Positive Obligations under the European Convention on Human Rights

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Abstract

Positive obligations have a growing importance in the jurisdiction of the European Court of Human Rights (ECtHR). This article analyzes the relation between positive obligations and proportionality with the help of *Alexy's* principles theory. Applying the proportionality test to both negative and positive obligations may undermine any margin of appreciation of the Member States. This gives rise to the problem of overdetermination. An account of different types of the margin, however, helps to understand the precise scope of the margin in the field of positive obligations. The *Hatton* Case is used as a seminal example to illustrate these issues.

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I. Introduction

It is widely acknowledged that human rights do not only provide protection for individual freedom against an intrusive state, but may also require the state to take positive action.[1] The ECtHR has increasingly recognized implied positive obligations of Member States as arising from the rights in the European Convention on Human Rights (ECHR). Positive obligations have a "growing importance" in the jurisprudence of the ECtHR.[2] There is increasing evidence that literally all human rights involve both negative and positive duties.[3] Hence, the request to elaborate the duties embodied in human rights comes as no surprise:

> Identifying the multiple duties that may be relevant to any one right sharpens an understanding of what is distinctive to and necessary to realize that right.[4]

Nonetheless, *Mowbray's* account that "the issue of positive obligations under the ECHR has been subject to limited commentary in the existing literature"[5] is still valid today.

A central topic in the current debate on human rights is the role of weighing as a means of achieving the specific balance between negative and positive obligations. Balancing plays a central role in the jurisdiction of the ECtHR. In order to analyze the relation between balancing and positive obligations further, I will follow *Alexy*'s account of discursive constitutionalism[6] here by applying his most recent analysis[7] on the structure of positive obligations to the case law of the ECtHR. In particular, I will address the proportionality test in the context of negative obligations first, so that the differences in the context of positive obligations become as clear as possible.

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1 See *S. Fredman*, Human Rights Transformed. Positive Rights and Positive Duties, 2008, 1 et seq.

2 *A. R. Mowbray*, The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights, 2004, 229.

3 *H. Shue*, Basic Rights. Subsistence, Affluence, and U.S. Foreign Policy, 1996, 155; *A. R. Mowbray* (note 2), 224; *S. Fredman* (note 1), 65.

4 *H. J. Steiner et al.*, International Human Rights in Context. Law, Politics, Morals, 2007, 186.

5 *A. R. Mowbray* (note 2), 3.

6 *R. Alexy*, Balancing, Constitutional Review, and Representation, International Journal of Constitutional Law 3 (2005), 572.

7 *R. Alexy*, On Constitutional Rights to Protection, Legisprudence 3 (2009), 1. On an earlier reception of *Alexy's* principles theory, albeit not referring to his analysis of the structure of positive obligations in detail, see *S. Fredman* (note 1), 65 et seq., and *J. Rivers*, Proportionality and Discretion in International and European Law, in: N. Tsagourias (ed.), Transnational Constitutionalism: International and European Perspectives, 2007, 107 et seq.

Lastly, I will take up the issue of the margin of appreciation as related to positive obligations.

Prior to this, in the remainder of this introduction, I will (1) identify the structure of positive obligations as the main focus, (2) highlight the logical basis of the argument developed here, and (3) introduce the *Hatton* Case which will be used as an example throughout this article.

1. Justification, Content, and Structure

Positive obligations cause several problems which may be classified in three groups.[8] The first group concerns the *justification* of positive obligations. It comprises questions as such whether and to what extent positive obligations should be included in a catalogue of rights and how their incorporation, notwithstanding whether it is achieved by means of express textual requirement or by means of judicial creation, can be rationally justified.[9] Into this group belongs the question whether and to what extent positive functions of the state are a question of rights, rather than politics or morals.[10] It has been shown by *Mowbray* that a common justification for the judicial recognition of positive obligations under the ECHR has been to ensure that the rights are "practical and effective".[11] The second group of problems deals with the *content* of positive obligations. It is crucial to ascertain the precise scope of positive obligations. Here, the financial consequences of introducing positive obligations play a role as well as the question how positive obligations are related to the fundamental conflict between freedom and security. Both the justification problem and the content problem can only be sufficiently addressed if the *structure* of positive obligations is clear. This is the third group of problems, and it will be the focus of the present article.

From a practical perspective, the structure of positive obligations is the most eminent problem for the court in applying convention norms imposing positive obligations. Furthermore, two most fundamental issues are intrinsically connected to the problem of the structure of positive obligations, namely the applicability of the proportionality test to positive obligations and the function of the margin of appreciation doctrine.

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8 See *R. Alexy* (note 7), 3.
9 See *A. R. Mowbray* (note 2), 2.
10 See *S. Fredman* (note 1), 9 et seq.
11 *A. R. Mowbray* (note 2), 221.

2. Disjunctive Structure

The ECtHR has remarked frequently that it does not really matter whether it analyzes a case in terms of a positive or a negative obligation, since in both cases a fair balance between the competing interests has to be struck:

> 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 (...) or in terms of an interference by a public authority (...), 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.[12]

Accordingly, the Court sometimes even leaves open whether a positive or a negative obligation is at stake:

> The Court is not therefore required to decide whether the present case falls into the one category or the other.[13]

These statements by the Court are correct only insofar as the principle of proportionality, requiring a fair balance, is, indeed, applicable to both categories. However, apart from this general level, the position of the court is mistaken. The application of the proportionality test *in detail* is fundamentally different in both categories, as will be shown below. This is due to the important fact that the internal structure of positive obligations is fundamentally different from those of negative obligations in at least one respect.[14] Negative obligations forbid to destroy, obstruct, or interfere with a legal interest. If it is forbidden to destroy or interfere with a legal interest, then *any* action, which amounts to or causes destruction or interference, is forbidden. On the contrary, if there is an obligation to protect or rescue a legal interest, *not any* action that amounts to or causes protection or rescue is obligated. The prohibition of killing people, for example, implies the prohibition of *any* killing action, whereas the obligation to rescue people does *not* demand *any* rescue action. Rather, in the latter case, if it is obligated to rescue someone from drowning, there is a free choice as to the means, as long as the result of rescue is achieved: one may rescue by swimming to-

[12] *Hatton and Others v. the United Kingdom (Grand Chamber)* (2003) 37 E.H.R.R. 28, para. 98. See also *Hatton and Others v. the United Kingdom* (2002) 34 E.H.R.R. 1, 2, para. 96; *López Ostra v. Spain* A/303-C(1995) 20 E.H.R.R. 277, 278, para. 51; *Powell and Rayner v. the United Kingdom* A/172(1990) 12 E.H.R.R. 355, 368, para. 42.

[13] *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 119.

[14] See *R. Alexy* (note 7), 5.

wards him, *or* by throwing a life-saver, *or* by pulling him aboard a boat. The obligation is not to all three actions of rescue, but only to one of the three. Therefore, positive obligations have an alternative or disjunctive structure, whereas negative obligations have a conjunctive structure. The alternative structure of positive obligations implies that the unlawful omission of an action has no definite opposite.[15] Rather, there are as many opposites as possible alternatives. Positive unlawful actions of the state, on the contrary, have a definite opposite, namely the omission of the same unlawful action.

All important differences between positive and negative obligations follow from this fundamental difference. The Court can under no circumstances leave open the question whether it analyzes the case in terms of a positive or in terms of a negative obligation. And it has to follow a different structure of the proportionality test in order to determine whether a fair balance has been struck between the competing interests.

3. The *Hatton* Case

I will use the Grand Chamber Judgment in the *Hatton* Case as an example throughout this article. *Hatton* originated in an application against the United Kingdom lodged by eight UK nationals in 1997. They lived, or had lived, near Heathrow Airport and were complaining about the noise levels caused by night flights at the airport. Before 1993, the noise caused by night flights had been controlled through restriction on the total number of take-offs and landings. After that date, however, noise was regulated through a system of noise quotas. Each aircraft type was assigned a "quota count (QC)". The noisier the aircraft, the higher the QC. This allowed aircraft operators to select a greater number of quieter aeroplanes or fewer noisier aeroplanes, provided the QC was not exceeded. The new scheme imposed these controls strictly between 11.30 p.m. and 6 a.m. The introduction of the 1993 scheme was preceded by a number of studies on the effects of aircraft noise on sleep disturbance, on the one hand, and on the economic effect of night time restrictions of flights, on the other.

The 1993 scheme led to a considerable increase in the number of movements at night. Following the introduction of the 1993 scheme, local authorities in the area sought judicial review. The scheme was found to be contrary to a statutory provision which required that a precise number of aircraft be specified, as opposed to a noise quota. This caused the Govern-

[15] *G. Lübbe-Wolf*, Die Grundrechte als Eingriffsabwehrrechte. Struktur und Reichweite im Bereich staatlicher Leistungen, 1988, 40.

ment to include a limit on the number of aircraft movements allowed at night. In addition to the restrictions on night flights, a number of noise mitigation and abatement measures were in place at Heathrow.

The case was brought to the ECtHR in May 1997. The applicants alleged that the Government's policy on night flights at the airport gave rise to a violation of their rights under Article 8 of the Convention, the right to respect for private and family life. In 2001, a Chamber judgment was delivered which held (by 5 votes to 2) that there had been a violation of Article 8, and (by 6 to 1) that there had also been a violation of Article 13. The British Government requested that the case be referred to the Grand Chamber which delivered its judgment in July 2003. The Grand Chamber (by 12 votes to 5) held there was no violation of Article 8 and (by 16 votes to 1) there was a violation of Article 13.

The complaint principally focused on a substantive breach of Article 8, namely sleep deprivation. But in addition, it focused on the procedural unfairness of the lack of proper scrutiny of the Government's policy in respect of night flights and noise quotas at Heathrow. Lastly, as far as Article 13 (right to an effective remedy) is concerned, it focused on the absence of a fair trial to remedy the nuisance. In order to assess the structure of positive obligations, I will address the substantive claim as to Article 8 here only.

II. Negative Obligations and the Proportionality Test

In order to illuminate the differences in the internal structure of the proportionality test as clearly as possible, I will first analyze the *Hatton* Case from the perspective of a negative obligation. In fact, there is a collision between a negative and a positive obligation in this case. The positive obligation of the state to protect its citizens from the exposure to noise stemming from night flights collides with the negative obligation not to hinder the economic activities of the aircraft operators by imposing too strict controls on night flights. The former obligation follows, *prima facie*, from Article 8 ECHR, whereas the latter obligation stems, *prima facie*, from Article 1 Prot. 1.

The negative obligation has not, as an individual right, been extensively considered by the Court. Rather, the court considered the economic interests mainly from the perspective of the general public, as opposed to individual interests of the aircraft operators.[16] In order to get a full picture of

[16] *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), paras. 121, 126.

the case it is decisive to reconstruct the collision of all relevant principles and, hence, to take into account negative individual rights also. In the *Hatton* Case, this aspect has been stressed, for example, by *Sir Brian* who dissented in the Chamber judgment. He called for taking regard of "the rights and freedoms of air carriers" as the colliding principle rather than mere "macro-economic policy".[17]

As far as the negative obligation is concerned, it does not make any difference whether one addresses the economic interests as individual rights or as interest of the general public, as long as both have convention status under Article 8 para. 2.

Whenever a negative and a positive obligation collide with each other, it is possible to address the case from both perspectives. One may ask whether the negative or the positive obligation have been violated respectively. In this section, I will take up the question as to the violation of the negative obligation; in the next section, I will take up the question as to the violation of the positive obligation.

In order to consider the violation of the negative obligation, I will first (1) address the four proportionality rules and then (2) move on to *Alexy's* Weight Formula, before (3) analyzing the *Hatton* Case.

1. The Four Proportionality Rules

Whether a negative obligation has been violated is assessed by means of a range of conditions. The most important condition is the proportionality test. This test consists of four rules,[18] namely legitimate ends, suitability, necessity, and proportionality in its narrow sense. All these rules are based on the idea that constitutional or human rights *qua* principles are optimization requirements. They are norms requiring that something be realized to the greatest extent possible, given the factual and legal possibilities.[19] Principles are, therefore, characterized by the fact that they can be satisfied to varying degrees. By contrast, rules are norms that are always either fulfilled or not.[20]

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[17] *Hatton and Others v. the United Kingdom* (note 12), at Dissenting Opinion of Judge *Sir Brian Kerr*, 39 et seq.

[18] These rules are sometimes referred to as sub-principles of the proportionality test. However, they are actually rules, not principles in the sense of optimization requirements. See *R. Alexy*, A Theory of Constitutional Rights, 2002, 66, fn. 84.

[19] *R. Alexy* (note 18), 47.

[20] *R. Alexy* (note 18), 48.

The rules of suitability and necessity concern optimization relative to what is factually possible. They follow the idea of Pareto-optimality. The other two rules – legitimate ends and balancing – refer to what is legally possible. The legal possibilities are essentially defined by competing principles. Balancing, then, consists in nothing else than optimization relative to competing principles.[21] The fourth rule of the proportionality test, the proportionality in its narrow sense, can be expressed by *Alexy's* first Law of Balancing:

> The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.[22]

In the following analysis, only the last rule – the proportionality in its narrow sense – is of interest. The first Law of Balancing demonstrates that balancing can be broken down into three steps.[23] The first step consists in establishing the degree of non-satisfaction of, or detriment to, a first principle. In the second step, the importance of satisfying the competing principles is established. Lastly, in the third step it is established whether the importance of satisfying the latter principle justifies the detriment to, or non-satisfaction of, the former.

These three steps of balancing have been captured by *Alexy's* Weight Formula.

2. The Weight Formula

The Weight Formula is an attempt to picture the structure of balancing with the help of a mathematical model. It is a complete description of the structure of balancing of two competing principles P_i and P_j. *Robert Alexy* has first introduced this formula in his postscript to *A Theory of Constitutional Rights*.[24] The formula reads as follows:

$$W_{i,j} = \frac{W_i \cdot I_i \cdot R_i^e \cdot R_i^n}{W_j \cdot I_j \cdot R_j^e \cdot R_j^n}$$

Formula 1: Weight Formula in its Complete Form

21 *R. Alexy* (note 6), 573.
22 *R. Alexy* (note 18), 102.
23 *R. Alexy*, On Balancing and Subsumption, Ratio Juris 16 (2003), 433 (436-437).
24 *R. Alexy* (note 18), 408 et seq.; *R. Alexy*, The Weight Formula, in: J. Stelmach et al. (eds.), Studies in the Philosophy of Law. Frontiers of the Economic Analysis of Law, 2007, 9.

W_i and W_j stand for the abstract weights of the two principles P_i and P_j respectively. The abstract weight of a principle is the weight that the principle has relative to other principles, but independently of the circumstances of any concrete case. The abstract weights of colliding human rights are often equal and, then, can be disregarded in balancing. Sometimes, however, the abstract weights of the colliding principles are not equal. The right to life, for example, has a higher abstract weight than the right to property.

I_i and I_j stand for the intensities of interference with the two principles respectively. The action submitted to the proportionality test is an interference by means of a certain measure M. Thus, I_i and I_j always refer to a particular case; they are by definition concrete variables, as opposed to the abstract variables W_i and W_j. The third and the fourth pair of variables refer to the reliability of the empirical (R_i^e and R_j^e) and normative (R_i^n and R_j^n) premises concerning what the measure means for the non-realization of the one principle and the realization of the other principle. *Alexy* has not yet differentiated between R^e and R^n, but I have demonstrated elsewhere that it is important to make this difference since the degree of reliability of the empirical and the normative premises may be different in a particular case.[25] The reliability of the premises actually follows the second, or epistemic, Law of Balancing, which reads:

> The more heavily an interference with a right weighs, the greater must be the reliability of its underlying premises.[26]

In the present article, the reliability of the premises will not be considered further. Thus, I will use a shortened version of the Weight Formula here, which contains the abstract weights and the intensities of interference and dispenses with the epistemic reliabilities.

The sole symbol in the Weight Formula that has not been introduced thus far is $W_{i,j}$. $W_{i,j}$ stands for the concrete weight of P_i, that is, for the weight of P_i in the circumstances of the case at hand. $W_{i,j}$ symbolizes a relative weight: the concrete weight of P_i in a given case is relative to P_j.

From the jurisdiction of the German Federal Constitutional Court, *Alexy* has developed a three-grade or triadic scale, consisting of the stages light (l), moderate (m) and serious (s).[27] The use of this scale is possible for intensities of interference with P_i as well as with P_j. P_j often represents the principle

[25] *M. Klatt/J. Schmidt*, Spielräume im Verfassungsrecht. Zur Abwägungslehre der Prinzipientheorie, 2010.

[26] See *R. Alexy* (note 24), 25.

[27] The variable l stands not only for the term "light", but also for other expressions such as minor or weak, while s stands for high or strong as well as for serious. See *R. Alexy* (note 24), 15.

a state calls upon to justify a measure interfering with a human right P_i. It is important to note that the triadic scale is applicable to both pairs of variables, I_i and I_j as well as W_i and W_j.[28] The triadic scale can be facilitated by the use of number, following the geometrical sequence of 2^0, 2^1, 2^2, that is, 1, 2, and 4. The geometrical sequence has the advantage of taking account of the fact that the power of principles increases overproportionately with an increasing intensity of interference.[29]

In spite of the use of numbers, it should be noted that the Weight Formula is by no means an attempt to replace balancing with mere calculation. Rather, it is a formal tool that allows making explicit the inferential structure of balancing principles, just as logical tools allow for making explicit the inferential structure of subsumption according to the legal syllogism.[30]

The combination of the Weight Formula with the triadic scale enables us to define the following rules of decision, determining the outcome of the balancing: in all cases in which the value of $W_{i,j}$ is greater than 1, P_i takes precedence over P_j. In all cases in which the value of $W_{i,j}$ goes below 1, P_j takes precedence over P_i. And in all cases in which the value of $W_{i,j}$ is 1, there is a stalemate. In the latter case, balancing determines no result and, thus, there is discretion in balancing.[31]

3. The *Hatton* Case

I will now apply the Weight Formula to the balancing in the *Hatton* Case and will first consider the negative obligation not to interfere with the economic interests of the aircraft operators. This perspective from the negative obligation is much easier to analyze than the perspective from the positive obligation. P_i shall be used for the Article 1 Prot. 1 right, P_j shall be used for the Article 8 right. P_i is a negative obligation, requiring the state to abstain from interfering with the economic activities, including operating night flights, of the aircraft operators. P_j is a positive obligation, requiring the

[28] This provides for the possibility of comprehensive compensation. Under this equal-weight assumption, for example, a light interference ($I_i = l$) with a principle of a high abstract weight ($W_i = s$) has the same importance as a serious interference ($I_j=s$) with a principle of a low abstract weight ($W_j = l$).

[29] This fact corresponds to the law of diminishing marginal utility, see *R. Alexy* (note 24), 103.

[30] See *R. Alexy* (note 23).

[31] This is an instance of the so-called structural discretion, as opposed to epistemic discretion. See *Alexy* (note 18), 394 et seq. For a critical view on *R. Alexy's* model, see *M. Klatt/J. Schmidt* (note 25).

state to protect the people living in the area from sleep disturbances by active measures such as introducing restrictions on night flights. Thus, we face a collision between a negative and a positive obligation here.

We shall assume that the abstract weights of both principles, that is, W_i and W_j, are equal and, thus, cancel each other out. Also, we shall assume that the reliabilities of both the normative and the empirical premises are equal and, thus, need not be considered further. The result of the balancing, then, turns on the intensities of interference. We can therefore apply the Weight Formula in a reduced form here:

$$W_{i,j} = \frac{I_i}{I_j}$$

Formula 2: Weight Formula in its Reduced Form

I will first consider the view of the Government. As far as I_i is concerned, the Government and the respondents from the airline industry stressed the economic importance of night flights. Other European hub airports, they argued, had less severe restriction on night flights than those imposed at the three London airports. If restrictions on night flights were made more stringent, UK airlines would be placed at a significant competitive disadvantage. Furthermore, they provided information showing that a typical daily night flight would generate an annual profit of up to £ 15 million. The loss of this profit would impact severely the ability of airlines to operate.[32] Hence, from this perspective, the interference that would occur with P_i if more restrictions on night flights would be imposed is *serious* (*s*). This assessment was shared by the British Air Transport Association who submitted that a reduction in night flights would cause major damage to British Airways' business.[33]

The Government did not only argue in favor of P_i. It also focused on demonstrating that the interference with P_j was less severe.[34] It pointed to the fact that the house market in the areas was thriving and that the applicants had not claimed that they were unable to sell their houses and move. Furthermore, sleep studies showed that external noise levels below 80 dBA were very unlikely to cause any increase in the normal rate of disturbance of

[32] See *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), paras. 107-108.

[33] See *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 115.

[34] See *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), paras. 106, 109.

someone's sleep; and that even with noise levels between 80 and 95 dBA the likelihood of an average person being awaked was about 1 in 75. It follows from these arguments, that according to the Government the intensity of interference with P_j is, if at all, *moderate* (*m*).

Under these conditions, from the Government's perspective, $W_{i,j}$ is determined as in Formula 3:

$$W_{i,j} = \frac{I_i}{I_j} = \frac{s}{m} = \frac{2^2}{2^1} = 2$$

Formula 3: Balancing from Government's Perspective

Thus, P_i takes precedence. The economic interests of the aircraft operators outweigh the interest of the people to be protected from noise disturbances.

The picture changes, however, if we address the balancing from the applicants' view. As far as P_j is concerned, they maintained that the disturbances caused by night flights were extensive because large numbers of people were affected and because the night noise was frequently in excess of international standards.[35] Hence, the applicants argue for the intensity of interference I_j to be assessed as *serious* (*s*). As for P_i, they pointed to the fact that many of the world's leading business centers (for example, Berlin, Zürich, Hamburg, and Tokyo) had full night-time passenger curfews of between seven and eight hours. Accordingly, the importance of P_i would be, if at all, *moderate (m)*. Therefore, P_j takes precedence, as shown in Formula 4.

$$W_{i,j} = \frac{I_i}{I_j} = \frac{m}{s} = \frac{2^1}{2^2} = \frac{1}{2}$$

Formula 4: Balancing from the Applicants' Perspective

The Grand Chamber explicitly recognizes that the relative weight, that is, the value for $W_{i,j}$, is decisive for the balancing outcome.

> Whether in the implementation of that regime the right balance has been struck in substance between the Article 8 rights affected by the regime (...) depends on the *relative weight* given to each of them.[36]

[35] *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 111.

[36] *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 125; emphasis added.

Thus, the Court engages in a discussion on the values assigned to I_i and I_j respectively. As for I_j, the Court on the one hand disapproves the Government's attempt to weaken the interest of the people living in the area. The Court "sees no reason to doubt the sincerity of their (the applicants') submissions in this respect".[37] On the other hand, however, the Court also stresses that mitigation measures were in place as well as the individual's ability to move away without financial loss.[38] We may conclude from this that the Grand Chamber assigns the value *moderate* to I_j. As for I_i, the Court states, albeit in rather general terms, that it is reasonable to assume that night flights contribute at least to a certain extent to the economic interests. Thus, it assigns the value *moderate* to I_i also. Hence, in the view of the Court, there is a stalemate, as can be seen in Formula 5.

$$W_{i,j} = \frac{I_i}{I_j} = \frac{m}{m} = \frac{2^1}{2^1} = 1$$

Formula 5: Balancing from Grand Chamber's Perspective

This analysis is in accordance with the Grand Chamber relying essentially on the margin of appreciation of the authorities of the Member State, as far as the substantial principles are concerned.[39] Here, the margin of appreciation is identical with a structural discretion. In the context of his new theory of balancing,[40] *Alexy* describes structural discretion as a stalemate in balancing of competing principles. What human rights neither command nor prohibit falls within structural discretion.[41]

It is not the point here to discuss the position of the majority of the Grand Chamber, which was dissented to by five judges.[42] Rather, our analysis so far suffices to demonstrate how balancing functions when the focus is on whether a negative obligation, namely the economic interest of the aircraft operators P_j, was violated. Our analysis shows that the collision between a negative and a positive obligation has a quite simple structure when the focus is on whether a specific protecting measure M violates a negative

37 *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 118.
38 *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 127.
39 *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 129.
40 *R. Alexy* (note 23), 433; *R. Alexy*, Constitutional Rights, Balancing, and Rationality, Ratio Juris 16 (2003), 131; *R. Alexy* (note 24).
41 *R. Alexy* (note 18), 394 et seq.
42 For a critical view on the majority's approach to the margin, see also *J. Hyam*, Hatton v United Kingdom in the Grand Chamber. One Step Forward, Two Steps Back?, EHRLR 2003, 631 (638-640).

obligation on the grounds that it is disproportionate. The question is, then, simply whether the use of *M* brings about an intensity of interference with the negative obligation I_i that is higher than the hypothetical intensity of interference with the positive obligation I_j which would be caused by forgoing *M*, that is, *Non-M*.[43]

In addition, arguments as to the scope of the margin of appreciation as well as to the procedural aspect relating to the scrutiny of the policy in respect of night flights played a significant role in the judgment. More could be said, then, as to the external justification of the values assigned to I_i and I_j, and, as far as the scrutiny of investigation is concerned, to R_i and R_j. Since, however, I will concentrate on the substantial matters, and, more specifically, on the differences between the positive and the negative perspective, I will not further consider the Court's judgment, but rather move on to an analysis of the positive obligations in the case.

III. Positive Obligations and the Proportionality Test

The picture is much more complex when we shift our focus to whether a positive obligation is violated by granting too little, or none, protection. The factor in the Weight Formula which is most important to positive obligations is I_j. I_j stands for the intensity of the negative consequences for the colliding positive obligation P_j which would, hypothetically, occur if the authority would, according to their negative obligation, *not* interfere with P_i, that is, if a specific protecting measure *M* would *not* be taken. In other words: I_j represents the intensity of interference with a positive obligation P_j by non-interference with the negative obligation P_i.[44]

In order to analyze the interference with the positive obligation P_j by means of granting too little, or none, protection from noise, I will consider *Hatton* in a simplified constellation. It consists of (1) four alternative protecting measures. I will then (2) demonstrate how two lines of values can be used to clarify the positive obligation. Lastly, I will ask (3) whether we need two lines of values for negative obligations also.

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43 *R. Alexy* (note 7), 9.

44 *R. Alexy* (note 7), 7. As for the use of the term "interference" for describing inaction that results in less protection (interference by non-protection), see also *F. Sudre*, Les Obligations Positives Dans La Jurisprudence Européenne Des Droits De L'homme, in: *P. Mahoney* (ed.), Protecting Human Rights. The European Perspective. Studies in Memory of Rolv Ryssdal, 2000, 1359 (1374).

1. Four Protecting Measures

The first measure, M_1, is a full night-time passenger curfew of eight hours. To recapitulate, the applicants argued that a full curfew was in place in many of the world's leading business centers, like Tokyo, Zürich, and Berlin.[45] M_2 is a curfew reduced to five hours, while only quieter aeroplanes are allowed during the remaining night hours. M_2 is similar to the restrictions in place at Frankfurt Airport.[46] M_3 dispenses with a curfew, but still only allows quieter aeroplanes. M_4 allows any night flights and, hence, does not make any difference between day and night flights. The only protective measure under M_4, then, may be specific action to mitigate noise nuisance. This apparently resembles the situation at Paris-Charles de Gaulle and Amsterdam-Schiphol.[47]

2. Two Lines of Values

We may now assign values to the protecting measures M_1-M_4 using the triadic scale. This exercise aims at analyzing how the proportionality test and the alternative structure of positive obligations are interconnected. Their relation would be the same if different values would be correct.

We can note the degree of protection from noise D_j in combination with the intensity of interference I_i as in Table 1:

Protective Measure	P_i Intensity of Interference I_i	P_j Degree of Protection D_j
M_1	s	s
M_2	m	m
M_3	m	m
M_4	l	l

Table 1: Degree of Protection and Intensity of Interference

There is, naturally, a difference in the interference with P_i when one compares imposing a reduced curfew (M_2) to the omission of any curfew (M_3), since their consequences on the economic activity of the airline operators

45 *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 114.
46 *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 107.
47 *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12).

differ. This difference could easily be represented in a more refined scale, for example, a double-triadic scale. The latter would allow to picture differences within the moderate area and, hence, the differences between M_2 and M_3. For the purposes here, however, I will confine myself to the rather rough triadic scale and consider both M_2 and M_3 as moderate interferences with P_i. A similar consideration is true for M_2 and M_3 as far as P_j is concerned.

Table 1 looks like a sequence of stalemates. M_1, for example, that is, the complete curfew of night flights, gives, on the one hand, a maximum of protection from noise, but, on the other, also interferes seriously with the freedom of property. The same relation occurs in M_2-M_4. Hence, all protecting measures would be likewise proportional.

This picture, however, is not complete since it does not take regard of a further element, namely the consequences an omission of a protecting measure has for the fulfillment of the positive obligation.[48] This element is the intensity of interference by non-protection (*Non-M*), which is represented by I_j. While D_j refers to the degree or the intensity of protection, I_j refers to the intensity of non-protection. In order to get a complete picture, we therefore have to include a second line of values as far as the positive obligation P_j is concerned, stating I_j, as in Table 2:

	P_i	P_j	
Protective measure	Intensity of Interference I_i	Degree of Protection D_j	Intensity of Interference I_j
M_1	*s*	*s*	*Non-M*$_1$*: l*
M_2	*m*	*m*	*Non-M*$_2$*: m*
M_3	*m*	*m*	*Non-M*$_3$*: m*
M_4	*l*	*l*	*Non-M*$_4$*: s*

Table 2: Lines of Values with both Intensities of Interference

Alexy has lucidly pointed to the fact that the disjunctive structure of positive obligations implies that a negation of any measure, for example, *Non-M*$_3$, does not have a definite opposite.[49] *Non-M*$_3$ could mean M_1 as well as M_2 or M_4. This situation is fundamentally different from the conjunctive structure of negative obligations, where any measure interfering with a right

48 *R. Alexy* (note 7), 11.
49 *R. Alexy* (note 7).

does have a definite opposite. This difference has to be considered when asking whether a positive obligation has been violated.

Generally speaking, a positive obligation is violated if the protection granted is, with respect to the intensity of interference with the colliding negative obligation, insufficient. This definition can now, with the help of the analysis in Table 2, be made more precise. The intensity of interference by non-protection (*Non-M_n*) is exactly the intensity of non-protection which results from employing M_{n+1} rather than M_n, M_{n+1} being the protecting measure that ranks directly below M_n in the list of the degrees of protection D_i. For example, M_2 or M_3 are employed rather than M_1, or M_4 rather than M_2 or M_3. *Alexy* has labeled this phenomenon the chain-negation.[50] The chain-negation is a relative negation, for it does not have a definite opposite. A certain protective measure M_n is negated relatively to other protective measures.

Based on this more precise picture of the structure of positive obligations, the list of protecting measures does no longer display a series of stalemates, as in Table 1. Rather, we can exclude both M_1 and M_4 as disproportionate. M_1 (strict curfew), on the one hand, is disproportionate since its omission *(Non-M_4)* causes only light non-protection while at the same time the intensity of interference with the freedom of property P_i is serious. Thus, M_1 is excluded by the proportionality test in its form of the prohibition of excessive means. M_4 (no restriction on night flights, only mitigation measures), on the other hand, is disproportionate since its omission causes serious non-protection while the hypothetical interference with the freedom of property is only light. Therefore, M_4 is excluded by the proportionality test in its form of the prohibition of insufficient means.

This example demonstrates clearly that both the prohibition of insufficient means and the prohibition of excessive means stem from the proportionality test.[51] They are not two separate rules, but represent the two perspectives of the proportionality test.

M_2 and M_3 both fall within a stalemate, for both are located at the *moderate* level. The United Kingdom, therefore, could choose freely between M_2 and M_3. In the simplified constellation considered here, M_1 and M_4 were the sole alternatives to M_2 and M_3, and both were disproportionate. The United Kingdom, therefore, must employ either M_2 or M_3.

The Grand Chamber acknowledged that M_4 (no restrictions, only mitigation) had not been employed at Heathrow. It stated:

50 *R. Alexy* (note 7).
51 *R. Alexy* (note 7), 11 et seq.

> (…) airlines are not permitted to operate at will, as substantial limitations are put on their freedom to operate, including the night restrictions which apply at Heathrow.[52]

This is in line with the Judgment delivered by the Third Section who had concluded that

> modest steps at improving the night noise climate are (not) capable of constituting the measures necessary to protect the applicants' position.[53]

Likewise, we can conclude from the emphasis[54] the Grand Chamber places on the economic interests that it considers M_1 (complete curfew) to be disproportionate as well. This is in contrast to the majority of the Third Section who had decided that the Government "had failed to adduce any evidence of the specific importance of night flights".[55]

I have only considered a simplified situation here, characterized by a list of four possible protecting measures. In reality there are many more alternatives, making the picture much more complex. We may assume, however, that the structure of problems which stem from the combination of the proportionality test and disjunction remains the same. I have demonstrated that in case of a positive obligation P_j, it is necessary to consider two lines of values, namely the degree of protection D_j and the intensity of interference by non-protection I_j.

3. Two Lines for Negative Obligations

The question arises whether we have to consider two lines of values in the case of the negative obligation also. *Alexy* has demonstrated that this is possible, but unnecessary.[56] The second line of the negative obligation P_i would concern the degree of realization (D) of P_i. In the case of positive obligations, the degree of realization is the degree of protection. In the case of negative obligations, the degree of realization is the degree of freedom to do or not to do something. In order to demonstrate this difference, I will add a further sequence of values to Table 2 that refers to the degree of freedom D_i.

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52 *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 126.
53 *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), 3, para. 106.
54 *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 126.
55 *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), 19.
56 *R. Alexy* (note 7), 13 et seq.

	P_i (Negative Obligation)		P_j (Positive Obligation)	
Protective Measure	Intensity of Interference I_i	Degree of Freedom D_i	Degree of Protection D_j	Intensity of Interference I_j
M_1	*s*	*l*	*s*	*Non-M_1: l*
M_2	*m*	*m*	*m*	*Non-M_2: m*
M_3	*m*	*m*	*m*	*Non-M_3: m*
M_4	*l*	*s*	*l*	*Non-M_4: s*

Table 3: Four Lines of Values

Table 3 gives us the complete picture of all sequences of values involved. We can see, however, that the degree of freedom D_i is directly dependent upon the protective measures M_1-M_4. M_1 (complete curfew), for example, means a serious interference with the negative obligation ($I_i = s$) and, at the same time, a small degree of freedom ($D_i = l$), because the aircraft operators are very limited in their freedom how to operate their flights.

In the case of negative obligations, therefore, both the intensity of interference I_i and the degree of realization D_i can be determined *directly* from a given measure M_n. This is a fundamental difference to the case of positive obligations. For the latter, we have seen that in order to establish the intensity of interference by non-protection I_j, a detour that leads to the hypothetical omission of the measure (*Non-M_n*) is necessary. We have to note, therefore, that in the case of negative obligations a detour that leads to the hypothetical omission of the measure is *not* necessary in order to determine the values relevant for balancing according to the Weight Formula.

Balancing, however, is only the last of the four prongs of the proportionality test. We may ask whether the second line D_j is necessary in order to determine one of the other prongs. I will only discuss the need of including D_j as far as the third prong, the necessity test, is concerned. A measure is necessary only if there is no less restrictive but equally effective measure available to achieve the intended policy goal. For the purposes of this discussion, I will consider *Hatton* in a slightly modified version in which the interference with the negative obligation (I_i) by M_3 (no curfew, but only quieter aircraft allowed) is not *m*, but *l*. We could justify this modification by assuming a changed situation in which the airlines operate newer and quieter aircraft anyhow, so that the omission of any curfew already results in a light interference with their economic interests. Hence, the modified constellation looks like this:

	P_i (Negative Obligation)		P_j (Positive Obligation)	
Protective measure	Intensity of Interference I_i	Degree of Freedom D_i	Degree of Protection D_j	Intensity of Interference I_j
M_1	sS	l	s	*(Non-M_1) l*
M_2	m	m	m	*(Non-M_2) m*
M_3	l	s	m	*(Non-M_3) m*
M_4	l	s	l	*(Non-M_4) s*

Table 4: Necessity Test (Modified Constellation)

In this modified constellation, M_2 no longer passes the necessity test. The medium interference with P_i ($I_i = m$) by M_2 is no longer necessary, for the same degree of protection ($D_j = m$) can be achieved by M_3. M_3 infringes upon P_i less intensively ($I_i = l$) than M_2 ($I_i = m$). The important point here is that this necessity test can be done *without* any reference to the degree of freedom D_i, while reference to the degree of protection D_j is required. As with the balancing test, we see that reference to D_j is not requisite in the case of the necessity test.[57]

At this point, I would like to add a point on the necessity test that Table 4 allows us to see clearly.[58] This point arises from the fact that equal values do not only occur in the sequence D_j ($M_2 = M_3 = m$), but also in D_i ($M_3 = M_4 = s$). Hence, it is possible to employ a necessity test to M_4 also. To recapitulate: We already excluded M_4 for reasons of disproportionality in the narrow sense: M_4 did not pass the balancing test.[59] The question now is whether M_4 also fails the necessity test. Table 4 shows that the same degree of freedom ($D_i = s$) can also be achieved by M_3, which at the same time provides for a higher degree of protection ($D_j = m$) than M_4. Hence, M_4 is not necessary in order to achieve the degree of freedom D_i.

The questions whether M_2 and M_4 respectively pass the necessity test represent two different types of this test. The first type can be called "internal" necessity test, because it starts with the observation that M_2 and M_3 are equally protective for P_j ($D_j = m$).[60] A measure is internally necessary if there is no alternative measure which gives equal protection, but interferes less with the colliding principle. This test is internal to the perspective of the

57 *R. Alexy* (note 7), 15.
58 See *R. Alexy* (note 7), 15 et seq.
59 See *A. R. Mowbray* (note 2).
60 *R. Alexy* (note 7), 15.

positive obligation since it begins with the consequences a measure has for the degree of protection.

The second type can be called "external" to the perspective of the positive obligation, because it starts with the observation that M_3 and M_4 equally interfere with P_i ($D_i = s$), that is, the colliding negative obligation. A measure is externally necessary, if there is no alternative measure which interferes to the same degree with the colliding principle, but is more protective.

In the end, however, it is possible to employ the external necessity test with the help of I_i instead of D_i. M_4 and M_3, for example, both interfere with P_i lightly ($I_i = l$), but M_3 ensures a higher protection D_j. We can conclude, therefore, that D_i is completely dispensable for both types of the necessity test as well. We can use D_i, but we are not obliged to do so. All in all, this fact again indicates the "fundamental asymmetry"[61] between positive and negative obligations which stems from the difference in structure mentioned above.[62]

IV. Positive Obligations and the Margin of Appreciation

Ever since positive obligations have been recognized by the ECtHR, the Court has held that the Member States must be allowed a margin of appreciation which is particularly wide.[63] In *Powell and Rayner*, for example, the Court asserted:

> It is certainly not for the commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere. This is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation.[64]

Hence, as far as positive obligations are concerned, it is particularly important to identify the criteria to establish the exact scope of the margin of

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61 *R. Alexy* (note 7).

62 See I. 2.

63 *F. Sudre* (note 44), 1369; *J. Gerards/H. Senden*, The Structure of Fundamental Rights and the European Court of Human Rights, International Journal of Constitutional Law 7 (2009), 619 (650). For a different view, see *C. Ovey*, The Margin of Appreciation and Article 8 of the Convention, HRLJ 19 (1998), 10.

64 *Powell and Rayner v. the United Kingdom* (note 12), 369, para. 45. See also *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 100.

appreciation.[65] Here, again, *Alexy's* principles theory can be of help, as will be demonstrated below.

One important objection against positive obligations is the problem of overdetermination. The problem of overdetermination stems from the fact that, at least in a complex legal order, protecting one principle means interfering with a different principle. This "dialectics of protection and interference"[66] gives rise to the notion that the Member States may be caught between the prohibition of excessive means and the prohibition of insufficient means. Since both the negative and the positive obligation must be optimized according to the proportionality test, there may be only a single right solution, leaving the Member States no margin of appreciation at all.

This one right solution problem has been discussed by *Alexy* and his opponents as the problem of the highest point.[67] Some scholars tend to solve this problem by dispensing with the proportionality test and substituting it with a sort of minimum protection standard. This, however, does not solve the problem. Either the minimum standard is determined without the proportionality test and, hence, without balancing – what, then, could be the rational standard according to which the minimum standard is determined? Or the minimum standard is determined with the help of balancing and proportionality – then the proportionality test is, contrary to the intention, not really substituted at all.

The highest point problem played a significant role in the Chamber Judgment in *Hatton*. The majority of the Chamber considered that

> States are required to minimise, 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.[68]

This passage could be interpreted as alluding to a maximum point theory, leaving no room for any margin of appreciation. Hence, it received severe criticism by two dissenting judges. Judge *Kerr* argued:

> I am not aware of any other convention case in which such a test has been applied. Indeed, it is difficult to see how it can be reconciled with the principle that States should have a margin of appreciation in devising measures to strike the

65 *J. Gerards/H. Senden* (note 63), 651.

66 See *R. Alexy* (note 7), 4.

67 See *R. Alexy* (note 7), 4 et seq. For an account on a similar debate between *J. Habermas* and *R. Alexy* on the "firewall problem", see *S. Greer*, The European Convention on Human Rights. Achievements, Problems and Prospects, 2006, 203 et seq. For a recent proposal how to combine minimum and maximum perspectives see *E. Brems*, Human Rights: Minimum and Maximum Perspectives, HRLJ 9 (2009), 349.

68 *Hatton and Others v. the United Kingdom* (note 12), 2, para. 97.

> proper balance between respect for Article 8 rights and the interests of the community as a whole. (...) The test enunciated by the majority denies to States any discretion as to how they wish to address socio-economic issues, and instead requires that all policy decisions be dictated by a strict "minimum interference with fundamental rights" rule.[69]

In the same line, Judge *Greve* stated that the standard relied on by the majority

> is (...) incompatible with the wide margin of appreciation left by the European court to Contracting States in other planning cases.[70]

From the standpoint of the principles theory, however, this debate can be clarified by the norm-theoretic distinction between rules and principles.[71] Rules are norms that require something definitely, given that certain conditions for their applications are fulfilled. If a rule is valid and applicable, it is then definitely required to do exactly what it demands. Thus, rules are norms that are either fulfilled or not. By contrast, principles are norms requiring that something be realized to the greatest extent possible, given the factual and legal possibilities.[72] As optimization requirements, principles can be satisfied to varying degrees. Thus, principles demand something *prima facie*, while rules demand something definitely.[73]

This norm-theoretic distinction may help us to untangle the irritation which was caused by the quoted passage from the Chamber Judgment in *Hatton*. That states are "required to minimise, as far as possible, the interference" with human rights is a reasonable statement if it is understood as referring to the *prima facie* character of rights. As optimization requirements, human rights indeed require the states *prima facie* "to achieve their aims in the least onerous way". In this sense, human rights have an overshooting character. According to the prohibition of insufficient means, protective rights definitely prohibit the Member States from going below the level at which disproportionality begins. Even above this point, however,

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69 *Hatton and Others v. the United Kingdom* (note 12), at Dissenting Opinion of Judge *Sir Brian Kerr*, 38 et seq.

70 *Hatton and Others v. the United Kingdom* (note 12), at Partly Dissenting Opinion of Judge *Greve*, 32.

71 *R. Alexy* (note 18), 44 et seq.

72 *R. Alexy* (note 18), 47.

73 I follow *R. Dworkin's* somewhat simplistic model here. In fact, rules also have a *prima facie* character, for it is always possible to include an exception clause into rules. Still, the *prima facie* character of both rules and principles is fundamentally different, and this justifies the simplification made here. For details, see *R. Alexy* (note 18), 57 et seq.

they continue to demand *prima facie* that more protection be granted.[74] *Alexy* describes this relation as follows:

> Owing to the colliding defensive right, however, this demand as such might well not be strong enough. In this case, the protective right is relevant but not determinant.[75]

If the quoted passage from the Chamber Judgment is understood as referring to a *prima facie* obligation, but not to a definite obligation, then it does not fall short of the maximum point problem. In particular, it is compatible with allowing for a margin of appreciation of the Member States, for the *prima facie* protection does not exclude introducing a margin as to the definite protection. If this interpretation of the Chamber Judgment is true, then the dissenting Judges *Kerr* and *Greve* are mistaken.

The scope of the margin of appreciation also played a fundamental role in the Grand Chamber Judgment. The Court was faced with conflicting views as to the margin of appreciation to be applied.[76] While the Government claimed a wide margin on the ground that the case concerned matters of general policy, the applicants claimed that the margin was narrow due to the "intimate" nature of the right protected. An answer to these conflicting views presupposes clarity as to the specific types of the margin that are at issue, which will be considered below.

Furthermore, the issue of the margin is closely connected to the competence of the ECtHR to review Member States' actions. The Court is competent to judicial review only if an action does not fall within the margin of appreciation, and vice versa. Thus, in *Hatton*, the Grand Chamber stated in the direct context of the choice of the Member States as to the ways and means of meeting their positive obligations:

> The Court's supervisory function being of a subsidiary nature, it is limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance.

The Court does not, however, specify the exact scope of the margin, nor does it, in this judgment, give any indication as to the criteria it applies in order to arrive at the specified scope of the margin. In the following, I would like to demonstrate how the principles theory can be of help when clarifying this issue.

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[74] See *R. Alexy* (note 7), 16. This may be meant by *S. Fredman* who concluded that "positive duties retain their normative force even when they are not immediately fulfilled", see *S. Fredman* (note 1), 65.

[75] See *R. Alexy* (note 7), 16.

[76] See *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 103.

Alexy's principles theory of rights is particularly useful since it allows for a typology of different variants of the margin of appreciation which is much more precise than other approaches. The principles theory allows establishing both the existence of and the limits to the margin of appreciation. Following the principles theory of rights, we can distinguish two types of the margin of appreciation: structural and epistemic margin of appreciation. I will only consider the three sub-types of the structural margin here.[77] These are (1) the margin in balancing, (2) the margin in means-selecting, and (3) the margin in ends-setting.

1. Margin in Balancing

The margin in balancing has already been considered above. It is equivalent to the structural discretion resulting from a stalemate in balancing according to the Weight Formula. Since the law generally employs relatively rough scales, stalemates in balancing are quite frequent.

We have seen the margin in balancing in *Hatton* analyzed above. In my analysis from the negative obligation's perspective, a stalemate occurred in balancing according to the view of the Grand Chamber. Both the intensity of interference with the applicants' right to respect for their private and family life and their homes and the intensity of interference with the economic interest of the airlines had been evaluated as *moderate* by the Court.[78] Hence, human rights did neither prescribe nor forbid to give preference to one right or the other, according to the view of the Grand Chamber.

2. Margin in Means-Selecting

The margin in balancing is not peculiar to positive obligations. Rather, it is also applicable to negative obligations. This is different in the case of the margin in means-selecting. The margin in means-selecting is the only type

[77] On epistemic discretion in constitutional rights adjudication, see *M. Klatt/J. Schmidt* (note 25). For the relation between epistemic discretion (as to the facts of the case) and the margin of appreciation, in *Hatton*, see *J. Gerards/H. Senden* (note 63), note 136. For an earlier account on the margin, based on the principles theory also, see *J. Rivers* (note 7).

[78] See Formula 5: Balancing from Grand Chamber's Perspective.

of margin which exclusively occurs in positive obligations.[79] It follows directly from the disjunctive structure of positive obligations.[80]

We have seen the margin in means-selecting in our analysis of the *Hatton* Case from the perspective of the positive obligation. Both M_2 and M_3 fall within a margin in means-selecting.[81] Both M_2 and M_3 cause a moderate degree of protection D_j while interfering with P_i moderately likewise. Hence, the UK had a margin in selecting either M_2 or M_3. This possibility of selecting either M_2 or M_3 shows that the objection of overdetermination is not true. The Member States are not always caught between the prohibition of excessive means and the prohibition of insufficient means, for there is a span between the two in the present case.[82]

The margin in balancing is a first order margin, for it considers a stalemate on the basis of a single measure M_n only. The margin in means-selecting, in contrast, is a second order margin, for it considers a stalemate between two or more measures. In the latter case, there is a line of stalemates. The margin in means-selecting is, therefore, a kind of meta-stalemate.[83]

The margin in means-selecting was explicitly mentioned by Judge *Costa* in his separate opinion to the judgment delivered by the Third Section. He stated:

> There is the margin of appreciation which must be left to the States in this sphere, particularly as to the choice of means by which to reduce aircraft noise.[84]

Likewise, the Grand Chamber stated:

> Whilst the State is required to give due consideration to the particular interests, the respect for which it is obliged to secure by virtue of Article 8, it must in principle be left a choice between different ways and means of meeting this obligation.[85]

It should be noted that my analysis not only demonstrated the existence of a margin in means-selecting, but also its limits. M_1 and M_4 had to be excluded for reasons of disproportionality. The prohibitions of excessive and

79 *R. Alexy* (note 7), 16.
80 See *A. R. Mowbray* (note 2); *R. Alexy* (note 18), 396.
81 See Table 2: Lines of Values with both Intensities of Interference.
82 See *R. Alexy* (note 7), 21.
83 See *R. Alexy* (note 7), 25.
84 *Hatton and Others v. the United Kingdom* (note 12), at Dissenting Opinion of Judge *Costa*, 29.
85 *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 123.

insufficient means represent the outer limits of the margin in means-selecting and, thus, define its scope.

3. Margin in End-Setting

In respect of any human right, the Member States have a margin in end-setting whenever the human right contains an authorization to limit its enjoyment which either leaves the reasons for the limitation completely open or, while identifying the possible reasons for limiting the right, "permits limitations for these reasons without requiring them".[86]

In the first case, the margin in end-setting means a competence of Member States to decide upon whether and on the basis of which aims they wish to limit the enjoyment of a human right. In the second case, the Member States are bound to a catalogue of possible aims, but they may still decide upon whether they wish to limit the right. If they decide to limit the right, however, they may do so only on the basis of an aim which is contained in the catalogue of possible aims.

In the case of positive obligations under the European Convention, this analysis of the margin in end-setting helps to shed light on the rather unclear statement of the ECtHR that

> even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of a *certain relevance*.[87]

The "certain relevance" consists precisely in that the aims of the catalogue in Article 8 para. 2 limit the margin in end-setting of the Member States. In limiting the right, they are not allowed to choose any aim they wish to, but only those which are mentioned in Article 8 para. 2. Hence, in the *Hatton* Case, we experience an instance of the second variant of the end-setting margin, which is characterized by a limited discretion to choose from a prescribed list of aims, rather than to identify the aim freely. The Grand Chamber recognized this limited margin in end-setting of the Mem-

[86] *R. Alexy* (note 18), 395.

[87] *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 98, emphasis added; see also *Powell and Rayner v. the United Kingdom* (note 12), 368, para. 42; *Rees v. United Kingdom* A/106 (1987) 9 E.H.R.R. 56, 64; *López Ostra v. Spain* (note 12), 278, para. 51.

ber States, which is also linked to the first prong[88] of the proportionality test:

> The Court observes that according to the second paragraph of Article 8 restrictions are permitted, inter alia, in the interests of the economic well-being of the country and for the protection of the rights and freedoms of others. It is therefore legitimate for the State to have taken the above economic interests into consideration in the shaping of its policy.[89]

V. Conclusion

In this article, I have explored some basic differences and commonalities of negative and positive obligations respectively in regard to their internal structure and its implications for balancing. Following *Alexy's* principles theory, and contrary to the approach of the ECtHR, positive obligations have a disjunctive structure that differs from the alternative structure of negative obligations.

Due to this fundamental difference, the application of positive obligations follows a different scheme. This is most clear in the different proportionality test, which, in the case of positive obligations, necessarily contains two lines of values: Both the intensity of interference by non-protection and the degree of protection are required in order to assess whether the prohibition of insufficient means has been violated.

With the help of the principles theory, I have distinguished different types of the margin of appreciation. These allow for valuable insights into the structure of the margin and its function in the field of positive obligations.

Furthermore, I have rejected the standard objection against positive obligations, namely that the recognition of positive obligations may entrap the Member States between the prohibition of excessive means and the prohibition of insufficient means, eliminating any margin of appreciation.

In fact, the margin of appreciation does not follow different criteria in positive obligations, as compared to negative obligations. This is subject to one exception: One specific type of the margin, namely, the margin in means-selecting, does only occur in positive obligations, but not in negative obligations. The only meaningful way, therefore, to speak of a particularly broad margin in positive obligations is to refer to the means-selecting margin.

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88 See *S. Fredman* (note 1).

89 *Hatton and Others v. the United Kingdom (Grand Chamber)* (note 12), para. 121.