Positive Obligations, Deference and Subsidiarity

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International human rights law and its enforcement systems rely on the collaboration of states to respect their obligations and protect rights. It follows that even when regional human rights courts carry out their watchdog role, they cannot ignore that 'it takes two to tango'. Vladislava Stoyanova perfectly understands this dilemma in her book 'Positive obligations under the European Convention on Human Rights'. As she smartly put it, when it comes to positive obligations, 'on the one hand, the State is regarded as the main problem since it can be a source of oppression and, on the other hand, the State is regarded as the solution since it is also a source of protection' (p. 9). This is particularly relevant in the context of positive obligations, as they require states to actively put in place measures to fulfil their human rights duties.

This duality requires the European Court of Human Rights (ECtHR) to find a delicate balance between respecting the principle of subsidiarity though granting deference to member states and demanding proper compliance with the obligations of the European Convention on Human Rights (ECHR). The problem faced by the ECtHR is common to all the other regional human rights systems, and a comparison with them could help in gaining a better understanding of the different balancing options. In particular, reading Stoyanova's book with the other regional systems in mind makes us reflect on whether it is possible and advisable to reach a different balance between deference and rigorous scrutiny in the context of positive obligations.

Balancing Reasonableness, Subsidiarity and Deference

Such a balance is achieved, inter alia, through the application of the principle of 'reasonableness', to which Stoyanova dedicates Chapter 4.

Reasonableness plays a key role in understanding the judicial attitude of the ECtHR towards positive obligations. As the book explains, reasonableness supports causation arguments for positive obligations in two ways: on the one hand, the ECtHR would rule against the state if there was not strong causation between the harm suffered by the applicant and the omission by the state, but it was reasonable to expect certain positive actions; on the other hand, the ECtHR could rule in favour of the states if there was a strong causation, but a specific obligation was considered an unreasonable burden on the state. This duality confirms how reasonableness operates at a very context-specific level and that it is highly subjective as it is not clear whether the reasonableness test takes the perspective of the court, the person who suffered the harm, a citizen of the state whose interested was or wasn't protected or the state itself. This is nothing new in the realm of positive obligations, as Stoyanova reflects, as specific positive obligations are always decided on a case-by-case basis, sometimes favouring the individual victim's interest while others the

whole community and the state. This uncertainty brings into question the big issue of deference and subsidiarity. In the absence of a clear definition of what specific positive obligations should be imposed on each state in every situation, the ECtHR forcibly relies on national authorities (p. 85).

States always welcome, and sometimes even demand, deference and subsidiarity from regional systems as they enable them to interpret and apply their human rights obligations in a manner that is compatible with their national needs. In this context, the ECtHR is certainly the champion of subsidiarity and deference compared to the other regional systems. The African Court of Human and Peoples' Rights (ACtHPR) is still defining its approach, swinging between more and less deferential attitude depending on the characteristics of the case. On the contrary, the Inter-American Court of Human Rights (IACtHR) has openly rejected strong deference and re-interpreted subsidiarity with closer scrutiny.

Indeed, excessive deference to the states may lead to confusion as to what the concrete and specific obligations deriving from the Convention are. Stoyanova explains that obligations to ensure 'effective protection' or to provide an 'adequate framework' are not properly explained and there are no tangible criteria to assess state compliance (p. 87). The ECtHR hasn't developed a proper standard of protectiveness as this inevitably changes depending on the specific circumstances involved. With all this flexibility, the principle of reasonableness is paramount as it acts as a boundary and limit test to avoid imposing unreasonable and excessive burden on the state (p. 89).

Reasonableness and the Margin of Appreciation

In the judicial practice of the ECtHR, the principle of reasonableness is often translated in the very well-known Margin of Appreciation (MoA), to which Stoyanova dedicates part of Chapter 4. She interestingly distinguishes between the MoA in its structural sense (the 'better position' rationale, following which the ECtHR suspends or limits its review) and the MoA in the State's choice of means and measures to fulfil an obligation.

Stoyanova explains that the MoA with regards to compliance with positive obligation is wider because there is no one-to-one correlation between the right and the corresponding positive obligations, as there are many ways in which the right can be positively ensured. However, Stoyanova argues that the structural MoA, understood as the intensity of review, is not wider for positive obligations *per se* (p. 91). Rather, she holds that this structural MoA impacts the stringency of scrutiny on the alternatives for fulfilling positive obligations. While I completely agree with her overall argument, I would disagree with this sharp distinction since I believe that the highly sensitive topics falling within the scope of Article 8 ECHR and its positive obligations, make it particularly exposed to wider structural MoA. Yet, in doing so, I certainly conflate the two types of MoAs she diligently separates. Regardless, what she convincingly observes is that, in areas where states are granted a wide MoA, the ECtHR only assesses whether the State had struck a fair balance within the MoA granted and would ignore any alternative option, even if that would have struck a better balance and granted more protection (p. 93).

It follows that the ECtHR ultimately adopts a very state-supportive approach, paying significant attention to avoid imposing excessive obligations to state authorities. However, this may sometimes lead to excessive leniency and a failure to adequately monitor states' compliance, in addition to a reduction of the principle of certainty of the law. For some human rights scholars and practitioners (me included), the excessive use of the MoA and deference by the ECtHR is perceived as a missed opportunity for the Court to effectively protect human rights. When making an argument for a less deferential approach from the ECtHR, one of the most useful resources is to look outside the European space to the two other regional human rights courts. However, in the specific context of positive obligations, these may only confirm that little change is possible.

The Practice of Other Regional Courts

As mentioned earlier, the IACtHR sits on the opposite site of the deference spectrum compared to the ECtHR. With its conventionality control doctrine, that requires all state parties to the American Convention on Human Rights (ACHR) to comply with the Court's ruling even in cases not directly addressed to them, the IACtHR decided to limit the flexibility of its adjudication and applied stricter scrutiny. This certainly brings the advantage of providing more clarity and certainty in terms of obligations and expectations from states, both elements that Stoyanova observed as problematic in the case of the ECtHR. However, when dealing with positive obligations, the IACtHR did not offer such a dramatically different approach compared to that of the ECtHR. While the obligations to investigate and the specific obligations to provide operational protection are detailed, other positive obligations remain fairly general and vague, subject to continuous case-by-case assessments. Furthermore, the case-law of the IACtHR on positive obligations related to Article 11 ACHR (the equivalent to Article 8 ECHR) is extremely limited, thus not allowing a fair comparison. Nevertheless, the fact that the IACtHR shows slightly more deference on positive obligations could confirm the objective difficulty of granting less deference when positive obligations are concerned.

The ACtHPR has limitedly addressed positive obligations in its case-law, which mostly focuses on fair trial. On right to life and prohibition of torture (to have a common ground with Stoyanova's analysis), the *LIDHO v Ivory Coast* judgment is particularly relevant. Here, the ACtHPR was confronted with allegations against the state for failure to protect the right life following a dumping of toxic waste. The Court heavily relied on the ECtHR's case-law on positive obligations to conclude that the state failed to 'take all the necessary measures to mitigate the effects and limit the damage caused to human life' (para. 140). The wording is not different from that of the Strasbourg court and seems to confirm the alignment of the ACtHPR to the ECtHR, at least for what concerns positive obligations.

Concluding Remarks

Another matter linked with deference and subsidiarity is state compliance with the judgments and the overall fulfilment of the courts' role of protecting human rights. Generally, the less deferential approach of the IACtHR has sometimes led to backlash from its state parties, while some of the success of the ECtHR could be

attributed to its embracing of subsidiarity as one of the Court's guiding principles. Stoyanova reflects on the fact that the principle of effectiveness is often used for justifying positive obligations (p. 11). If we follow the same rationale, we could ultimately conclude that for an effective human rights protection, where states do comply with their positive obligations, the deferential approach of the ECtHR is overall a good deal, even if there still is a margin of improvement.
