

No 'Significant Flaws' in the Regulatory Framework: *E.S. v. Sweden* and the Lowering of Standards in the Positive Obligations Case-Law of the European Court of Human Rights

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Abstract

In the judgment of 21 June 2012 in the case of *E.S. v. Sweden*, concerning the alleged failure of the Swedish state to protect a minor against her stepfather attempting to secretly film her naked, the European Court of Human Rights has introduced a 'significant flaw' test in its positive obligations case-law. The judgment suggests that the Court will generally not find a violation in a case concerning a complaint that a state has failed to discharge its positive obligation to provide a regulatory framework and to apply it in practice, unless it is shown that there have been 'significant flaws' in the provision or application of that framework. The article argues that the Grand Chamber should overrule the Chamber judgment and apply a more principled approach to positive obligations, in line with the Court's prior case-law and reaffirming the principles of effectiveness and priority-to-rights.

Keywords

E.S. v. Sweden – European Convention on Human Rights – positive obligations – regulatory framework – right to respect for private life.

1. Introduction

On 21 June 2012, the Fifth Section of the European Court of Human Rights (the Court) issued its judgment in the case of *E.S. v. Sweden*.¹ The applicant complained that the Swedish legal system had failed to protect her against her stepfather attempting secretly to film her naked when she was fourteen

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¹ ECtHR 21 June 2012, *E.S. v. Sweden*. During the subsequent proceedings before the Grand Chamber, the name of the case was changed to *Söderman v Sweden*.

years old. In its judgment, the Court found that Sweden had not violated the right to privacy (Article 8 ECHR), particularly holding that there had not been a 'significant flaw' in the Swedish regulatory framework and its application in practice. Despite the fact that the introduction of a 'significant flaws' test potentially has major implications for the Court's positive obligations case-law, the case has largely remained under the radar of legal scholars.² This article will first give an overview of the factual background to the case, as well as to the Court's decision and the dissenting opinion of Judges Spielmann, Villiger and Power-Forde. It further argues that the 'significant flaw' test has a number of problematic aspects and that it amounts to a lowering of standards in the Court's case-law. Finally, the article argues that the referral of the case to the Grand Chamber on 19 November 2012 provides the Court with a unique opportunity to re-examine the facts of the case in a more principled way, in line with its prior case-law.

2. Factual background

In 2002, at the age of fourteen, the applicant discovered that her stepfather had hidden a video camera in the laundry basket in the bathroom, making a buzzing sound and flashing, and directed towards the spot where she normally undressed. She took the video camera to her mother, but her stepfather took the camera away from her. Subsequently, the applicant saw her mother and stepfather burn a film, without being sure whether it was a recording of her. The applicant's mother reported the incident to the police in 2004 when she found out that the applicant's cousin had also experienced incidents with the stepfather. In February 2006, the District Court convicted the stepfather of sexual molestation. In October 2007, the stepfather was, however, acquitted on appeal by the Court of Appeal.

While the Court of Appeal found it unclear whether a recording was actually made, since the recording had been burned, it did find it established that the stepfather had put a camera in the bathroom and that he had started the recording system when the applicant was about to take a shower, with the aim of filming her for a sexual purpose. The Court of Appeal nonetheless did not find that the stepfather's acts legally constituted the offence of sexual molestation under the Swedish Penal Code. In order to qualify as sexual molestation, it had to be established that the stepfather had acted with the intent that the applicant would find out about the filming. According to the Court of Appeal, this was not

² With the exception of the short commentary X, Case and Comment - Selected Decisions from the European Court of Human Rights from May and June 2012, *European Human Rights Law Review* 576-579 (2012).

the case as it was apparent that the stepfather's motive was to film her covertly and that he had not been indifferent to the risk that she might find out about the act. The Court of Appeal did not find it material that the applicant indeed had found out about the filming, as this knowledge was not covered by the stepfather's intent. The Court of Appeal further referred to a Supreme Court judgment, in which the Supreme Court had held that the filming of sexual abuse was as such not an offence because Swedish law did not contain a general prohibition against filming an individual without his or her consent. While the Court of Appeal acknowledged that there had been a violation of the applicant's personal integrity, particularly in the light of her age and of her relationship to her stepfather, it nonetheless held that the stepfather could not be held criminally responsible for the isolated act of filming the applicant without her knowledge. The Court of Appeal further held that the stepfather's act might, at least theoretically, have constituted an offence of attempted child pornography, considering the applicant's age. The Court of Appeal, however, could not consider whether the stepfather could have been held responsible for such a crime, as no such charges had been brought against him. In December 2007, the Supreme Court refused leave to appeal.

3. The judgment

A. Characterisation complaint and the applicability of Article 8 ECHR

The applicant complained both under Article 8 (the right to respect for private life) and under Article 13 ECHR (the right to an effective remedy). The Court, however, considered the case to be more appropriately examined under Article 8, as the complaint was entirely directed against the remedies available to her and as it did not concern the lack of a remedy against the state to enforce the substance of a Convention right or freedom at the national level.³ The Court held that the case came within the scope of Article 8 ECHR, because the applicant's complaint concerned her moral integrity, which is an element of the broader concept of 'private life'.⁴

The choice of Article 8 rather than of Article 13 in this kind of case, where the applicant complains that the alleged lack of protection *inter alia* stems from an alleged shortcoming in the regulatory framework, is in line with the Court's practice. The Court has always examined the question

³ *E.S. v. Sweden*, *supra* note 1, para. 38.

⁴ *Ibid.*, para. 40.

whether the regulatory framework should prohibit a certain conduct (in this case the covert filming of a naked minor) under the substantive right (in this case Article 8) and not under Article 13.⁵ In such situations the Court generally does not consider it necessary to examine separately the specific 'remedial' concerns under Article 13.⁶

B. The Court's general principles

Subsequently, the Court listed the general principles applicable to the case. Firstly, the Court stated that positive obligations under Article 8 ECHR may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.⁷ Secondly, the Court recalled that the choice of means calculated to secure compliance with Article 8 ECHR in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. The margin of appreciation is, however, narrowed where a particularly important facet of an individual's existence or identity is at stake, or where the activities at stake involve a most intimate aspect of private life.⁸ Thirdly, the Court held that states are required to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals. While effective deterrence against grave acts where fundamental values and essential aspects of private life are at stake requires efficient criminal law provisions, civil law may be sufficient as to less grave acts.⁹ Fourthly, according to the Court only 'significant flaws' in legislation and practice, and their application, would amount to a breach of the state's positive obligations under Article 8 ECHR. In particular, it is not the task of the Court to replace the domestic authorities in their assessment of the facts of the case or in their assessment of the alleged perpetrator's criminal responsibility.¹⁰

⁵ See explicitly, for example, ECtHR 6 November 2012, *Redfern v. United Kingdom*, in which the Court examined the regulatory framework under Article 11 (the freedom of association), because 'Article 13 does not require the law to provide an effective remedy where the alleged violation arises from primary legislation' (para. 62).

⁶ E.g. ECtHR 4 December 2003, *M.C. v. Bulgaria*, para. 187; and ECtHR 2 December 2008, *K.U. v. Finland*, para. 51. If, however, the failure to discharge the positive obligation under the substantive provision has a negative impact on access to other available and effective remedies, a separate issue may still arise under Article 13; see *mutatis mutandis* with respect to Article 2 (the right to life), ECtHR (GC) 30 November 2004, *Önerildiz v. Turkey*, para. 148.

⁷ *E.S. v. Sweden*, *supra* note 1, para. 57.

⁸ *Ibid.*, para. 58.

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 59.

C. The Court's application of these principles to the facts of the case

The Court then applied the general principles to the facts of the case. According to the Court, there were no indications that it was clear to the authorities, notably to the public prosecutor, when indicting the stepfather, or to the District Court, when convicting him, that the disputed act would not be covered by the provision on sexual molestation.¹¹ The Court recalled that the Court of Appeal, while acquitting the stepfather of sexual molestation, had pointed out that the stepfather's acts might, at least theoretically, have constituted an attempted child pornography crime. The Court of Appeal, however, could not consider whether the stepfather could be held responsible for such a crime, as no such charge had been brought against him. The Government claimed that it would have been difficult to establish that there had been an attempted child pornography crime, as that would have required at least a picture of a pornographic nature, which did not exist since the video tape had been destroyed by the applicant's mother.¹² According to the Court, it was not its task to speculate on why a charge of attempted child pornography had not been brought against the stepfather. In particular, the Court held that the authorities could obviously not be held responsible for the lack of evidence in the form of a film, nor for the possibility that other elements might also have been lacking for the offence to have constituted an attempted child pornography crime. In any event, the Court recalled that only 'significant flaws' in legislation and practice, and their application, can constitute a breach of the state's positive obligations under Article 8 ECHR.¹³

The Court therefore held that it could not be concluded that at the relevant time the disputed act of the stepfather was not in theory covered by the Penal Code, as it could fall within the provisions concerning sexual molestation and attempted child pornography. The Court further held that the case had to be distinguished from *X and Y v. the Netherlands*,¹⁴ as there had not been any procedural requirements that made it impossible for the applicant to enjoy practical and effective protection by the Penal Code. Moreover, as opposed to *K.U. v. Finland*,¹⁵ there were no obstacles for which the authorities

¹¹ *Ibid.*, para. 63.

¹² This position is, however, disputed by Professor of Criminal Law Madeleine Leijonhufvud in her legal opinion, submitted by the applicants to the Grand Chamber. Leijonhufvud argues that a charge for attempted child pornography could never have been brought, because under Swedish law 'the video film did not constitute a pornographic picture'.

¹³ *E.S. v. Sweden*, *supra* note 1, para. 64.

¹⁴ ECtHR 26 March 1985, *X and Y v. the Netherlands*.

¹⁵ *K.U. v. Finland*, *supra* note 6.

could be held responsible to launching an effective investigation to identify and prosecute the perpetrator.¹⁶

The Court then turned to the question whether, in the special circumstances of the case, it was a 'significant flaw' in Swedish legislation that the Penal Code did not contain another provision that could have covered the act at issue. More concretely, it could be argued that if the Penal Code at the relevant time had contained specific provisions concerning acts of covert or illicit filming, completed and attempted, such provisions could also have covered the act at issue in the present case. With respect to that assessment, the Court recalled that civil law remedies were also available to the applicant, but that she chose to join her claim for damages to the criminal proceedings.¹⁷

The Court emphasised that it was not its task to review the relevant legislation in the abstract – particularly the absence in Swedish legislation of specific provisions concerning acts of covert or illicit filming¹⁸ – but that it must confine itself to examining whether, in the case at hand, the absence of a provision in the Penal Code on attempted covert filming constituted a 'significant flaw' in Swedish legislation. According to the Court, the relevant question was whether the legislators should have foreseen that in a case of attempted covert filming of a minor for a sexual purpose, where the film was subsequently destroyed without anyone having seen it, and where the person who filmed did not intend the minor to find out about the filming, the provision of sexual molestation could not cover the act, and a charge of attempted child pornography would not necessarily be brought.¹⁹

The Court reiterated the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. An offence must therefore be clearly defined in the law. However, in any system of law, including criminal law, it must be accepted that, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation.²⁰ The Court reaffirmed that the choice of means calculated to secure compliance with Article 8 ECHR is in principle a matter that falls within the Contracting States' margin of appreciation.²¹

¹⁶ *E.S. v. Sweden*, *supra* note 1, para. 65.

¹⁷ *Ibid.*, para. 66.

¹⁸ *Ibid.*, para. 67.

¹⁹ *Ibid.*, para. 68.

²⁰ *Ibid.*, para. 69.

²¹ *Ibid.*, para. 70.

The Court, referring to *Von Hannover v. Germany*,²² stressed the need for increased vigilance in protecting private life to contend with new communication technologies which make it possible to store and reproduce personal data. The Court particularly took into account that Sweden had taken active steps in order to combat the general problem of covert filming of individuals by issuing a proposal to criminalise certain acts of such filming in situations where the act violates the personal integrity of the filmed person.²³

In the light of these considerations and taking into account the special circumstances of the case – notably the fact that at the relevant time the disputed act of the stepfather was in theory covered by the provisions concerning sexual molestation and attempted child pornography – the Court held that the Swedish legislation and practice and their application to the case at hand did not suffer from such ‘significant flaws’ that it could amount to a breach of Sweden’s positive obligations under Article 8 ECHR.²⁴ The Court therefore found that there had not been a violation of Article 8 ECHR.²⁵

The novelty of the *E.S. v. Sweden* judgment lies in the decisive character attributed to the ‘significant flaws’ test (see section 4.B.), resulting in the provision of less protection to the applicant. In the next sections, this paper will criticise the application of the ‘significant flaws’ test (see section 4.C) and instead propose a stricter standard of effectiveness (see section 4.D). Applying this stricter standard would result in the overruling by the Grand Chamber of the Chamber judgment (see section 5).

D. The dissenting opinion

In a dissenting opinion, Judges Spielmann, Villiger and Power-Forde argued that the Court should have found a violation of Article 8 ECHR. Basing themselves on the leading case of *X and Y v. the Netherlands*, the dissenting judges held that a breach of Article 8 requires two conditions: (i) that the case concerns fundamental values and essential aspects of private and/or family life; and (ii) that there is a lacuna in the legislation which fails to protect these values. As regards the first condition, the judges held that it was indisputable that what was in issue was a very serious offence and, indeed, one where fundamental values and essential aspects of the applicant’s private life were at stake. As regards the

²² ECtHR 24 June 2004, *Von Hannover v. Germany*.

²³ *E.S. v. Sweden*, *supra* note 1, para. 71.

²⁴ *Ibid.*, para. 72.

²⁵ *Ibid.*, para. 73.

second condition, the dissenters note that the Court of Appeal had found that what the applicant's stepfather had done did not amount to a crime under Swedish law since there was no general prohibition against filming an individual without his or her consent. According to the dissenters, the Court of Appeal had thereby acknowledged that there was a lacuna in the Swedish legislation. The dissenters further had difficulties with accepting the principle, as applied by the Court of Appeal, that for a criminal offence to have been committed, the victim must have knowledge of the offence. In the dissenters' minds, both the *mens rea* and the *actus rea* were sufficiently present once the domestic courts accepted that the stepfather had intended to film the applicant secretly and had proceeded to do so. Finally, the dissenters were not aware of any reasons why the stepfather had not been prosecuted on other grounds, namely on account of attempted child pornography. On the whole, the dissenters found that there had been a significant omission in the relevant Swedish legislation which resulted in the applicant being left without protection.

E. Referral to Grand Chamber

Unsurprisingly, in the light of the clear division in the Chamber – a majority judgment of four Judges versus a dissenting judgment of three Judges – the Grand Chamber panel of five Judges decided on 19 November 2012 to refer the case to the Grand Chamber at the applicant's request. During the proceedings before the Grand Chamber, the name of the case was changed to *Söderman v. Sweden*.

4. Implications for the Court's positive obligations case-law

A. The positive obligation to develop a regulatory framework protecting human rights

It is apparent from the Court's case-law with respect to the positive obligation to protect individuals against other private parties that member states have to provide individuals with some degree of legal protection in order to prevent their human rights from being violated. In this sense, Keir Starmer has held that

The duty to put in place a legal framework which provides effective protection for Convention rights in many respects represents the minimum obligation of Contracting States under the Convention.²⁶

Similarly, Dimitris Xenos has stressed that

In most circumstances, a regulatory framework can be imposed as a core content of positive obligations under paragraph 1 of the Convention rights. Regulations of human rights standards to educate the behaviour of private parties or to condition the operation of their activities are the first and most basic content of positive obligations.²⁷

As rightly stressed by Judges Spielmann, Villiger and Power-Forde in their dissenting opinion, the leading case in this respect is the 1985 judgment of *X and Y v. the Netherlands*. This case concerned the rape of a mentally disabled girl by the son-in-law of the director of the home she stayed in. The victim's father had lodged a criminal complaint against the son-in-law for the offence of abuse of a dominant position to cause a minor to commit indecent acts. The complaint was, however, dismissed by the domestic courts since Dutch law required it to be lodged by the victim herself. This had been impossible because, being mentally disabled, she was legally incapable of lodging such a complaint. In its judgment, the European Court of Human Rights found

that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.²⁸

In the circumstances of the case, the Court held that the relevant provisions of the Criminal Code did not provide the applicant 'with practical and effective protection'.²⁹

While protection against serious violations of human rights requires criminal law provisions, the protection afforded by civil law may be sufficient with respect to less grave acts, for example in the

²⁶ K. Starmer, Positive obligations under the Convention, in: J. Lowell and J. Cooper (eds), *Understanding Human Rights Principles* 147 (Oxford: Hart Publishing, 2001).

²⁷ D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* 107 (Abingdon: Routledge, 2012).

²⁸ *X and Y v. the Netherlands*, *supra* note 14, para. 27.

²⁹ *Ibid.*, para. 30.

sphere of medical negligence.³⁰ The protection offered by the regulatory framework should thus be proportionate to the seriousness of the human rights violation concerned.³¹

The judgment of *E.S. v. Sweden* raises the question as to which standards the Court should apply when determining whether or not a state has failed to discharge this positive obligation to develop a regulatory framework protecting against human rights violations by private parties. According to the majority, the relevant standard is whether there had been a ‘significant flaw’ in legislation or practice, or in their application. The finding of such a ‘significant flaw’ thus results in the finding of a violation of Article 8 ECHR. In the dissenting Judges view, on the other hand, it is sufficient to find that there is a lacuna in the legislation that results in a failure to protect ‘fundamental values and essential aspects’ of private life. In order to determine the most appropriate standard to deal with this kind of cases, I will first trace the origins of the ‘significant flaws’ test (section 4.B) and then show that its application in the *E.S. v. Sweden* judgment amounts to a lowering of standards in the Court’s case-law (section 4.C). Then I will argue in favour of a stricter standard, in line with the Court’s established case-law (section 4.D).

B. The origins of the ‘significant flaws’ test

In the majority judgment, the Court identifies the ‘significant flaws’ test as one of the general principles applicable to the case at hand. In elevating the ‘significant flaws’ test to a general principle, the Court refers to the authority of *M.C. v. Bulgaria*. This case concerned the date rape of a fourteen-year-old girl by two men. The prosecutor decided not to start criminal proceedings because the use of force or threats had not been established beyond reasonable doubt and, in particular, it had not been established that the applicant had resisted the perpetrators or attempted to seek help from others. The European Court of Human Rights held that it was its task

to examine whether or not the impugned legislation and practice and their application in the case at hand, combined with the alleged shortcomings in the investigation, had such significant

³⁰ E.g. ECtHR (GC) 17 January 2002, *Calvelli and Ciglio v. Italy*, para. 51.

³¹ See L. Lavrysen, Protection by the Law, in: E. Brems and Y. Haeck (eds), *Human Rights and Civil Rights in the 21st Century* (Heidelberg: Springer, forthcoming).

flaws as to amount to a breach of the respondent State's positive obligations under Articles 3 and 8 of the Convention.³²

In *M.C. v. Bulgaria*, the Court, however, made no further use of the notion of 'significant flaws', nor did it elaborate on what had to be understood by this notion. In finding a violation of Articles 3 and 8 ECHR, the Court merely held that

the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.³³

Before *E.S. v. Sweden*, the Court had mentioned the notion of 'significant flaws' in two more cases. In the domestic servitude case of *Siliadin v. France*, the Court held that it had

to examine whether the impugned legislation and its application in the case in issue had such significant flaws as to amount to a breach of Article 4 by the respondent State.³⁴

The Court found a violation of Article 4 ECHR, particularly because it considered

that the criminal-law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions of which she was a victim.³⁵

In the case of *M. and C. v. Romania*, concerning the sexual abuse of a four-year-old by his father, the Court considered its task to be

to examine whether or not the alleged shortcomings in the investigation had such significant flaws as to amount to a breach of the respondent State's positive obligations under Articles 3 and 8 of the Convention in respect of the second applicant.³⁶

The Court found a violation of Articles 3 and 8 ECHR, particularly holding

³² *M.C. v. Bulgaria*, *supra* note 6, para. 167.

³³ *Ibid.*, para. 185.

³⁴ ECtHR 26 July 2005, *Siliadin v. France*, para. 130.

³⁵ *Ibid.*, para. 148.

³⁶ ECtHR 27 September 2011, *M. and C. v Romania*, para. 112.

that the investigation of the case and, in particular, the approach taken by the domestic authorities fell short of the requirements inherent in the States' positive obligations to establish and effectively apply a criminal-law system punishing all forms of sexual abuse.³⁷

In neither *Siliadin* nor *M. and C.* did the Court further mention the notion of 'significant flaws', nor did it clarify what had to be understood by it.

It thus appears that before *E.S. v. Sweden*, the notion of 'significant flaws' did not have any specific content and this notion's mention did not have any influence on the Court's further reasoning. Holding that it had to examine whether there had been 'significant flaws' in legislation or practice, or their application, was just another way for the Court to put that it had to examine whether the state had failed to provide the applicants effective protection. As we will see hereunder, 'effective protection' is exactly the stricter standard that in general emerges from the Court's positive obligations jurisprudence (see section 4.D).

In *E.S. v. Sweden*, however, the Court for the first time applies the notion of 'significant flaws' as a separate test in order to verify whether the state has failed to discharge its positive obligations. In its examination, the Court considers three issues not to constitute a 'significant flaw'. Firstly, the Court accepted that the disputed act was 'in theory' covered by the offence of sexual molestation. The Court thus did not consider the fact that, in order to qualify as such an offence, Swedish law required that the perpetrator had the intent that the victim would find out about the act, to be a 'significant flaw'. Secondly, the Court further accepted that the act was 'in theory' covered by the offence of attempted child pornography. The Court did not consider the evidentiary issues – in particular the alleged requirement of evidence in the form of a picture of a pornographic nature – to constitute a 'significant flaw'. Thirdly, the Court did not consider it to be a 'significant flaw' in Swedish legislation that the Penal Code did not contain another provision that could have covered the act at issue, in particular a specific provision concerning acts of covert or illicit filming, either completed or attempted.

³⁷ *Ibid.*, para. 121.

C. The problematic nature of the ‘significant flaws’ test

The Court’s application of the ‘significant flaws’ test in *E.S. v Sweden* has a number of problematic aspects. First of all, by introducing the ‘significant flaws’ test, the state’s positive obligation is in a sense ‘negativised’: it becomes an obligation *not to do something* (i.e. allow ‘significant flaws’ in legislation), rather than an obligation *to do something* (i.e. provide effective protection). As such, this may not be so problematic, on condition that there is sufficient certainty with respect to the content of this ‘negative’ criterion. In the absence of any criteria as to what counts as a ‘significant flaw’, such an approach fails to provide any guidance as to what does amount to sufficient legal protection of human rights. The Court’s judgment, however, did not give sufficient guidance in the abstract as to what could be regarded as a ‘significant flaw’. It merely gave three examples of what did not count as a ‘significant flaw’ in the case at hand.

Secondly, the application of the ‘significant flaws’ test in *E.S. v. Sweden* indicates that this test is particularly tailored to deal with situations in which the lack of protection clearly stems from one particular legal loophole. An example of such a situation would be the above-discussed case of *M.C. v. Bulgaria*, in which the lack of protection directly and entirely stemmed from the restrictive definition of rape under Bulgarian law, which did not cover non-consensual sexual acts in the absence of physical resistance by the victim. In *E.S. v. Sweden*, the situation is different, since the lack of protection stems from a combination of three factors: the problems related to establishing whether the stepfather had committed sexual molestation, those related to the establishment of attempted child pornography and the absence of a specific provision concerning acts of covert or illicit filming. Even if none of these factors in themselves constituted such a ‘significant flaw’, this does not discharge the Court from examining whether their combination might have resulted in a situation in which the rights of the applicant were not sufficiently protected. This appears to be exactly the problem in this case: not the absence of any of these means of protection in particular, but rather the fact that none of them provided protection in practice in the case at hand. The suggested approach, moreover, would be more in line with the margin of appreciation doctrine (see section 4.D): it is not for the Court to identify the particular course of remedial action (by identifying a particular ‘significant flaw’), since, as the Court reaffirmed in *E.S. v. Sweden*, the choice of means to ensure compliance with a positive obligation in principle falls within the state’s margin of appreciation.³⁸ If the Court had found a violation of Article 8, it would still be up to the

³⁸ *E.S. v. Sweden*, *supra* note 1, para. 70.

state to decide either to tackle any of the three discussed problems or to adopt any other adequate course of action.

Thirdly, the application of the ‘significant flaws’ test is overly deferential. In its case-law the Court has always stressed that ‘[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective’.³⁹ In this light, it is strange that the Court accepts the argument that Swedish criminal law ‘in theory’ – rather than in practice – provided sufficient protection.⁴⁰ As I will illustrate in the next section, the Court has always applied a standard of effectiveness in cases concerning the positive obligation to provide legal protection. The ‘significant flaws’ test is hard to reconcile with the principle of effectiveness, which requires effective legal protection against human rights violations. In the context of the positive obligation under Article 2 ECHR (the right to life) to take preventive operational measures to protect an individual whose life is at risk, the Court has, for example, invoked the principle of effectiveness to reject standards comparable to the ‘significant flaws’ test. According to the Court, the standards suggested by the Government in *Osman v. United Kingdom* – whether there had been ‘gross negligence’ or ‘wilful disregard of the duty to protect life’ – were incompatible with the need to provide practical and effective protection of the right to life.⁴¹ On a spectrum, protection is not either effective or ‘significantly flawed’: between both points on the spectrum, there are other positions in which insufficient protection is provided. As the ‘significant flaws’ test would not result in the finding of a violation with respect to these other positions, the introduction of this test in *E.S. v. Sweden* thus amounts to a lowering of standards in the Court’s jurisprudence.

Fourthly, the judgment is hard to reconcile with the priority-to-rights principle. This principle requires that Convention rights be systematically accorded greater weight than collective goods in the proportionality analysis.⁴² As early as the *Belgian Linguistics* case, the Court recognised that ‘[t]he

³⁹ E.g. ECtHR 9 October 1979, *Airey v. Ireland*, para. 24. For two recent Grand Chamber authorities, see ECtHR (GC) 17 January 2012, *Stanev v. Bulgaria*, para. 231, and ECtHR (GC) 7 June 2012, *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, para. 138.

⁴⁰ As the legal opinion of Professor of Criminal Law Leijonhufvud (*supra* note 12) illustrates, the Court has all too easily accepted this protection ‘in theory’.

⁴¹ ECtHR (GC) 28 October 1998, *Osman v. United Kingdom*, para. 116: ‘The Court does not accept the Government’s view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life ... Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2.’

⁴² S. Greer, *Constitutionalizing Adjudication under the European Convention on Human Rights*, 23 *Oxford Journal of Legal Studies* 413-414 (2003).

Convention [...] implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter'.⁴³ Protection of Convention rights can thus be considered as the rule, while justified limitations are the exception.⁴⁴ The priority-to-rights principle thus principally favours human rights protection over competing interests and there is no principled reason why the same is not equally relevant in the context of positive obligations, as in the context of negative obligations. The priority-to-rights principle is also reflected in the burden of proof: the principle requires the state to bear the burden of proving the proportionality of any limitation of a Convention right.⁴⁵ With respect to positive obligations, once it is established that a situation interferes with a Convention right, the priority-to-rights principle *mutatis mutandis* requires states to bear the burden of proof that their inactions do not violate the Convention right concerned.⁴⁶ In *E.S. v. Sweden*, however, the Court failed to respect the priority-to-rights principle, by finding that there is generally no violation of a Convention right unless it is established that there has been a 'significant flaw' in the regulatory framework or its application. Such a test by its nature requires the applicant to provide the positive proof of the existence of a 'significant flaw' rather than requiring the state to provide the negative proof of the absence of a 'significant flaw'. The applicant is thus placed at a disadvantaged position vis-à-vis the state, since the applicant has to provide both proof of the interference and proof of the existence of a 'significant flaw'. This creates a presumption that the state

⁴³ ECtHR (GC) 23 July 1968, Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium, para. 5.

⁴⁴ S. Smet, The Nature and Form of Conflicts between Human Rights in the Case Law of the European Court of Human Rights 40 (manuscript on file).

⁴⁵ Greer, *supra* note 42, 428. Similarly, S. Van Drooghenbroeck, Conflits entre droits fondamentaux, pondération des interest: fausses pistes (?) et vrais problèmes, in: J.-L. Renchon (ed.), Les droits de la personnalité 314-315 (Brussels: Bruylant, 2009). Some examples of cases in which the Court explicitly applied the burden of proof in line with the priority-to-rights-principle are ECtHR (GC) 13 July 2000, *Elsholz v. Germany*, para. 48; ECtHR (GC) 12 September 2012, *Nada v. Switzerland*, para. 181 (the need for the State to adduce 'relevant and sufficient' reasons for justifying an interference); and ECtHR 24 April 2012, *Yordanova and Others v. Bulgaria*, para. 118 (inferences drawn from a lack of explanation or argumentation justifying interference). Related to the burden of proof is the axiom *in dubio pro libertate*: any remaining doubt as to the necessity of a limitation will play to the benefit of the Convention right concerned, see Smet, *supra* note 44, p. 40, with reference to F. Ost and S. Van Drooghenbroeck, La responsabilité face cachée des droits de l'homme, in: H. Dumont, F. Ost and S. Van Drooghenbroeck (eds), La responsabilité face cachée des droits de l'homme 33-34 (Brussels: Bruylant, 2005).

⁴⁶ L. Lavrysen, The Scope of Rights and the Scope of Obligations: Positive Obligations, in: E. Brems and J. Gerards (eds), Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights (Cambridge University Press, forthcoming). Similarly G. van der Schyff, Limitation of Rights – A Study of the European Convention and the South African Bill of Rights 69 (Nijmegen: Wolf Legal Publishers, 2005); and J. Gerards and H. Senden, The Structure of Fundamental Rights and the European Court of Human Rights, 7 International Journal of Constitutional Law 644 (2009).

has discharged its positive obligations, which is contrary to the priority-to-rights principle, since it exempts the state from bearing the burden of proof in the proportionality analysis.⁴⁷

A more promising approach is a line of legal reasoning developed by the Court in the case of *K.U. v. Finland*. The case concerned the posting by an anonymous person of the contact details of a twelve-year-old boy on an internet dating site, which exposed the boy to the interest of sexual predators. When examining the extent of the positive obligation under Article 8 ECHR, the Court held that ‘a positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities or, as in this case, the legislator’.⁴⁸ If the state fails to establish that there has been such an ‘impossible or disproportionate burden’, the Court will find that there has been a violation of the Convention right concerned. It is disappointing that the Court in *E.S. v. Sweden* applied a ‘significant flaw’ test, rather than the stricter ‘impossible or disproportionate burden’ test, which would have been more in line with the priority-to-rights principle.

Fifthly, in the case of *Broniowski v. Poland* concerning positive obligations under Article 1 Protocol 1 (the right to property), but equally relevant with respect to positive obligations under Article 8, the Court held that

The rule of law underlying the Convention and the principle of lawfulness in Article 1 of Protocol No. 1 require States not only to respect and apply, in a foreseeable and consistent manner, the laws they have enacted, but also, as a corollary of this duty, to ensure the legal and practical conditions for their implementation.⁴⁹

The Court could have applied the same type of reasoning to the case of *E.S. v. Sweden*, in which the legal and practical conditions were lacking for the effective application of the criminal law to the challenged act, owing to the refusal of domestic courts to hold a perpetrator liable if he did not want the victim to find out about the alleged act of sexual molestation and because of the prosecutorial policy not to file charges for (attempted) child pornography in the absence of photographic evidence. Moreover, it appears that even if there had been photographic evidence, it would have been impossible to bring

⁴⁷ It also violates the axiom *in dubio pro libertate*, since remaining doubt benefits the state rather than the applicant.

⁴⁸ *K.U. v. Finland*, *supra* note 6, para. 48. Another problem may be the possibility of conflicting rights. In such cases, the priority-to-rights-principle is unable to give any guidance, as all rights concerned principally require priority. According to the Court in *K.U. v. Finland*, in such cases it is ‘the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context’ (para. 49).

⁴⁹ ECtHR (GC) 28 September 2005, *Broniowski v. Poland*, para. 184.

charges for the latter offence, since it was unlikely that the film could have been considered ‘pornographic’ under Swedish law.⁵⁰ It cannot therefore be accepted that the regulatory framework, as applied in practice, was able to provide the applicant with the requisite protection, owing to the interpretation given by the domestic courts to the relevant offences and/or the restrictive prosecutorial policy.

Sixthly, the lack of protection in practice stands in contrast to the international consensus on the need to protect children effectively against such practices through criminal law. The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (‘Optional Protocol’)⁵¹ requires states to criminalise *inter alia* the production and possession of child pornography⁵² as well as an attempt to commit such act.⁵³ The Optional Protocol requires states to adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the Protocol at all stages of the criminal justice process.⁵⁴ At the level of the Council of Europe, the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (‘Council of Europe Convention’)⁵⁵ equally requires the criminalisation of the production and possession of child pornography.⁵⁶ The Convention *inter alia* requires states to take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child.⁵⁷ Both the Optional Protocol and the Council of Europe Convention would be futile in the absence of the effective investigation and prosecution of the offences concerned.⁵⁸ These instruments illustrate an international consensus on the need to criminalise and effectively investigate and prosecute sexual crimes against minors. In line with this consensus, the Court should avoid a deferential approach with respect to such crimes and instead apply firm legal standards. The Court should have found that, by not allowing criminal liability with respect to acts that arguably come within the scope of the Optional Protocol and the Council of Europe Convention, the

⁵⁰ *Supra* note 12.

⁵¹ Adopted by General Assembly resolution A/RES/54/263 of 25 May 2000, 2171 UNTS 227.

⁵² Article 3, para. 1 (c) Optional Protocol.

⁵³ Article 3, para. 2 Optional Protocol.

⁵⁴ Article 8, para. 1 Optional Protocol.

⁵⁵ Adopted at the 28th Conference of European Ministers of Justice in Lanzarote on 25 October 2007, 201 CETS.

⁵⁶ Article 20, para. 1 Council of Europe Convention.

⁵⁷ Article 30 para. 1 Council of Europe Convention.

⁵⁸ *Mutatis mutandis* Article 8, para. 2 Optional Protocol and Article 34, para. 2 Council of Europe Convention, which both require that uncertainty about the age of the victim should not prevent the initiation of a criminal investigation.

Swedish regulatory framework failed to live up to the international consensus to protect effectively against such crimes.

D. The standard from the Court's case-law: effective protection

The principle of effectiveness requires states to protect rights that are practical and effective, rather than theoretical or illusory.⁵⁹ This principle is a general interpretative principle the European Court applies when determining the extent of protection under the ECHR.⁶⁰ It is particularly important in the Court's positive obligations case-law, in which it has been the primary rationale for the development of positive obligations under almost every Convention article.⁶¹ As I will argue in the next section, the Grand Chamber should remain faithful to the Court's established case-law on the positive obligation to provide legal protection of human rights against third parties, by applying the standard that legal protection must be effective rather than devoid of 'significant flaws'.

The principle of effectiveness is prominent in the leading case of *X and Y v. the Netherlands*, where the Court required 'effective deterrence' of the human rights violation concerned and where it found that the applicant did not enjoy 'practical and effective protection' by the Criminal Code.⁶² In *M.C. v. Bulgaria*, the Court held that Article 8 requires states to enact criminal-law provisions 'effectively punishing' rape and to apply them in practice through 'effective investigation and prosecution'.⁶³ In *Siliadin v. France*, the Court held that the criminal-law legislation in force did not afford the applicant 'practical and effective protection' against servitude, in violation of Article 4 ECHR.⁶⁴ In the trafficking case of *Rantsev v. Cyprus and Russia*, the Court held that Article 4 ECHR requires that the spectrum of safeguards set out in national legislation must be adequate to ensure the 'practical and effective protection' of the rights of the victims or potential victims of trafficking.⁶⁵ In *K.U. v. Finland*, the Court

⁵⁹ E.g. *Airey*, *supra* note 39, para. 24.

⁶⁰ D. Harris, M. O'Boyle, E. Bates and C. Buckley, *Law of the European Convention on Human Rights* 15 (Oxford University Press, 2009).

⁶¹ See Mowbray's discussion in A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004).

⁶² *X and Y v. the Netherlands*, *supra* note 14, paras 27 and 30.

⁶³ *M.C. v. Bulgaria*, *supra* note 6, para. 153. Similarly *M. and C. v. Romania*, *supra* note 36, paras 108, 111 and 121.

⁶⁴ *Siliadin*, *supra* note 34, para. 148. Similarly ECtHR 13 November 2012, *C.N. v. United Kingdom*, paras 76-77 and 81.

⁶⁵ ECtHR 7 January 2010, *Rantsev v. Cyprus and Russia*, para. 284.

held that the ‘practical and effective protection’ of the right to privacy (Article 8 ECHR) of the applicant required the taking of ‘effective steps’ to identify and prosecute the perpetrator.⁶⁶

In all these cases, the standard of effectiveness is applied to examine whether the state has discharged its positive obligation, both with respect to the regulatory framework and to the legal and practical conditions for the prosecution and punishment of perpetrators (see above section 4.C). The former sometimes requires more than the simple criminalisation of a human rights violation: effective protection against trafficking also requires the regulation of businesses used as a cover for human trafficking and the development of immigration rules that do not encourage, facilitate or tolerate trafficking.⁶⁷ The former also requires that criminal provisions that ‘in theory’ may protect against a human rights violation are interpreted and applied in such a way that effective protection is provided: in the case of *M.C. v. Bulgaria*, for example, the issue is not the law itself, but the restrictive application of the crime of rape in the applicant’s case, due to a prosecutorial policy.⁶⁸ The latter may, for example, require the provision of investigative techniques, such as an obligation on internet service providers to provide information on the identity of anonymous offenders on the internet.⁶⁹

In general terms, in this type of case the principle of effectiveness requires at the basic level the existence of a measure capable of providing individuals protection against human rights violations by private actors. While absolute protection is not required, as positive obligations are obligations of means rather than obligations of result,⁷⁰ the principle of effectiveness does require that the state strives to provide as much protection as can reasonably be expected from them.⁷¹ According to Xenos, ‘the choice of measures is reviewed against the standard of effectiveness, which aims, consciously or unconsciously, at an end/complete result’,⁷² in particular the end result ‘not to suffer a violation of human rights by a given activity’.⁷³ In other words, the principle of effectiveness requires an appropriate means-ends

⁶⁶ *K.U. v. Finland*, *supra* note 6, para. 49.

⁶⁷ *Rantsev v. Cyprus and Russia*, *supra* note 65, para. 284.

⁶⁸ *M.C. v. Bulgaria*, *supra* note 6, paras 170-174.

⁶⁹ *K.U. v. Finland*, *supra* note 6, paras 48-49. The required regulatory framework must reconcile the various competing interests, in particular the protection of the right to privacy of the victim, the freedom of expression of internet users and the confidentiality of telecommunications.

⁷⁰ E.g. C. Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention* 388 (Berlin: Springer, 2003).

⁷¹ *Mutatis mutandis Osman v. United Kingdom*, *supra* note 41, para. 116.

⁷² Xenos, *supra* note 27, p. 118.

⁷³ *Ibid.*, p. 102. Elsewhere, I have held that an element of optimisation of human rights protection is inherent in the principle of effectiveness, in line with the optimisation conception of rights as proposed by *inter alia* Robert Alexy, see Lavrysen, *supra* note 31. According to R. Alexy (*A Theory of Constitutional Rights* 328 (Oxford University Press

relationship. While the Court holds that the choice of means to discharge a positive obligation generally falls within the state's margin of appreciation,⁷⁴ the protection offered by these means must nonetheless be effective. The principle of effectiveness, in combination with the margin of appreciation doctrine, thus delineates a range of means that are appropriate to protect human rights. If the state fails to use a means at its disposal or if it applies a means that for whatever reason is not capable of appropriately protecting the right concerned in practice, the state has failed to discharge its positive obligation, unless it can justify the proportionality of its inaction, in line with the priority-to-rights principle.

5. Rearguing *E.S. v Sweden*

The referral of the case to the Grand Chamber is a unique opportunity for the Court to overrule the *E.S. v. Sweden* judgment. It therefore is crucial that the Grand Chamber asks the right question. Instead of asking whether there were any 'significant flaws' in the regulatory framework or its application, the Grand Chamber should ask whether the protection offered in practice by the regulatory framework and its application was effective in the sense of *X and Y v. the Netherlands* or not. In order to verify whether there has been a violation of Article 8, the Court has to examine three distinct questions.

The first question is whether the challenged act was sufficiently serious to trigger the need for the State to develop and apply a regulatory framework to protect against such acts and to punish perpetrators. Clearly there was such a need, taking into account the nature of the challenged act as sexual abuse of a minor. In this respect, the Court in *K.U. v. Finland* had held that

sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives.⁷⁵

2002)): '[w]herever procedural norms can raise the protection of constitutional rights they are prima facie required by constitutional principles. If no competing principles apply, then there is a definitive right to their application.'

⁷⁴ E.g. ECtHR 9 June 2005, *Fadayeva v. Russia*, para. 96.

⁷⁵ *K.U. v. Finland*, *supra* note 6, para. 46.

The seriousness was also acknowledged by the domestic courts, which had established that the stepfather had committed an act violating the applicant's personal integrity. The Court's jurisprudence, moreover, indicates that sexual abuse of minors principally requires criminal law sanctions.⁷⁶

The applicant was thus in principle entitled to effective protection by the regulatory framework, in particular by the criminal law. The second question then is whether applicant did enjoy such effective protection in practice. As held above, the starting point of this analysis is that the state has a certain margin of appreciation to determine the means to provide the applicant with protection, insofar as this protection can be considered effective in the sense of *X and Y v. the Netherlands*.

The prosecution and – if his criminal responsibility had been established by the domestic courts⁷⁷ – conviction of the stepfather for the offences of sexual molestation or (attempted) child pornography would undoubtedly have been an appropriate means to protect the applicant's right to privacy. It is important to note that the obligation to apply the regulatory framework in practice through prosecution is not an obligation of result, but an obligation of means to take all reasonable steps possible to successfully prosecute the perpetrator of a human rights violation.⁷⁸ The mere fact that the stepfather was not convicted is thus not sufficient to find a violation of the right to privacy. As the Court held in *M.C. v. Bulgaria*, it is 'not concerned with allegations of errors or isolated omissions in the investigation'.⁷⁹ Severe shortcomings in the investigation and prosecution,⁸⁰ or a prosecutorial or judicial policy that excludes the challenged act from the sphere of protection, will, however, in principle result in the finding of a violation.

In this case, the protection offered by the offence of sexual molestation was clearly ineffective, since it did not apply in the situation where the perpetrator did not intend the victim to find out about the offence – which necessarily holds true for cases of covert filming – despite the fact that the violation of the victim's personal integrity was nonetheless established. This ineffectiveness was caused by the Court of Appeal's restrictive interpretation,⁸¹ which rightly stunned the dissenting judges, who held that

⁷⁶ See *K.U. v. Finland*, *supra* note 6; *M.C. v. Bulgaria*, *supra* note 6; and *X and Y v. the Netherlands*, *supra* note 14.

⁷⁷ With respect to this question, the European Court has always stressed that – since it is not a fourth instance – 'it cannot replace the domestic authorities in the assessment of the facts of the case; nor can it decide on the alleged perpetrators' criminal responsibility' (e.g. *M.C. v. Bulgaria*, *supra* note 6, para. 168).

⁷⁸ *Mutatis mutandis Osman v. United Kingdom*, *supra* note 41, para. 116.

⁷⁹ *M.C. v. Bulgaria*, *supra* note 6, para. 168.

⁸⁰ See, for example, *ibid.*, paras 175-185.

⁸¹ *X*, *supra* note 2, p. 579.

‘both the *mens rea* and the *actus rea* were sufficiently present once the domestic courts accepted that the stepfather had intended to film the applicant secretly and had proceeded to do so’. The offence of (attempted) child pornography also did not provide effective protection, since the act does not appear to be ‘pornographic’ under Swedish law. Even if it had been covered by that provision, the protection would have been ineffective since prosecutorial practice required evidence of a photographic nature, including in the applicant’s case where the facts had been clearly established by the domestic courts despite the video evidence having been destroyed. The question remained whether there were other effective means at the state’s disposal. Regardless of the question whether criminalising covert or illicit filming would be an appropriate means to protect against a personal integrity violation rather than a mere privacy violation, such a means did not exist in Swedish law, nor did any other effective means.

The third and final question is whether protecting the applicant would impose an ‘impossible or disproportionate burden’ on the state, in the sense of *K.U. v. Finland*. In line with the priority-to-rights-principle, the burden lies on the state to justify its failure to provide an effective means of protection. Since the Swedish state did not demonstrate such an ‘impossible or disproportionate’ burden, the Grand Chamber should therefore find a violation of Article 8 ECHR.

The Grand Chamber judgment in the case of *E.S. v. Sweden (or Söderman v. Sweden)* is likely to become a leading case in the Court’s positive obligations case-law. As a regulatory framework can indeed rightly be considered the ‘first and most basic content’ of positive obligations to protect the human rights of individuals against private actors,⁸² it is important for the Court to take a firm position on the development of this framework, as well as its application. In line with *Broniowski v. Poland*, the latter also requires the state to ensure the appropriate legal and practical conditions for its application in practice. In order to take such a firm position, it is crucial for the Grand Chamber to drop the ‘significant flaws’ test and to endorse unambiguously the principles of effectiveness and priority-to-rights. That way, the Grand Chamber would provide a more appropriate level of protection against human rights violations by private actors in general and against the sexual abuse of minors in particular.

⁸² Xenos, *supra* note 27, p. 107.