

HUMAN RIGHTS IN A POSITIVE STATE

HUMAN RIGHTS IN A POSITIVE STATE

Rethinking the Relationship
between Positive and Negative
Obligations under the European
Convention on Human Rights

Laurens LAVRYSEN



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

Distribution for the UK and Ireland:

NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7 PP
United Kingdom
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for Europe and all other countries:

Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21
Email: mail@intersentia.be

Distribution for the USA and Canada:

International Specialized Book Services
920 NE 58th Ave. Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832
Email: info@isbs.com

Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights
© Laurens Lavrysen 2016

The author has asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as author of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

ISBN 978-1-78068-425-3
D/2016/7849/118
NUR 828

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

ACKNOWLEDGEMENTS

Writing this book would not have been possible without the support of a number of people who rightly deserve credit for this. First of all, I want to thank my supervisor, Eva Brems. Thank you, Eva, for hiring me in the first place; for believing in me throughout my research; for giving me the autonomy to grow as a researcher; for giving me confidence when I had doubts; for your ear-splitting laughter which contributes to our pleasant working environment; for being the engaged scholar I admire, combining academic virtue with a genuine concern for the rights of those people who need it most. It has been a privilege to work for you.

I want to thank my colleagues from the Human Rights Centre for making our research group such a hospitable place. I want to particularly thank my fellow Strasbourg watchers with whom I've had the honour to collaborate closely. Thank you, Saïla, Alexandra, Stijn, Lourdes, Maris, Valeska, Lieselot, Helena, Corina and Eline. Our biweekly discussions on recent developments in the jurisprudence of the European Court of Human Rights have greatly contributed to my development as a researcher in this area.

A number of colleagues deserve to be acknowledged personally. Saïla, I want to thank you for being such a generous person, always willing to openly share experiences, always willing to help. I was lucky to share an office with you at the moments when I struggled most with my work. Giselle, I want to thank you for being such a warm person, you're always the first to notice when something's wrong, to listen and to give good advice. If you hadn't been such a great scholar, I'm sure you would have been a great therapist. Corina, thank you for being such an eternal source of positive energy at work. Helena, you're truly my university BFF. Thanks for all the coffees, all the swims, all the moments we shared. Without you, life at university would not have been such good fun. Finally, my gratitude goes out to Martine. Without your eternal support, we would all get inevitably lost in the labyrinth of university bureaucracy.

I also want to thank Prof. Dr. Wouter Vandenhoe and Prof. Dr. Yves Haeck for their input as members of my doctoral guidance committee. I similarly want to thank the members of my PhD jury. In particular the input by Prof. Dr. Paul Lemmens and Prof. Dr. Janneke Gerards was valuable when finalising this manuscript. My gratitude also goes out to the FWO (Research Foundation Flanders) for funding my PhD research.

In addition, I want to thank my friends for always supporting me. I am particularly indebted to Tim, Raïssa and Nicolas. I also want to thank my partner Marjan for her support and for her patience while I was finalising my dissertation.

Finally, I want to thank my family: mama, papa, Celine and Sarah for always believing in me. I know that you are all in your own special way proud of me. Mama, you are one of those exceptionally altruistic persons that make this world a better place. I want to dedicate this PhD to you.

CONTENTS

Acknowledgements v

Chapter 1.

Introduction 1

1.1. Aims of the Study 2

1.2. Setting the Stage 2

1.3. Working Definition and Related Concepts 9

1.4. State of the Art and Scope of this Study 15

1.5. Thesis and Research Questions 23

1.6. Methodology 27

 1.6.1. Analytical and Normative Approach 27

 1.6.2. Critical Approach and Deconstruction 31

 1.6.3. Empirical Scope of the Study 34

1.7. Structure of the Study 41

Chapter 2.

Typologies of Positive Obligations 45

2.1. Substantive and Procedural Positive Obligations 47

 2.1.1. The Basic Distinction between Substance and Procedure 50

 2.1.2. The Difficulties in Distinguishing between Substance and Procedure 53

 2.1.3. Procedural Positive Obligations – General 57

 2.1.4. Investigative Obligations 61

 2.1.5. Access to Effective Remedies 66

 2.1.6. Careful Decision-Making 75

2.2. Horizontal and Vertical Positive Obligations 78

 2.2.1. Horizontal (Substantive) Positive Obligations 82

 2.2.1.1. Obligations to Protect Life and Physical or Personal Integrity 83

 2.2.1.2. Protection within Private Law Relations 87

 2.2.1.3. Activities of Public Importance: Monitoring and the State’s System Responsibility 90

2.2.1.4.	The State's Role as Guarantor of Pluralism	94
2.2.1.5.	Selected Other (Horizontal Substantive) Positive Obligations	98
2.2.2.	Vertical (Substantive) Positive Obligations	100
2.2.2.1.	The "Duty of Schizophrenia"	100
2.2.2.2.	Creation of Legal Status	103
2.2.2.3.	Special Duty of Care towards Persons under the State's Control	105
2.2.2.4.	Protection in the Absence of Interference	107
2.2.2.5.	Obligation to Take into Account Certain Particularities	109
2.2.2.6.	Substantive Equality	110
2.3.	Obligations Requiring a Legal and Administrative Framework and Ad Hoc Obligations	112
2.3.1.	The Rationale for Requiring an Adequate Legal and Administrative Framework	118
2.3.2.	Criminal Law Provisions	123
2.3.3.	Non-Criminal Contexts	126
2.4.	Conclusion: the Diversity of the Court's Case Law	130

Chapter 3.

	Relevant Principles and Tests	131
3.1.	The Knowledge Condition	131
3.2.	Proximity	137
3.3.	Effectiveness	146
3.4.	Delineating State Responsibility	155
3.5.	Qualifying Terms	158
3.6.	Proportionality Analysis	166
3.6.1.	The Application of the Principle of Proportionality in General	167
3.6.2.	Proportionality and Positive Obligations	171
3.6.2.1.	Relevant Factors in the Proportionality Analysis	174
3.6.2.2.	Move Towards Proceduralisation	179
Substance-flavoured procedural review	181	
3.7.	Margin of Appreciation	185
3.7.1.	The Meaning of the Margin of Appreciation	186
3.7.2.	Factors Determining the Width of the Margin of Appreciation	189
3.7.3.	Consequences of the Margin of Appreciation	191
3.7.4.	The Margin of Appreciation and Positive Obligations	193
3.7.4.1.	"Quantitative" Reading of the Case Law	195
3.7.4.2.	"Qualitative" Reading of the Case Law	201

Women on Waves and Others	201
Notion of “respect” under Article 8	202
Choice of means	206
3.7.4.3. Conclusion on the Margin of Appreciation	210
3.8. Conclusion	210
Chapter 4.	
Comparison Positive vs. Negative Obligations	213
4.1. The Exceptional Character of Positive Obligations	214
4.2. The Different Structure of the Court’s Examination under Articles 8–11	221
4.3. The Margin of Appreciation	225
4.4. Polycentricity	226
4.5. Proportionality	228
4.6. Conclusion	237
Chapter 5.	
Deconstructing the Dichotomy	241
5.1. “The State” in the Court’s Case Law	243
5.1.1. Early Case Law Concerning “Hybrid” Entities	247
5.1.2. The <i>Kotov</i> Case	249
5.1.3. Deconstructing the Notion of “Public Authority”	254
5.2. Actions vs. Inactions/Omissions in the Court’s Case Law	261
5.2.1. Theoretical Difficulties in Distinguishing between Actions and Omissions	262
5.2.2. Practical Difficulties in Disentangling Action and Omission in the Court’s Case Law	270
5.2.3. Baselines in the Court’s Case Law	276
5.2.3.1. The “Status Quo” Baseline	276
“Negativist” rights	276
Modifying an “existing” legal status	277
“Existing” vs. “new” rights	284
Denial of health care	288
Refusal decisions	290
5.2.3.2. Curtailing vs. Implementing a Right	291
5.2.3.3. Domestic Law Making Interference “Lawful”	298
5.3. Conclusion: Holding the Positive State Accountable	304

Chapter 6.

Transforming the Court's Legal Methodology	309
6.1. Wildhaber's Proposal.....	311
6.2. The Structure of the Analysis.....	314
6.2.1. Scope Stage.....	314
6.2.2. Discarding the Categorisation Question.....	315
6.2.3. Legality Test.....	317
6.2.3.1. Unlawful Inactions.....	318
6.2.3.2. Condoning Illegalities.....	322
6.2.3.3. Adequacy of the Legal and Administrative Framework.....	324
6.2.3.4. Quality of the Law.....	326
6.2.3.5. Conclusion on the Legality Test.....	328
6.2.4. Legitimacy Test.....	328
6.2.5. Proportionality Test.....	330
6.2.5.1. Margin of Appreciation.....	330
6.2.5.2. Proportionality Analysis.....	332
6.3. Some Final Examples.....	335
6.3.1. Examples from the Court's Case Law.....	335
6.3.2. Re-examining <i>Hristozov</i>	337
6.4. Conclusion.....	341

Chapter 7.

General Conclusion	343
7.1. Summary of the Findings.....	343
7.2. Refuting the Worst Fears of the Critics.....	346
7.3. Suggestions for Further Research.....	347
<i>Bibliography</i>	351
<i>Corpus of Cases</i>	367