type of aircraft. This allowed airport operators to increase the number of flights provided the aircraft in question were less noisy. The following years saw further trials, studies, and eventually the reintroduction of an upper limit on flight numbers and further noise mitigation measures. The applicants alleged that these new restrictions remained insufficient.

The Court ultimately did not find a violation of Article 8, but that there had been a violation of the right to effective remedy under Article 13 ECHR. The question is, if there had been a violation of Article 8, which act or omission should be considered pivotal? Was it the act of replacing the quota scheme in 1993? Or was it the failure to design an adequate quota scheme, to conduct sufficiently rigorous studies,

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\(^9\) *Finogenov and Others v Russia* (2015) 61 EHRR 4 para. 188.

\(^10\) *Hatton and Others v The United Kingdom* (2003) [GC] 37 EHRR 28.
or to reinstate stricter noise mitigation measures? No single act or omission in Hatton stands out as the obvious baseline for assessing compliance with the Convention (Lavrysen 2016, p. 305). Besides posing a challenge for commentary, it is against the backdrop of factual complexity we must read this frequently quoted passage:

Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants’ rights under paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole (para. 98).

The message here, anticipated in earlier judgments, is that the outcome of judicial review is not dictated by the choice of a positive or negative rights framing. The Court has repeatedly emphasised, moreover, that ‘the boundaries between the State’s positive and negative obligations […] do not lend themselves to precise definition’. Given the purpose of the present article — to refine the tools of delineation used in scholarship — statements like these invite a question: If the Court does not engage directly with the conceptual problem of distinguishing positive and negative duties, why should scholars make the attempt?

The response to this question requires adding some nuance to its premise. On the one hand, the statements quoted above can be taken to mean that the distinction between positive and negative duties has little to no bearing on the Court’s assessment (see e.g. Palmer 2009, p. 404; Lavrysen 2013, p. 166). On the other hand, one may argue that the distinction is too impactful for the Court to leave the question of framing open (Klatt 2011, p. 695). In my view, neither stance is warranted. The reason is that the quoted statements concern only the methodology of the ECtHR and not its conception of duties. The primary task of the Court is to reach a verdict and offer redress in individual cases. Rather than getting embroiled in questions of conceptual delineation, the more efficient approach when tackling individual applications is to proceed directly to proportionality review and the ultimate determination of whether the state has struck the right balance between active measures and non-interference. In effect, the Court is describing the same methodological freedom as that of a football player running towards a ball lying somewhere on the pitch; the location of the ball, i.e. the sought-after point of balance between competing interests, is not determined by the angle of approach. There is nothing in Hatton or later judgments, however, to indicate that judges cannot conceive of duties in positive or negative terms, should they choose to do so, or that their classification of a

11 See e.g. Marckx para. 31; Airey v Ireland (1979) 2 EHRR 305 para. 25. For later examples, see e.g. S.H. and Others v Austria (2011) [GC] ECHR 1878 para. 87; Dickson v The United Kingdom (2008) [GC] 46 EHRR 41 para. 70–1.
12 See e.g. Gül v Switzerland (1996) 22 EHRR 93 para. 38; Von Hannover v Germany (2005) 40 EHRR 1 para. 57; White v Sweden (2008) 46 EHRR 3 para. 20. For an extensive analysis of this jurisprudence, see (Lavrysen 2016, pp. 202–210, 270–304).
13 See Brontowski v Poland (2005) 40 EHRR 21 para 143–6; Dickson para 71.
duty cannot impact stages of their proportionality assessment. Assessing this impact requires accurate delineation.

**Decoupling Acts and Omissions from Positive and Negative Duties**

The second challenge when attempting to identify positive and negative duties is conceptual. I propose that acts and omissions are not always straightforwardly correlated with positive and negative duties, respectively. Besides highlighting the limits of the act/omission distinction, examining this potential for disconnect will also provide valuable guidance for the analysis of case law.

At this stage of the argument, it is necessary to look beyond the legal doctrinal literature to moral and political theory, where the conceptual problem of distinguishing positive and negative duties has garnered far more attention. Some methodological caveats are therefore in order. Terminologically, moral and political theorists are typically less concerned with the distinction between positive and negative duties and more with the distinction between *doing and allowing harm.* The difference should not be overstated, however. The language of doing and allowing harm also features in the legal literature, and it is attributed normative significance for overlapping reasons as that of the distinction between positive and negative duties (Smet 2013, p. 486; for comparison see e.g. Quinn 1989, p. 288–90; McMahan 1993, p. 250; McCarthy 2000, p. 749; Woollard 2015 pp. 4, 9). The second caveat relates to our relevant right-holders and duty-bearers. The ethics of doing and allowing harm are commonly examined in the context of *horizontal* duties — duties owed to persons by other persons or to states by other states. Owing to the subsidiary nature of the Convention as a supervisory mechanism, meanwhile, ECtHR case law deals primarily with *vertical* duties — duties owed to persons by states. Even if we assume, for the sake of argument, that this disparity in right-holders and duty-bearers has bearing on matters of moral justification, such normative translation issues do not automatically carry over to the more limited problem of delineation. As long as our purposes are solely classificatory, and provided that relevant examples can be transplanted into a legal context, the philosophical discourse should still be instructive.

Some political theorists do engage directly with the language of positive and negative duties. One such theorist is Thomas Pogge, whose project has been to strengthen the duties that the world’s rich nations have towards poor nations by framing them as negative duties of restitution for harm rather than as positive duties to aid (Pogge 2005). Clearly, there is a normative premise at work here — the idea that duties can be made stronger by recasting them as negative assumes that negative duties have some form of inherent priority. More importantly for our classificatory purposes, Pogge questions how we should conceptualise what he calls *intermediate duties:* duties to avert or remedy harms caused by one’s own past or present conduct. His argument is that duties of this kind do not fit well into the conventional dichotomy of positive and negative duties. They are ‘positive insofar as they require the agent to do something, and negative insofar as this requirement *is continuous with* the duty to avoid causing harm to others’ (Pogge
If we grant that the plight of the world’s poor nations is in part due to the past actions of rich nations, and hence that the duties in play are of an intermediate kind, he concludes that it is misleading to appeal only to positive duties when arguing that rich nations should aid the poor.

Pogge’s analysis translates fairly easily into the context of duties between persons, or between persons and states. If a driver backs his car into the neighbour’s hedge, he may feel inclined to offer to repair the damage caused. Replanting bushes or paying damages are both performative acts, but their purpose is to re-achieve compliance with a continuous negative duty not to destroy neighbouring hedges. Similarly, imagine that a state seeks to (re-)achieve compliance with the Convention by amending discriminatory marriage laws. My argument echoes that of Pogge in that it can be misleading, after noting the presence of a performative duty to amend legislation, to straightforwardly conclude that we are dealing with a positive rights case. Performative amendment can be construed as a response to, and continuous with, a still-active negative duty of non-interference. This potential source of classificatory error does not allow all negative rights cases to be framed in positive terms — in some instances, such as ongoing surveillance, compliance requires only a cessation of the interference.

The analysis brings out a further important point. After the successful dissemination of the account of human rights developed by Henry Shue, it should come as no surprise that the ECtHR has identified abundant positive duties within the Convention. Human rights are aggregates of substantively interdependent duties, requiring that states commit to a range of both mandates and constraints in order to secure the practical and effective protection (Shue 1996, pp. 36–40; Mowbray 2004, p. 221; Möller 2012, pp. 29–33). The right to life, for example, would be diluted if states did not craft a legislative framework for the use of firearms, just as the right to freedom from slavery and servitude would be hollowed out if states did not investigate suspected violations. Pogge’s argument is not incompatible with this interaction of duties. It speaks, rather, to their relative role in supporting a judgment. And his conclusion — that the negative duty not to cause harm may be less visible but normatively more important than the performative duty to provide aid — is a template for our interpretation of case-law. The fact that the implementation of a judgment requires active measures, or that judges have deliberated on the content and scope of those measures, does not straightforwardly signify that we are dealing with a positive rights case. If that were true, any and all judgments precipitating state action could be construed as positive rights cases. Instead we must look to the underlying duties motivating the required active measures.

For further guidance on the problem of delineation, it is necessary to temporarily abandon the language of positive and negative duties in favour of the language of doing and allowing harm. I will draw here on the work of Jeff McMahan, who is concerned with classifying instances of withdrawing aid as either killing or letting die. The relevant terms can be clarified by starting, as McMahan does, within the terminological framework of Warren Quinn:
Harmful positive agency is that which an agent’s most direct contribution to the harm is an action, whether his own or that of some object. Harmful negative agency is that in which the most direct contribution is an inaction, a failure to prevent the harm (Quinn 1989, pp. 301–2).

Thus, killing as an instance of harmful positive agency translates into what legal theorists may call a violation of negative duty, while letting die translates into a violation of positive duty (Foot 2002, p. 27). Within this framework, McMahan argues that the withdrawal of aid, although outwardly an act in violation of negative duty, falls within the ambit of positive duties if the agent herself was the one to provide the aid and the cause of the need for aid was external (McMahan 1993, p. 261). Imagine that someone writes a cheque for another person in financial need. The cheque creates a barrier to the harm that the recipient would otherwise suffer. Now imagine that the person who writes the cheque immediately tears it up. While tearing up the cheque looks like an active interference, this withdrawal of aid counts as an instance of allowing harm, i.e. a violation of a positive duty to provide aid, because the barrier to harm is one the agent herself provided. Tearing up the cheque simply nullifies the intervention, and the net effect is tantamount to non-intervention (McMahan 1993, p. 256; see also Kamm 2001, pp. 28–9).

How does this account apply in legal contexts? The scenario of withdrawing aid is exemplified in the Grand Chamber case of *McDonald*,14 which concerned a decision by authorities to reduce the financial support for a woman with limited mobility. If asked whether *McDonald* should be considered a positive or negative rights case (Lavrysen 2016, p. 25), McMahan would likely answer that providing and then cancelling financial support amounts to the net effect of non-intervention. The underlying duty to aid remains positive.

The more interesting area of application is legislative amendment. The outwardly positive act of amending legislation may, according to McMahan’s account, still fall within the ambit of negative duty if the state is responsible for the harm that the amendment seeks to prevent or remedy. That is, the act of legislative amendment is continuous with a negative duty if the source of harm is legislation in its unamended form. An example would be a law that bars women from serving in the armed forces. Here, the state has been lacking in its continuous duty to refrain from interfering, and the performative measure of removing the barrier would serve to fulfil a negative duty of non-discrimination. Only if the harm stems from another source, such as discriminatory hiring practices in the private sector, would failure to legislate count as violation of a positive duty to prevent discrimination. McMahan sums up this argument with the keen observation that while ‘stopping oneself from intervening may be an active form of nonintervention, it is a form of nonintervention’ (McMahan 1993, p. 260). Taking action to remove the harm caused by prior action returns the state to a position of compliance.

Two points are worth noting before moving on. The first is that these brief comments fall far short of capturing the detailed arguments put forward by Pogge and McMahan.

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14 *McDonald v The United Kingdom* (2015) [GC] 60 EHRR 1.
My aim is not to draw out all the nuances of their analyses or address potential concerns (see Woollard 2015, pp. 51–3), but only to indicate how overreliance on the distinction between acts and omissions can lead us astray. Pogge and McMahan’s key finding, echoed elsewhere (see e.g. Kamm 2001, p. 37; Woollard, 2015, p. 11), is that there is no universally reliable correlation between acts and omissions and doing and allowing harm. Omitting to provide aid can amount to the violation of a negative duty, and the active withdrawal of aid can amount to a violation of a positive duty. Likewise, the act of amending legislation can be continuous with both positive and negative duty.

The second point to note is that further philosophical analysis is unlikely to yield more practical ways of distinguishing legal duties in ECtHR case law. Legal practitioners cannot be expected to engage with what is a fairly complex philosophical discourse, and clear answers would not necessarily be forthcoming. McMahan, for instance, examines possible ways of refining our delineation criteria by sorting duties according to the source of the harm they are intended to avert. Yet, he also finds that this refinement can be made to fail by adding further details to a given scenario. Hence, he concludes that the problem of distinguishing doing from allowing harm is persistent and inescapable (McMahan 1993, p. 267). This ratchet effect is very much present in a legal context, as the facts of a case tend to be considerably more complex than the scenarios devised by philosophers.

A recurring theme so far has been that outwardly positive acts, be they provision of aid or legislative amendment, can fall within the ambit of negative duty fulfilment. In effect, negative rights cases can take on the appearance of positive rights cases through a prior violation and the resultant need to take active measures in order to (re-)achieve compliance. The result is a potentially inflated count of positive rights cases. The next task, therefore, is to find some other method of delineation, one that is able to make up for the shortcomings of the act/omission distinction while remaining practicable in a legal context. To these dual criteria, I suggest we add a third, which is that the chosen delineation method should provide some form of explanatory benefits when engaging with ECtHR case law. In the next section, I argue that the most likely way of satisfying these three criteria is to distinguish positive and negative legal duties by their capacity for fulfilment options.

The Structural Asymmetry of Positive and Negative Duties

Alexy and Klatt have proposed that there is a logical difference in the structural properties of positive and negative rights, and that this difference stems from the nature of their fulfilment conditions (Alexy 2009a, p. 4; Alexy 2009b, p. 208; Klatt 2011, p. 694; for further doctrinal applications, see Stoyanova 2018). Negative duties they label as conjunctive, because any and all actions disproportionally limiting the right are prohibited. In order to respect the right to property, for instance, the state must refrain from unlawful appropriation of property, and from creating disproportionate regulatory obstacles, and from overly onerous taxation, and so on. This is a blanket injunction; restraint on one front does not grant states the licence to act on other fronts. For a positive duty, meanwhile, not every act which brings about the fulfilment of the duty is required (Alexy 2009b, p. 308). Positive duties are
therefore labelled as *disjunctive*, meaning that there are multiple, independently sufficient paths to compliance. If states ensure that persons with disabilities can exercise their right to vote by organising public transport and building access ramps to voting stations, there is no further ‘and’ — no additional duty to establish an absentee ballot system, for instance.\footnote{The example is inspired by the case of *Molka V Poland* [2006] App. 56, 550/00.} Discharging the duty through one set of policies obviates the need for further measures.

This structural asymmetry between fulfilment options is widely acknowledged, including by prominent critics of the positive/negative distinction (see e.g. Friedman 2008, pp. 92, 150). The asymmetry is also apparent in case law. In *Pretty*, the ECtHR states that ‘the steps appropriate to discharge a positive obligation may be more judgmental, more prone to variation from state to state, more dependent on the opinion and beliefs of the people and less susceptible to any universal injunction’.\footnote{*Pretty v The United Kingdom* (2002) 35 EHRR 1 para. 15.} With time the Court has grown more confident in articulating the asymmetry, as when describing the choice of means when fulfilling positive duties under Article 2 in *Cevrioglu*: ‘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’.\footnote{*Cevrioglu v Turkey* [2016] ECHR 808 para. 55.} If nothing else, it is interesting to note how inappropriate the Court’s reasoning in *Cevrioglu* would be in the context of negative duty fulfilment.

An important consequence of structural asymmetry is, as Alexy notes, that access to multiple fulfilment options increases the scope for state discretion (Alexy 2009b, p. 308). The added discretion refers to the choice of means adopted to fulfil positive duties, rather than discretion in the adoption of policy goals or discretion in balancing conflicting rights (Alexy 2009a, 16). This choice of means makes it more difficult to demonstrate a breach (Alexy 2009b, p. xlix). The adjudicatory problem he points out is that of added counterfactuals. Upon finding that a state has provided inadequate access to voting stations for the disabled, for example, a court is not yet in a position to conclude that the duty to secure voting rights has been violated. Judges must instead go on to assess whether voting rights have been secured through other means, such as absentee ballots, mobile voting stations, and so forth. Contrast this staged assessment with that of negative duties. Upon concluding that a state has infringed voting rights by, for example, choosing to arbitrarily purge voter rolls instead of less intrusive security measures, violation cannot be rectified with measures that bolster voting rights in other ways. Instead of *multiple* counterfactuals, the act which crosses the threshold of disproportionationate infringement shares the *same* counterfactual: omission (Klatt 2011, p. 695). The asymmetry persists in cases where states must balance positive and negative rights. States have different options with regard to the measures taken to protect and fulfil rights, and these options can cause varying degrees of interference with negative rights, but once an active interference crosses the threshold of disproportionality, the only alternative is abstention.
Thus the margin in means-selecting ‘exclusively occurs in positive obligations’ (Klatt 2011, 715–716).

The present section examines some potential objections to the structural account that are not fully addressed by Alexy and Klatt. The remaining sections spell out in greater detail the implications of the asymmetry between positive and negative duties. Some of its explanatory benefits relate to the doctrines of proportionality and the margin of appreciation. A further, less explored implication is that the structural analysis forces an adjustment in our understanding of case law. The analysis will rely on Alexy and Klatt’s framework, albeit with three important adjustments. First, I do not commit to a claim that all important structural differences between positive and negative duties stem from asymmetrical fulfilment options (Alexy 2009b, p. 5; Klatt 2011 p. 695). Second, I propose that positive duties retain their disjunctive structure even when there is only one practicable fulfilment option left. And third, I have replaced the language of conjunctive or disjunctive structures with that of ‘fulfilment options’, a term that refers to the distinct measures and policies that a signatory state can pursue in order to discharge its duties under the Convention. This revised terminology is, I believe, both more accessible and more closely aligned with the language of ‘choice of means’ and ‘avenues’ that the Court employs when describing positive duties. Consequently, the sorting method works on the basis that:

(C1) all positive duties have the capacity for more than one fulfilment option, and
(C2) all negative duties allow only one fulfilment option.

These two claims require some clarification. To begin, the asymmetry in fulfilment options is ultimately rooted in the nature of acts and omissions. It is unlikely that any successful method of distinguishing positive and negative duties can be fully severed from this underlying dichotomy (Quinn 1989, pp. 301–2; Shue 1996, p. 37). The upshot is that this is a delineation method based not on fundamentals but on effects, which in turn raises a question: If the distinction between fulfilment options is not fundamental, should we not continue to focus on the distinction that is fundamental, namely that between acts and omissions? Perhaps, if our goal was to provide an ontological account of positive and negative duties. For purely classificatory purposes, however, the objection misses the mark. Legal theory is replete with tools that are charged with being reducible, most notably the Hohfeldian schema which sorts rights into claims, liberties, powers, and immunities. Faced with such criticisms, the response is that reducibility does not preclude utility (Barker 2018, pp. 598–9). The value of one’s chosen tools is measured in explanatory power, and so it is on this functional measure that the sorting method based on fulfilment options should be judged.18

18 The same utility criterion poses an issue for delineation based on the justiciability of duties or their cost of fulfilment, as both require the determination of a threshold value (Merills 1995, p. 106; Fabre 1998, p. 264; Lavrysen 2013, pp. 171–2; Klatt 2015, p. 358).
A second clarification is that sorting duties using C1 and C2 requires us to pay close attention to the level at which duties and their fulfilment options are specified. This is necessary because the term ‘human right’ is somewhat ambiguous. It can refer both to an aggregate and to specifics — to entire ECHR provisions and to the many lesser rights and correlative duties that spring from those provisions (Fabre 1998, p. 274; Pogge 2009, p. 128). The duty to secure voting rights, for instance, may translate into a very specific means, like building access ramps to voting stations, or it may refer to something altogether more complex: a short-hand for a diverse and evolving set of right-duty relations that includes both positive and negative duties (Wenar 2005, p. 234). As critics of the distinction are right to contend, the aggregate nature of human rights provisions makes them resist classification as wholly positive or negative. However, complexity at the aggregate level does not mean that it is impossible to distinguish the many lesser positive and negative duties within human rights (Fabre 1998, p. 275; Payne 2008, p. 223). Usually, the proper level of specification is decided for us, in the form of duties spelled out and scrutinised by the ECtHR in a specific judgment.

Having clarified the scope of C1 and C2, we can now examine possible objections. The most obvious way of refuting C1 is to argue that there are positive duties with only one fulfilment option (just as C2 can be refuted by identifying a negative duty with multiple fulfilment options). Consider the following case:

**Water Reservoir.** — A serious drought leaves authorities scrambling to supply drinking water. The only remaining source of water is a single reservoir, and so authorities must draw water from there.

Here is a seemingly positive duty both in terms of means (draw water from the reservoir) and ends (supply drinking water), yet *Water Reservoir* suggests that there is only one fulfilment option. Alexy has treated such scenarios as evidence that some positive duties have the same conjunctive structure as negative duties (Alexy 2009b, p. 309). The alternative and, I believe, preferable analysis is to acknowledge that *Water Reservoir* only creates the appearance of a singular fulfilment option by ignoring preceding events. Authorities could have diversified the water supply prior to the drought by building more reservoirs, recycling plants or desalination facilities. Consumption could have been reduced through rationing or pricing mechanisms. Rather than being evidence that some positive duties have a conjunctive structure, the predicament in *Water Reservoir* is the result of a series of choices. The significance of these choices can be brought out with a slight alteration to the scenario:

**Water Contamination.** — During a serious drought, the only recourse for authorities is to draw water from the last remaining water reservoir. However, they find that the water has been contaminated.

If we follow the logic of treating *Water Reservoir* as evidence that the duty to supply drinking water admits of only one fulfilment option, *Water Contamination* seems to show that the duty has no fulfilment options at all. The alternative assessment is that authorities have simply failed to discharge their duty. In *Water Reservoir*, authorities have painted themselves into a corner, and in *Water Contamination*,

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they are all out of options, yet the duty in both scenarios is still of a kind that admits alternate fulfilment options. Hence, authorities in both scenarios had, in the words of John Tasioulas, a ‘healthy plurality of ways of securing the right’ (Tasioulas 2007, p. 94). This conclusion also prevents what would otherwise be implausible discontinuities. Consider:

**Water Purchase.** — In the event of a drought, authorities can draw from a water reservoir or purchase water from a neighbouring municipality. After a contamination event, the purchasing agreement is left as the only recourse.

The positive duty in *Water Purchase* retains its structure. If the duty to supply water originally had the disjunctive structure of a positive duty, it is difficult to see why the event of a contamination should transmute its structure into that of a negative duty.

Against C2 — the claim that negative duties only allow one fulfilment alternative — one could argue that omission is something that admits of plurality; that there are different ways to omit. To succeed, this objection needs to demonstrate plurality in duty-fulfilment by altering the context of omission. In the context of adjudication, it could take the form of a claim that negative rights have multiple fulfilment options because there are different ways to avoid disproportionate interference. Yet, it is unclear how a shift in the context of an omission changes the omission itself. To illustrate with an anecdote, Woody Allen once quipped that he was an agnostic, his ex-wife an atheist, and now they could not agree on which religion not to raise the children in. The joke, of course, is that atheism and agnosticism are different contexts for the same crucial feature: an absence of faith in the proven existence of a god. If the two parents were to distinguish their common ground from its context, they would realise they are arguing over nothing. Likewise, we should attempt to avoid confusion by distinguishing a negative claim-right/duty relation from the legal norms that make up its context. Consider:

**Water Sale.** — Authorities receive a bid from a bottling plant to purchase the exclusive rights to draw water from the only available source.

Presumably, guaranteeing an effective right to water requires authorities to refrain from selling available water supplies to the highest bidder. Refusal of the bid from the bottling plant can happen in different ways and for different reasons. The deciding body may turn down the offer with a majority vote or by consensus. Authorities may cite the previous exercise of legislative power creating a prohibition on privatisation. They may justify the refusal with a disability to extinguish the right to water, or by citing a liability for damages if the right is infringed. Or they may simply exercise the same liberty to refuse that is afforded to any recipient of a contract offer. The presence of such further claims, duties, liberties, no-rights, powers, disabilities, immunities, or liabilities does not impinge on, or alter, the legal relation at the heart of the negative duty (See Hohfeld 1964, p. 58; Stocker 1967, pp. 510–1; Mellema

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19 I owe this anecdote to a conversation with Leif Wenar.
There is only one fact that is relevant to the fulfilment or violation of this duty, and that is the event or absence of a sale.

**Duties, Proportionality, and the Margin of Appreciation**

So far, I have argued that tracking acts and omissions is not always a reliable means of identifying positive or negative duties. I have also proposed that a structural delineation method based on fulfilment options can offer more consistent results. To highlight the benefits of the structural account, it is worthwhile to briefly note its implications for the doctrines of proportionality and margin of appreciation. This will only be an outline, as the relevant points are set out in greater detail by Alexy and Klatt.

Proportionality denotes a form of reasoning, a sequential technique for policing the boundaries of legislative reasonableness when faced with competing rights and interests (Gardbaum 2018, p. 222). When a state measure infringes on a right, proportionality review tests whether the measure furthers a legitimate objective, whether the adopted measure is rationally connected to the objective, whether the objective could be reached through less restrictive means, and whether the benefits of the measure outweigh its harmful effects (Möller 2012, p. 13; Huscroft et al 2014, p. 2014; Brems and Lavrysen 2015, p. 140). Now, doctrinal findings indicate that proportionality review for infringements of positive rights tends to be briefer and less intense than for negative rights (Gerards and Senden 2009, pp. 629–36; Barak 2012, pp. 422–34; Möller 2012, p. 179; Lavrysen 2013, p. 165; Gardbaum 2018, pp. 232). The alleged asymmetry is perhaps most clearly exemplified in the lack of less restrictive means testing in positive rights cases (Brems and Lavrysen 2015, p. 167; Stoyanova 2018, p. 353).

The mechanism behind the proposed asymmetry is disputed. Suggested explanations include judges’ lack of familiarity with positive duties, their acknowledgment of fiscal considerations, and their lingering worry that a strict proportionality review for positive duties will unduly restrict the autonomy of signatory states (Gardbaum 2018, pp. 241–6). The structural account lends itself to a further alternative. Since positive duties admit multiple fulfilment options, the omission of one active measure does not have a definite counterpart in the form of insufficient protection (Alexy 2009a, p. 11; Klatt 2011, p. 706). As a result, it is not enough for the Court to establish that a specific action has not been taken; judges must go on to assess whether the goal specified by the positive duty has been achieved through other means. The result, as the ECtHR noted in Pretty, is a far more complex and multifaceted proportionality assessment (para. 15). For negative duties, meanwhile, assessing the necessity and strict proportionality of a measure taken can be done with respect to the same counterfactual of omission (Klatt 2011, p. 709).

Asymmetries have also been found in how the ECtHR determines margins of appreciation — the degree of latitude afforded to member states in choosing how to fulfill treaty obligations. The doctrine itself seems to be somewhat flexible, ranging from a test of whether a rights restriction is manifestly unreasonable to a more nuanced evaluation of the quality and reasonableness of its justification.
— sometimes the test merges completely into proportionality review (Gerards 2018, pp. 498–502). Doctrinal analysis suggests that states are granted a wider margin of appreciation in the context of positive preventive measures than what is granted in the context of fulfilling negative duties (Gerards and Senden, p. 619; Lavrysen 2013, p. 166; Gerards 2018, p. 501). Here, structural asymmetry can help explain the difference by highlighting the means-selecting discretion inherent to positive duties (Alexy 2009a, p. 16). Consider once again the duty to ensure that those with disabilities can exercise their right to vote. A strict judicial review, where the court mandates one specific fulfilment option in the form of absentee ballots, risks overdetermination by ruling out all the alternative measures to achieve compliance — options that it may be in the interest of national authorities and their constituents to pursue (Alexy 2009a, p. 4; Alexy 2009b, p. 308). As stated by the Court in Cevrioglu:

[T]he choice of means for ensuring the positive obligations under Article 2 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 (para. 55).

In line with the principle of subsidiarity, states hold the primary responsibility for enforcing and protecting human rights. As affirmed in Airey, it is ‘not the Court’s function to indicate, let alone dictate, which measures should be taken’ when multiple fulfilment options are available. Or, as stated in Eremia, it is not the Court’s ‘role to replace the national authorities and to choose instead of them from amongst the wide range of possible measures that could be taken to secure compliance with their positive obligations’. The means-selecting discretion of member states also features in cases where positive and negative rights are in tension. If, as in Hatton, noise mitigation measures need to be balanced with commercial interests, there remains a choice of means with which to protect local residents. Once the threshold of disproportional interference with the negative right has been crossed, however, the only alternative to an offending measure is abstention (Klatt 2011, p. 715–716).

There is thus an argument to be made that the structural sorting method sheds some light on judicial review. By thinking of positive and negative duties in terms of fulfilment options, we align our analytical premises with empirical observation in a way that a reliance on acts and omissions does not. It must be acknowledged, however, that distinguishing duties by their fulfilment options is more cumbersome, and the potential explanatory benefits are arguably not sufficient to justify the added conceptual burden. The asymmetry in standards of review adopted by the ECtHR also remains disputed, as do its causes. In the next section, I will therefore examine whether the case for a structural sorting method can be made more compelling by demonstrating revisionary implications for the interpretation of ECtHR precedent.

20 Airey para. 26.
21 Eremia and Others v The Republic of Moldova (2014) 58 EHRR 2 para. 50.
Having developed the conceptual tools, the remainder of this article is dedicated to a relatively simple question: Has the count of positive rights cases in commentary on ECHR law been inflated through imperfect delineation methods? The question will be addressed by revisiting key judgments and classifying operative duties on the basis of their structural properties. Since a comprehensive review is not feasible in the confines of one article, my focus will be on a selection of judgments considered significant in the development of positive duties.

The chief candidate is *Marckx*, a plenary judgment that has been frequently cited by the Court itself and held up as a major milestone in the positive turn of ECHR law (see e.g. Alexy 2009a, p. 2; Leijten 2018, p. 40; Xenos 2012, p. 24). The judgment has been described as the ‘source’ of a process of deriving positive duties from the Convention (Harris et al. 2018, p. 25), as ‘[t]he major breakthrough’ for positive duties (Lavrysen 2016 p. 4), and as having ‘historic significance [as] the first case where the Court found a breach of a positive obligation under Article 8’ (Mowbray 2004, pp. 151–152).

The case concerned the regulation of childbirth outside of marriage in Belgium. According to the laws at the time, maternal affiliation upon birth was only automatic for married mothers. Since the applicant was unmarried, establishing maternal affiliation required a time-consuming process that left the mother and her child separated in law during the interim. This system was held to be a violation of Article 8 paragraph 1 taken alone. It was also held to be in violation of Article 8 in conjunction with the prohibition on discrimination under Article 14.

The choice to frame *Marckx* as a positive rights case may stem from the two-paragraph structure of Article 8 ECHR. The first paragraph safeguards the right to private and family life, while the second establishes the circumstances in which the right can be interfered with. Notably, the Court both stressed the choice of means available to Belgian authorities and held that a law which fails to satisfy the requirement in the first paragraph does not need to be examined under the second (para. 31). Taken together, these statements seem to indicate a framing not in terms of an interference with a negative right but rather a failure to fulfil a positive duty to ensure maternal affiliation. The problem with this reading of *Marckx* is that Belgian authorities had clearly fulfilled the framework duty to establish a system for maternal affiliation. The crux of the matter was not the absence of such a system, but rather a set of rules that specifically regulated births outside of wedlock. Were it not for this exception, the shape and form of the legal framework safeguarding family life in Belgium would be immaterial to the outcome in *Marckx*.

In his dissenting opinion, Judge Fitzmaurice points to the same conceptual problem. He speculates that the majority of the Court saw Article 8 paragraph 2 as immaterial because Belgian authorities had taken no ‘positive or concrete steps by way of interference’ such as home invasions or surveillance. The problem, as Fitzmaurice highlights, is that interference by authorities does not only take the form of concrete acts. Interference can also result from the exercise of legislative power. This observation fits well with McMahan’s account. According to his argument, the
operative moral duty in Marckx was not to craft a legal framework protecting family life but rather a duty to abstain, in the course of crafting this framework, from putting unmarried mothers and their children in a disadvantageous situation. Any other legislation or act that discriminated against unmarried mothers and their children would be similarly prohibited. Only one policy option was available: abstention, or, rather, the absence of particular rules disadvantaging this subset of persons.

It is at best unclear, then, how Marckx can be held up as a breakthrough for positive duties in ECHR law. To paraphrase McMahan, amending legislation that was detrimental to the applicants in Marckx may have been an active form of non-intervention, but it could be considered a form of non-intervention nonetheless. To paraphrase Pogge, even if the ECtHR employs the term positive duty to describe the legislative action necessary to achieve compliance, it would be misleading to classify Marckx as a positive rights case solely on the basis of a performative amendment while ignoring the underlying, negative duty. Or finally, to paraphrase the ECtHR in Airey, the substance of Marckx was not that the state had failed to act but that it had acted, or rather legislated, in a certain way (para. 32).

The analysis of Marckx carries over to similar cases. Of particular interest is Keegan, whose facts closely resembled those in Marckx but where the deliberation of the ECtHR differs in important respects. The applicant was a father who was not granted paternal affiliation from the moment of birth because he was not married to the mother. His daughter was subsequently placed for adoption without his knowledge or consent. Once again, the acts of registering paternal affiliation, or of amending the law to make such affiliation automatic, are performative. This supports a conclusion that Keegan was a positive rights case. Unlike in Marckx, however, the Court chose to frame the failure to establish paternal affiliation and subsequent adoption as an interference with a negative right that could only be permissible under the conditions set out in paragraph 2 of Article 8 ECHR (para. 49–51). Given the factual similarities between Marckx and Keegan, the difference in framing seems untenable. Perhaps the shift reflected residual uncertainty amongst judges. Or perhaps it is attributable, as Judge Fitzmaurice anticipated in his Marckx dissent, to the more tangible nature of adoption as a form of interference. In structural terms, however, the severity of adoption as a consequence has no bearing on the number of fulfilment options available when ensuring paternal affiliation. The legislative amendment required to grant automatic paternal affiliation would not provide an overall improvement in the life of the applicant; it would restore the status he would have enjoyed in the absence of differential legal treatment (Kamm, 2001, p. 24). Such an absence can only be guaranteed in one way, namely by refraining from differential treatment. The performative duty to grant paternal affiliation in Keegan may thus be construed as continuous with a negative duty of non-interference.

In Gorzelik, Polish authorities refused to register an association of individuals belonging to the Silesian national minority. Here, both parties and the Court agreed that the duty at stake was one of non-interference with the right to freedom of association under paragraph 2 of Article 11 ECHR. The question is, how can Gorzelik

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22 See in particular the plenary case Johnston and Others v Ireland (1987) 9 EHRR 203 para. 71–6.

23 Gorzelik and Others v Poland (2005) 40 EHRR 4.
be construed as a negative rights case while at the same time classifying *Marckx* as a positive rights case? Both cases concerned official registration and resulting effects on the legal standing of persons or associations. In *Gorzelik*, the choice not to register was made by administrative bodies and in compliance with domestic law. In *Marckx*, the lack of affiliation was a consequence of past legislative choices. Structurally, both cases feature a single fulfilment option. The only point of variance is the context of the decision to withhold the rights granted by official recognition, and the only option for fulfilment was to abstain from differential treatment.

*Cossey* provides a further example of the potential disconnect between legislative amendment and positive duties. The applicant, a post-operative transgender woman, was effectively barred from marrying under the law of the UK because her birth certificate did not register her as female. Certificates recorded sex at the date of birth and could not be amended. She claimed that this arrangement violated her Article 8 rights. The majority did not find a violation. As in *Marckx*, the legislative solution sought by the applicant — having a means to alter birth certificates — is performative, and again the question is whether the operative duty was positive or negative. The Court framed the question in the following manner:

> [R]efusal to alter the register of births or to issue birth certificates … cannot be considered as an interference. What the applicant is arguing is not that the State should abstain from acting but rather that it *should take steps to modify its existing system*. The question is, therefore, whether an effective respect for Miss Cossey’s private life imposes a positive obligation on the United Kingdom in this regard (para. 36, emphasis added).

Before treating this passage as proof that *Cossey* should be classified as a positive rights case, we should recall that the act of amending legislation can be continuous with a negative duty. The mere fact that legislative amendment is required to (re-)achieve compliance is not enough to support an overall positive rights classification. Regard must also be had to the nature of the duty motivating the legislative change. As in *Marckx*, a dissenting judge recognised this conceptual problem. Judge Martens questioned whether the issue was not the ‘refusal to alter the register of births or to issue birth certificates whose contents and nature differ from those of the birth register; the very essence of his complaints was that the legal system in force in the United Kingdom […] was inconsistent with his rights under Article 8’. Martens’ question mirrors both the dissenting opinion of Judge Fitzmaurice in *Marckx* and the results of delineation using fulfilment options. At the forefront in *Cossey* were a set of rules that hindered transgender people from obtaining birth certificates reflecting their gender. The rephrasing suggested by Judge Martens shifts the onus from a duty of performative amendment to a negative duty of respect for private and family life when designing a system for issuing birth certificates.

An argument against framing *Cossey* as a negative rights case is that a system for amending birth certificates can be set up in different ways, thus allowing multiple fulfilment options. This objection can be assessed with a comparison to the subsequent plenary case *B. v France*, which also concerned the inability of a
post-operative transgender woman to change her birth sex. This time, a system for amending birth certificates was already in place. A large majority found a violation of Article 8 ECHR, stressing that French birth certificates were intended to be updated throughout the life of citizens and that the inability of the applicant to change her birth sex was incompatible with the respect for her private life. In this case, the duty to amend legislation in order to end differential treatment may be recast as continuous with a negative duty (cf. Mowbray 2004, p. 134).

The above cases can be contrasted with a case where the problem of delineation was raised but where I believe the positive rights classification was ultimately correct. In Gaskin, the applicant’s lack of access to case records from his childhood was considered a violation of the right to respect for private life in Article 8 ECHR. The contention of the government of the UK was that this was a positive rights case, and that it hinged on whether the state had created a sufficient legal and administrative framework for giving access to case records. The European Commission of Human Rights, meanwhile, framed it as a negative rights case, hinging on whether the applicant was ‘obstructed by the authorities from obtaining such very basic information without specific justification’. The plenary Court sided with the former, framing the central question as one of whether the government’s handling of the applicant’s requests for access to his case records was in breach of a positive duty under Article 8. This result aligns with the structural analysis. The basis for a positive classification was not the need for legislative amendment itself but rather the lack of a mechanism for accessing a government service in the form of case records. Crucially, and providing that records would be accessible to all, the system for generating records and making them available could be designed in different ways.

Lastly, having revisited these central judgments, we are better placed to examine the famous concurring opinion of Judge Wildhaber in Stjerna. At the heart of this opinion is an argument that Gaskin, Keegan, and Cossey were all equally amenable to a positive rights or negative framing, and thus that it was incoherent for the Court to take a differentiated approach to its judicial review of positive and negative duties. This lone opinion did not shape later jurisprudence, but has featured prominently in the literature (see e.g. Mowbray 2004, p. 187; Lavrysen 2016, p. 23). The structural delineation method suggests that the rest of the Court was right not to be swayed. In Cossey, judge Wildhaber argued for a negative rights framing on the basis of official refusal to modify the system of civil registry. On the structural account, meanwhile, the basis for a negative rights framing lies in prior decisions made when designing the registry system — decisions which then led to differential treatment of the applicants. The same holds true for Keegan (where the severe consequences suffered by the applicant seem to have

24 B. v France (1993) 16 EHRR 1. 
25 Gaskin v The United Kingdom (1990) 12 EHRR 36 para. 38–41. 
26 The positive rights classification has been followed in subsequent cases about access to information, see e.g. Guerra and Others v Italy (1998) [GC] 26 EHRR 357 para. 44–6. 
27 Stjerna v Finland (1997) 24 EHRR 194.
guided the Court towards the correct, negative rights framing). And in *Gaskin*, a positive rights framing is more apt given the multiple fulfilment options available when setting up a system for storing and granting access to case records. Contrary to Wildhaber’s claims, then, the positive or negative framing of these three cases is not interchangeable. This weakens the charge of incoherence made against the Court.

**Conclusion**

There are several obstacles to distinguishing positive and negative duties on the basis of observed acts and omissions. Whenever these obstacles become apparent, we may instead resort to a sorting method based on asymmetrical fulfilment options; positive duties have the capacity for multiple fulfilment options, whereas negative duties only have the capacity for a single fulfilment option. This supplemental delineation tool improves our understanding of the legal duties scrutinised in ECtHR judgments, allowing for a more charitable reconstruction of judicial precedent and creating an improved platform for scholarly interpretation. It provides us with a plausible explanation for alleged differences in the application of key legal doctrines such as proportionality and margin of appreciation. Lastly, the revised sorting method challenges established views on the development of positive duties in ECHR law. Performative amendment can be required to (re-)achieve compliance with a still-active negative duty, and so classifying judgments where such amendment is discussed as positive rights cases may inflate the category.

To be clear, this argument does not support a conclusion that there are *no* ECtHR rulings founded on positive duties under the Convention, only that there are fewer such cases than first appearances may suggest. Nor will sharper tools of delineation assuage those who see the wider recognition of positive duties as detrimental to human rights protection, national autonomy, or the legitimacy of international courts. The reappraisal does, however, paint a more nuanced picture of ECtHR precedent. All human rights require for their fulfilment both acts and forbearances, and so the need for active measures will necessarily feature even in cases that hinge on negative duties.

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