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THE CREATION AND DEVELOPMENT OF POSITIVE OBLIGATIONS OF STSTES SIGNATORIES OF THE EUROPEAN CONVENTION FOR PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS[3]

Abstract: This paper deals with the creation and development of positive obligations of contracting states of the European Convention for the Protection of Human Rights and Fundamental Freedoms. At the beginning we explain the division of obligations from ECHR into positive and negative. Then we presented the reasons, methodology and legitimacy of the development of positive obligations under ECHR. We analysed their content and scope. Special emphasis has been placed on maintaining fair balance of interests, as well as on the relation between positive and negative obligations in the practice of the European Court of Human Rights. In conclusion we highlight innovation, usefulness, and importance of positive obligations under ECHR for the increased standard of human rights protection on a global level.

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1. Introduction

Depending on doctrinal assumptions, more precise definitions of human rights often differ. According to the positivist conception, human rights are a set of individual and collective rights proclaimed and protected by international and national law since the adoption of the Universal Declaration on Human Rights in 1948 (Landman, 2005, p. 2). Authors inclined to holistic approach define human rights as a result of evolution of natural rights, which are universal in the sense that they supplement and improve existing cultures and have to be supervised and implemented by a certain body having jurisdiction over all states (Afunaduula, 2005, p. 11). Some authors determine human rights as a set of minimal moral and political requirements universal in character that every individual possesses, or ought to possess, in relation to the government and the society in which he or she lives. Moreover, they emphasize that these rights are natural and innate, being a consequence of human autonomy and dignity, as values apriori of the highest moral rank which need not be proven since their ethical and epistemological status is evident (Henkin, 1979, str. 407). Classical theorists of constitutional law frequently define human rights as a means of limiting and controlling state power (Jovanović, 1990, p. 121).

Human rights are the rights we have by the very fact we are human beings (Bantekas, Oette, & Oette, 2014, p. 10). Their protection is imperative in contemporary modern society, since in this way not only individuals are protected, but also the humane, democratic values of entire communities, and, above all, the dignity of the human beings as such. The European Convention on Protecting Human Rights and Fundamental Freedoms (ECHR, hereafter) was the first regional document to guarantee international protection of human rights and fundamental freedoms comprised within it (Grabenwater, 2012, p. 128), and the European Council was the first organization to establish a court of human

rights and instituted an investigative procedure of individual petitions similar to the procedure of protecting basic human rights before national courts (Nowak, 2003, p. 160). This system represents the first successful attempt to mirror national systems of human rights protection on an international level. That is the reason it became the model for other regional and universal systems for protecting human rights (*Ibidem*, p. 159–160). The solutions provided for by this convention are the subject of our enquiry.

In this paper we attempt to present a development of a special kind of obligations the signatory nations of ECHR have taken commitment to called positive obligations. We explain the causes and forms of their origin, and then concisely present the most important moments in their evolution. Combining qualitative and quantitative methods in analysing the most important cases from the practice of European Court of Human Rights (hereafter: Court) together with the comments of experts, we show the legal basis and legitimacy of the emergence of positive obligations in the member countries of ECHR, as well as their content and scope, laying stress on the most important ones. The subject of our discussion shall be also the principles of maintaining fair balance of interest the Court was guided by in developing positive obligations, together with the relation between positive and negative obligations of ECHR signatories. In conclusion, we summarize the results of these investigations and offer our opinion about the future development of positive obligations.

2. The distinction between positive and negative obligations in ECHR

The European Court of Human Rights divided the obligations of signatory states into two categories – positive and negative obligations.

Negative obligations imply that states do not interfere in enjoyment and exercise of human rights under ECHR. They are explicitly stated in the text of ECHR and called their central, core values (Russel, 2010, p. 282), and, as such, they dominated the practice of the court during the first phase of its development.

Although the Court did not give a definition of positive obligations, their essence was explicated by judge Martens: "negative obligations require that member countries refrain from action, while the positive ones require action" (*the separate opinion of judge Martens accepted by judge Rousseau* in the verdict of *Gül v. Switzerland* (1996)). Van Dijk (1998), hence, characterises positive obligations as "obligations to act" (p. 17); we agree with that description.

Positive obligations imply that the government in the signatory countries has a responsibility to undertake any necessary measures to protect human rights, as well as to implement, in their respective national legal systems, reasonable and adequate measures to realize that goal. (Akandji-Kombe, 2007, p. 5). Almost without exceptions signatory countries of ECHR are required to take actions to protect the rights of the individual (Starmer, 2001, p. 139), but, in the same time, they are not committed to achieving concrete results (De Than, 2003, p. 168). In other words, the national governments are required to proceed in a certain way but are not required to guarantee a certain outcome.

3. The creation of positive obligations in connection with respect of human rights from ECHR

The creation of positive obligations is the result of creative interpretations of ECHR by the Court. Namely, these obligations are not explicitly stated in the text of the Convention but are created and developed through the interpretation of judges in the European Court in accordance with the standards of human rights protection accepted by the signatory states of ECHR. Since there was a need to go "beyond" the text of the Convention to secure the status and protection human rights deserve, but, in the same time, to keep the interpretation within the confines of its spirit and values.

3.1. The reasons for creating positive obligations and new methods of interpretation of ECHR

As a consequence of inevitable evolution in society and piecemeal change of ethical standards, unforeseen situations appeared before the Court (Mahoney, 2002, p. 104). The teleological principle, adopted as a central principle of interpretation for ECHR (Greer, 2003, p. 408), provided the judges with insufficient space for manoeuvre to meet the new challenges (Bantekas & Oette, 2014, p. 226), and give efficacious protection to the rights guaranteed by the Convention. Thus, the Court introduced creative methods of interpreting ECHR (*Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* (1968), §3 i 5) – the doctrine of "living instrument" and the doctrine of "practical and efficient" (Mowbray, 2005, p. 59–60). The doctrine of "living instrument" was established in the case *Tyrer v. United Kingdom* (1978), in which the Court emphasized, for the first time, that „ECHR was a living instrument that should be interpreted in the light of present circumstances" (*Tyrer v. United Kingdom*, 1978, §31). The Court explained that it is unavoidable that the regulations in ECHR are interpreted as influenced by the progress achieved in the domain of human rights and by the universally accepted standards in areas connected with the protection of human rights. In practice, the Court establishes whether the problem at hand represents a new trend pointing towards an already existing consensus among the member states of the European Council. Once a consensus has been reached about some of the goals presented in the preamble, any state breaking the consensus will be considered as violating the ECHR (Gemalmaz, 2007, p. 49; *Selmouni v. France* (1999)).

The principle of effectiveness emerges from the general agreement that the aim and purpose of ECHR is the protection of the individual and his/her rights. Therefore, the regulations of ECHR should be interpreted so that the protection they provide should be practical and effective, not theoretical and illusory. This principle, says Merrils (1993), "is a way to secure a certain weight to the decrees of the agreement, and to produce maximum effect" (p. 103). In accordance with the principle of effectiveness, the protection of individual rights is to be interpreted as

broadly as possible, while the exceptions to it as restrictively as possible (Greer, 2003, p. 408).

Whereas Mowbray (2005, p. 59-60) calls the above mentioned interpretation techniques "new", other authors see them as specific methods the Court has applied, consistent with the regulations from article 31 of the Vienna Convention on contract law (Vienna Convention on the Law of Treaties) whereby the terms of the contract should be interpreted in accordance with the aim and purpose of its enactment (Urbaite, 2011, p. 223). What makes them innovative is that they are adapted to specific aims and purposes of ECHR (*Ibidem*, p. 228). Thus, in the case *Soering v. The United Kingdom* (1989), the Court emphasized that any interpretation of the scope of rights and freedoms guaranteed by the ECHR should be consistent with its general spirit, since it is about an instrument created with the purpose of establishing and promoting the ideals and values of democratic society (*Soering v. The United Kingdom*, 1989, §87).

The application of these interpretation techniques leads to creating new, positive obligations of the signatory states of ECHR (Lavrysen, 2013, p. 160). Specifically, a purely negative approach to protecting human rights cannot warrant its efficiency, since the "constitutional model" of protecting human rights is found to be an inadequate response to a large number of challenges emerging in the area (Evans, 2004, p. 159).

As explained by Kremnitzer & Ghanayim (2003–2004): "In modern law fundamental human rights just do not fall under negative rights, in the sense that an individual can demand from the state the actualization of his/her basic rights and that the responsibility of the state is exhausted by respecting those rights, on the contrary, the duty of the state is not only to respect the rights, but actively to protect them. The more important the fundamental right is, the more comprehensive its protection should be" (p. 898).

It is demanded from the states not only not to interfere with individuals exercising their basic rights - unless they do not threaten the rights of others - but to do things for those individuals so that they have a better quality of life (Dickson, 2010, p. 203).

3.2. The legal basis of creating positive obligations considering protection of human rights from ECHR

Some positive obligations are explicitly referred to in the text of ECHR. For example, a right to a fair trial, guaranteed by the article 6 of ECHR; a right to education guaranteed by the article 2 of Protocol 1 on ECHR; the obligation to uphold free elections by article 3 of the same protocol (Starmer, 2001, p. 139). However, most of them have been developed as a consequence of judicial interpretation in conformity with the doctrine of „practical and effective" and with the special character of ECHR as an international agreement that protects human rights (Russell, 2010, p. 283), having not been explicitly stated in the text of ECHR. The legal basis of the positive obligations doctrine are presented in the articles 1 and 13 of ECHR in which the general obligations of contracting states are declared and the principle of effectiveness laid stress on – and these played the most important role in constructing positive obligations of states (Urbaite, 2011, p. 219-223).

The first principal element is a combination of substantive law and general obligation specified in article 1 of ECHR. It is about an interpretation according to which the general obligation of the contracting states is to provide effective enjoyment of rights guaranteed by ECHR which puts the states under obligation not only to refrain from violating human rights, but also to take concrete actions to protect them. This way, emphasizes De Than (2003), "the rights themselves guaranteed by ECHR are viewed as sources of positive obligations, and this gives article 1 of ECHR immense historical importance" (p. 169). On the basis of article 1 of ECHR, the Court established the obligation of contracting states to create an adequate national legal framework to increase effective protection of human rights warranted by this regional instrument of protection. Furthermore, the signatory states are responsible for providing resources to prevent violation of human rights, to give information and legal advice to individuals regarding content, scope and means of protecting their rights under ECHR (Russell, 2010, p. 283).

The article 13 of ECHR warrants the right of efficient legal remedy before national governments to everyone whose rights and freedoms guaranteed by this international agreement were violated. It is especially

significant regarding procedural positive obligations and general obligations of signatory states to establish adequate legal framework, as well as mechanisms of compensating victims whose human rights were violated (Urbaite, 2011, p. 222). On the basis of article 13 of ECHR the Court established the responsibility of contracting states to grant compensation to individuals whose rights were violated, as well as to conduct efficient investigation that will lead to prosecution of the perpetrator of the violation (Russell, 2010, p. 284) and to provide for sufficient participation of the victim of human rights violation in the proceedings before national courts (Urbaite, 2011, p. 222). Moreover, the Court established the responsibility of the governments of the signatory states of ECHR to guarantee the respect of human rights and freedoms even in case relations between private individuals are at stake (Van Dijk, 1998, p. 19)

3.3. The legitimacy of establishing positive obligations considering the rights under ECHR

The principle of rule of law is one of the cornerstones to the construction of positive obligations. This principle is woven into ECHR itself, especially considering making illegal the abuse of rights dealt with in article 17 (Urbaite, 2011, p. 219). Furthermore, the Court operatively established a theoretical ground for constituting positive obligations for the governments of the member states by developing a broader understanding of state responsibility provided by ECHR and by extending the definition of the term "victim of rights violation" within its practice (Starmer, 2001, p. 146).

The more conservatively inclined commentators were of opinion, however, that the development of positive obligations in some aspects went beyond the limits of interpretation proper of ECHR becoming *de facto* creator of law (Xenos, 2012, p. 214). They claim that the Court by taking such a course overstepped the limits of legitimate interpretation of the agreement (Urbaite, 2011, p. 214-232). If the answer to the question of who could be a bearer of human rights and what should be understood to be the responsibilities of the states considering their protection, depended solely upon the decision of the court, that would, as Russel

(2010) remarked, result in "vast, dark area of uncertainty that surrounds the legal obligations of the individual", because the Court "lacks the appropriate capacity to cope with the cumulative and unintentional consequences of individual behaviour" (p. 285). This author consequently insists that the task of establishing positive obligations should not be left to the courts, but it should fall under the competence of a legislative body (Russell, 2010, p. 294):

In contrast to this, most theoreticians hold that the Court, quite from the beginning, established in its verdicts that the ECHR is subject to evolutionary interpretation. It is for this reason that the Court's "hands were not tied", in the sense to be exclusively guided in making decisions by the original intentions of the creators of this legal document (Urbaite, 2011, p. 219). Van Dijk (1998) estimates that the judges in Strasbourg viewed the ECHR as "a living instrument of protecting human rights" and interpreted it in consonance with the standards of the present age. They proceeded with some care when decisions were to be made in cases in which the existence of certain obligations in accordance with the ECHR were implied, but not explicitly stated by the original authors of the document (p. 18). We find this argumentation clear, coherent and convincing. We agree that it is justified that the judges, having in mind the role of the Court, as an impartial, supranational protector of human rights, be given the freedom when interpreting regulations of an international document written seven decades ago, reflecting legal standards of that period, to adapt them, meeting the needs of contemporary society, which considering human rights protection reached an altogether higher level of development.

ECHR, as an agreement on human rights, has certain distinguishing characteristics that makes it less dependent on "daily" changes of will of its signatories. However, the Convention is essentially a contract dependent on the sovereign will of the contracting states as to whether they would accept (or not) a certain obligation (Van Dijk, 1998, p. 33). Therefore, the legitimacy of establishing positive obligations is not contained only in the fact that their doctrine is developed from the general obligations of the signatory states provided by the ECHR, but also in the fact that signatory states of the ECHR accepted the doctrine by acknowledging mandatory jurisdiction of the Court that first established

the doctrine of positive obligations and then continued to develop it further. We may reach the same conclusion by examining the total number of decisions made by the Court and the ensuing constant development of national legal systems and judicial practice. The normative legitimacy of positive obligations stems from promoting norms consistent with the European standards of protecting human rights, thus reflecting the common attitudes of the member states.

Bearing all this in mind, we agree with the assessment of Van Dijk (1998) when he says that "precisely because this is law created by judges, the judges of the national institutions as well as those in Strasbourg should proceed with caution not being too creative in accepting and forming positive obligations of contracting states, and whenever possible leave to the government quite wide a margin for assessment when establishing a fair balance between public interests at stake and the interests of the individual that requires application of certain positive measures" (p. 33). It is thus made possible to create common standards regarding the level of protecting human rights and its advancement, simultaneously respecting the sovereignty of the states, and leaving them enough space to implement these standards into their own national legal systems in an organic, natural and efficient way.

4. The content and scope of positive obligations from the ECHR

There are numerous variations regarding content of positive obligations, as they represent a comprehensive system of human rights protection consisting of legislative or regulative framework, administrative framework and practical measures for *ad hoc* application (Xenos, 2012, p. 209). Thus, positive obligations can be actualized by acts of the legislative, as well as the executive authorities. According to the proceedings the authorities are required to perform, positive obligations can be material or procedural (Urbaite, 2011, p. 215-216). Moreover, significant is the division regarding positive obligations of ECHR signatory states. We discuss this in some detail presently.

4.1. Establishing adequate legal framework for efficient protection of rights under ECHR

Starmer (2001) divides positive obligations of ECHR contract states into five categories (p. 146). In the first category falls the responsibility to secure a legal framework which would make efficient protection of rights guaranteed by ECHR possible. This responsibility is considered to be minimal, which every signatory state has an obligation to fulfil (Starmer, 2001, p. 147). The obligation of the state is to implement in its legal system a material law in order to make available active protection of human rights and adequate procedural guarantees (Xenos, 2012, p. 207); this does not necessarily mean incorporating the provisions of ECHR directly. It is sufficient to establish a practical framework for protecting human rights in the national legal system (Russell, 2010, p. 285) which includes efficient legal remedies. The states also have an obligation to criminalize certain actions in order to protect rights of individuals (Urbaite, 2011, p. 216).

This rule is of general character. However, some violations of the rights guaranteed by the Convention were so serious that the Court insisted on imposing criminal sanctions in the legal system of the states in which the violations occurred. For example, in the case X *and Y v. The Netherlands* (1985), the Court did not agree with the claims of the Dutch Government that their obligations under ECHR were fulfilled by the very fact that the petitioners had the opportunity to institute criminal proceedings and claim restitution for damage. The Court took the firm position that the protection provided by the lawsuit does not suffice in cases human rights are violated, such as this one when a mentally disturbed sixteen-year-old girl was sexually assaulted (Starmer, 2001, p. 147; *X and Y v. The Netherlands* (1985)).

To the question what concrete measures the states should implement to fulfil their obligations to the ECHR, the Court gave no precise answer. The role of the Court is just to appraise whether measures the states had adopted were adequate and sufficient to guarantee efficient enjoyment of human rights provided by the ECHR. In case they were not sufficient, the task of the Court is to determine what was the minimal amount of effort required to protect the right in question, that

is, what makes unhindered enjoyment of that right possible, and what is more, what procedures were possible in the given situation (*Ibidem*, 218). The positive obligation exists, although its actualization is up to the signatory states of ECHR. The Court acts as a supervisor and has the "final word" on whether the state acted in accordance with its responsibilities to ECHR (*Pini and others v. Romania* (2004), *ZIT Company v. Serbia* (2007), *Vlahović v. Serbia* (2008)).

4.2. Preventing violation of rights from ECHR

The signatory states have the responsibility to prevent violation of rights guaranteed by the ECHR. (Starmer, 2001, p. 146). This responsibility differs relative to the protected right in question. The protection of basic human rights requires special attention from the national governments. There is an obligation to introduce efficient provisions into the legal system to prevent wrongful behaviour (De Than, 2003, p. 182). As Russell (2010) puts it "in short, if it were possible to anticipate the things the Court had to deal with, it would be reasonable to assume that the national legislation would introduce into its legal system laws and policies that would forestall and prevent those expected violations of human rights. In other words, the signatory states would willingly accept positive obligations and acknowledge their legal impact" (p. 285).

Moreover, it is necessary in the signatory states to set up a network of executive agencies to prevent and discourage violation of human rights and to punish the perpetrators of such crimes. In some well-defined cases the executive organs of the government have taken preventive operative measures to protect individuals in case there is danger that their rights should be threatened by criminal acts of other persons (*Osman v. The United Kingdom,* 1998, §115).

4.3. Giving information and legal advice

The Court recognized that in large number of cases the only way for an individual to protect his or her rights guaranteed by the Convention is to have accessible relevant information (Starmer, 2001, p. 147). The

state authorities must not remain passive and unattainable to individuals who need information.

4.4. Conscientious reaction to violation of rights under ECHR

The states have an obligation to respond to violation of rights under ECHR (Starmer, 2001, p. 154), in particular, if basic rights are violated, such as the right to life, prohibition of torturing, inhuman and humiliating treatment or punishment. This implies not only making restitution to the victim, but also an obligation to conduct detailed and efficient investigation (Urbaite, 2011, p. 216), and what is more, instituting mechanisms of criminal proceedings where necessary (Starmer, 2001, p. 156).

4.5. Providing resources which will enable individuals to prevent violating rights guaranteed by ECHR

Finally, the contracting states have an obligation to provide resources which will enable individuals to prevent violating the rights under ECHR. These resources may include giving free legal advice or providing safe houses for potential victims (*Ibidem*, p. 147–157). Moreover, the states have a duty to provide resources and appropriate training for the members of the executive authorities to prevent violation of ECHR (O'Connell, 2010, p. 263).

4.6. Conclusion concerning types of positive obligations of the states under ECHR

The principles we outlined represent general conditions that the government of every signatory state must fulfil in order to comply with its positive obligations under ECHR. They must be applied with circumspection, taking into account the specifics of each context (Russell, 2010, p. 293). Considering the wide variety of human rights protected by the Convention and the distinctive characteristics of the legal systems of the signatory states, and especially taking into account the

uniqueness of each case; it is clear that one cannot apply one rigid rule to everything, and that one cannot demand from every state in each case identical proceedings. However, universal standards are necessary considering the content and minimal scope of positive obligations of member states. These standards are established and, when necessary, upgraded through the practice of the Court.

5. The principles of maintaining fair balance of interests the European Court was guided by when creating positive obligations

The Court has repeatedly pointed out that the principle of respecting human rights is not precisely determined. It varies from case to case relative to diverse proceedings of different authorities in different countries and situations. The Court was, therefore, extremely cautious in creating positive obligations. More than once it did not establish the existence of positive obligation on the grounds that it is not warranted by the text of the regulation in the ECHR, even by evolutionary interpretation. Such cautious approach shows that limits are set in cases when common perspective in legislation and judicial practice of contracting states is absent (Van Dijk, 1998, p. 120).

Thus Van Dijk (1998) concludes: „The Court is ready to establish the implied positive obligations in the text of the Convention if, and to the extent, the Court deems it necessary to increase the efficiency of the regulation in question, but shows restraint in cases when discovering obligations through interpretation of the text of ECHR would result in creating an entirely new obligation not connected with the text of the regulation in the ECHR, or accepting an obligation not generally accepted in that context and scope among the states members of the European Council" (p. 22).

As the judges of the Court were aware that instituting new positive obligations under ECHR can be an organisational and financial burden to the contracting states, the Court allowed the states to select appropriate measures or affirmative actions needed for efficient protection of rights or freedoms (Van Dijk, 1998, p. 22). In practice, this involves an obligation of national governments to achieve fair balance between general interests of the community and the interest of the individual.

Since such criteria for establishing fair balance are not included in the ECHR, general principles are established the judges are guided by in performing this challenging task through the practice of the Court. Hereby, a distinction between qualified and unqualified rights guaranteed by ECHR is made. Thus qualified rights are those which allow interference with a purpose of protecting rights of others or public interest (such as right to privacy and respect of family life). So, for example, the Court emphasizes in their verdict in the case *Von Hannover v. Germany* (2004) that dividing-line between positive and negative obligations of the state, according to the regulation from article 8 of ECHR, cannot be precisely defined; however, the principles applicable to them are similar. In both contexts special attention must be devoted to fair balance to be brought about between conflicting interests of the individual and of the community as a whole; and in both contexts the state is given a certain space for free estimation (*Von Hannover v. Germany*, 2004, §57).

By contrast, unqualified rights are rights that cannot be "balanced" against the needs of others or general public interest. There may be some exceptions though, such as the right to freedom and security, but, on the other hand, those that admit no exceptions such as the right not to be tortured. Therefore, the Court in the verdict to the case *Gafgen v. Germany* (2010) explicitly stated that "article 3 of ECHR is unambiguous – stating that every human being has an absolute, inalienable right not to be exposed to torturing or inhuman or humiliating treatment under any circumstances, even the most difficult ones. The philosophical ground of the absolute nature of this right according to article 3 does not permit any exceptions whatever, or any justifying factors, or any balance of interests regardless of the behaviour of the person related with and the circumstances of the offence" (*Gafgen v. Germany*, 2010, §107).

The principle of fair balance is present in the previous, as well as in the recent practice of the Court. In the case of *Soering v. The United Kingdom* the Court stated that the quest for fair balance between the general interests of the community and the protection of the basic rights of individuals is inherent to the ECHR as a whole. (*Soering v. The United Kingdom*, 1989, §88). The Court used this principle as a basis for proportionality assessment of interference of signatory states in enjoyment of rights of petition submitters, as well as for determining whether positive obligations of signatory states exist according to the ECHR.

Considering negative obligations, the most important instrument for achieving desirable balance of interests and preventing abuse and arbitrariness of the government is the principle of proportionality (Nowak, 2012, p. 275). This principle constraints the scope and content of permissible interference in the rights guaranteed by the ECHR. Only the least encroaching interference upon a given human right for the purpose of realizing some legitimate aim is considered permissible (Greer, 2003, p. 409). Its purpose is to prevent oppressive actions by the authorities in signatory countries. (Nowak, 2003, p. 60–61). When determining whether the principle of proportionality is respected, the Court must decide in the first place, whether the measures of the member state of ECHR are taken with the purpose of realizing a legitimate aim and secondly, whether the measures are appropriate to realize such an aim. Finally, the Court establishes whether the measures are unavoidable and whether the measures are moderate and the least intrusive considering human rights guaranteed by the ECHR (Nowak, 2012, p. 275).

The principle most often used considering positive obligations is the principle of "due attention". According to this principle the states have an obligation to take every measure which can be reasonably expected to be taken in the given circumstances in order to secure respecting the rights guaranteed by the ECHR.

At the same time, positive obligations must not impose too much burden on the states that accept them. Therefore, they must be defined as narrowly as possible and be related only to fundamental values protected by the ECHR (De Than, 2003, p. 169). The Court took the position as follows: ECHR should not be interpreted in such a way that the contracting states be imposed responsibilities they cannot fulfill or disproportional burdens (*Osman v. The United Kingdom*, 1998, §116). In the case *Rees v. The United Kingdom* (1986). The Court clearly expressed the judgement "that the scope of responsibilities will most certainly vary, bearing in mind the diversity of situations in the signatory states of ECHR, the difficulties of law enforcement in modern societies and important choices to be made considering prioritization and allocation of available resources" (*Rees v. The United Kingdom*, 1986, §37). Thus, showing understanding for the diversity of the situations in which the

states are required to carry out positive obligations emphasizing the importance of adaptability in judicial interpretation in this context.

To be sure, there is criticism of the principle of fair balance. Mostly their key argument is saying that in this way the Court becomes the centre of the question that belongs to the internal affairs of member states.

However, one should not forget that the Court allows a certain leeway for estimation to national states in this respect (Mowbray, 2020, p. 289-318). Thus, for example, the Italian Constitutional Court in subsection 7 of Decision No. 317 in 2009, explicitly stated that "the concept of protection expansion must include the condition of balancing rights in relation to other constitutional provisions which, in turn, guarantee fundamental rights that can be influenced by the expansion of individual protection. This balancing must be made principally by the lawgiver, but it is also a question to this Court (the Constitutional) when interpreting constitutional law. The overall result of complementing guarantees from the national law must be positive, in the sense that the impact of single provision of the European Convention on the Italian law must result with increased protection for the whole system of fundamental rights" (Repetto, 2013, p. 47). In other words, the task of national courts is to weigh interests fairly in order to contribute to increasing the level of protection of human rights, at least up to the level reached by the Convention and while balancing they have a certain amount of freedom and an occasion to estimate freely.

6.The relation between positive and negative obligations under ECHR

The negative obligations represent a bulwark, as it were, against arbitrary actions of authorities hindering individuals to enjoy and exercise their human rights (Russel, 2010, p. 282). Their formulation is in the negative, as a prohibition for a state to interfere with exercising individual rights in an arbitrary and disproportionate manner (Urbaite, 2011, p. 214). By contrast, positive obligations were largely created through interpretations of ECHR and are not explicitly stated therein. Those positive obligations, however, which are stated in the text of ECHR, are formulated positively, as requirements from the states to act in a certain way.

In the literature we find additional criteria pointing to distinct nature of positive obligations. They are viewed as "active protection of human rights" (Xenos, 2012, p. 206) based on paragraph 1 of ECHR. The justification of this requirement for the state to act with a purpose of protecting threatened rights is grounded on the knowledge that there is a need to protect certain human rights in a whole gamut of various circumstances. The existence of this objective element is the condition for application of positive obligations, based on which the limits of state responsibilities are efficiently set (*Ibidem*, p. 206–207).

The Court repeatedly issued the statement that "the dividing line between positive and negative obligations is not precisely defined" (*Keegan v. Ireland*, 1994, §49; Klatt, 2011, str. 694). However, these two kinds of obligations have some characteristics in common. In the famous case *Powell and Rayner v. The United Kingdom* (1990), it is emphasized that "the principles to be applied are very similar. In the context of both positive and negative obligations a fair balance must be established between the interests of individuals and interests of whole communities; in both of these context the state is given a certain margin of estimation considering which measures to take in order to secure recognition of the ECHR" (*Powell and Rayner v. The United Kingdom*, 1990, §41).

What is more, in some cases the Court was of opinion that it is unnecessary to analyse the case from the point of view of acting in accordance with either positive or negative obligations (Klatt, 2011, p. 694), but that the role of the Court is to ascertain whether a fair balance of private and public interest has been achieved (Urbaite, 2011, p. 218). Xenos (2012) goes even further claiming that the Court in its practice did not make a clear distinction between the positive and the negative obligations of states, adding that "the situation is made even worse by the growing tendency to designate each measure to respect human rights as a positive obligation" (p. 205).

Dickson and Hohfeld, disagreeing with the point of view of most theoreticians, claim that the dichotomy of positive and negative obligations is false, for all rights have correlative obligations which are both positive and negative. The authors claim also that negative obligations can be presented as positive and vice versa (p. 203).

Krähenmann (2013) has a similar opinion saying that in many cases negative and positive obligations are inseparable. As an example, he gives the duty of executive authorities to minimize the risk when planning an operation both to the target and to the random passers-by. This duty can be seen as a general principle of proportionality in using force, as well as a separate positive obligation of the executive authorities and the members of the force (p. 170).

Our view is that both positive and negative obligations have characteristics that are related to legal basis, legal grounds and expected (in)action of authorities. At the same time, they are interrelated and closely connected. Therefore, as the Court has often pointed out, it is not possible, and in our opinion, not even necessary, to distinguish between these two kinds of obligation. What is of essential importance is to increase awareness of either of these obligations within the signatory states of ECHR.

7. Conclusion

Positive obligations are responsibilities of states members to actively take part in protecting human rights guaranteed by the ECHR. There are different kinds of positive obligations depending on the kind of action expected from the national authorities.

Since only a few of these obligations are stated in the text of ECHR, the Court has established them by applying specific methods of interpretation of ECHR – the doctrine of "living instrument" and the doctrine of "practical and efficient" – taking into account rules from national legal systems, the rules of international law and the judicial practice of the international court, as well as supranational norms and standards. An important part in creating positive obligations has the principle of rule of law and the practice of the Court that widened the scope of state responsibility and the definition of who may be considered "a victim of human rights violation".

In developing positive obligations, the judges in Strasbourg are guided by the principle of fair balance between the general interests of the community and the opposed legitimate public interests taking care not to burden disproportionately the signatory countries. Although in accordance with the principle of "due attention" the states have an obliga-

tion to take every reasonable measure in given circumstances to secure the respect the rights guaranteed by the ECHR, in selecting concrete measures they are given a certain margin for free estimation. The same goes for balancing general interest and the interest of the individual. The role of the Court in Strasbourg is in this respect one of a supervisor, as it were.

We are in agreement with the judgement of Starmer (2001) that "in many aspects positive obligations represent the characteristic feature of ECHR distinguishing it from other instruments for protecting human rights, especially those created before the Second World War" (p. 159). Hence, we must not underestimate their increasing importance for the practice of the Court in Strasbourg (Klatt, 2011, p. 692). Instituting positive obligations, the protection of human rights reached a higher level, a step nearer to universal respect in the region and beyond.

The content of positive obligations of signatory states is a constantly expanding and upgrading area of expertise. Considering its increasing importance, there is surprisingly few publications and research papers in the area. The interpretive creativity of judges in Strasbourg in creating them, the ingenuity and skill behind their development, and the fact that the doctrine of positive obligations represents a response of judicial practice to the challenges the theory of the period could not foresee, let alone answer adequately, are good reasons for devoting closer attention to this topic in the future.

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NASTANAK I RAZVOJ POZITIVNIH OBAVEZA DRŽAVA POTPISNICA EVROPSKE KONVENCIJE O ZAŠTITI LJUDSKIH PRAVA I OSNOVNIH SLOBODA

Apstrakt: Ovaj rad se bavi nastankom i razvojem pozitivnih obaveza država ugovornica Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda. U njemu je najpre pojašnjena podela obaveza iz EKLJP na negativne i pozitivne. Potom smo se osvrnuli na razloge, metodologiju i legitimnost nastanka pozitivnih obaveza iz EKLJP. Analizirali smo njihov sadržaj i obim. U radu je posebna pažnja posvećena principima održavanja pravične ravnoteže interesa, kao i odnosu pozitivnih i negativnih obaveza u praksi Evropskog suda za ljudska prava. Zaključak rada se odnosi na inovativnost, korisnost i značaj pozitivnih obaveza iz EKLJP za povećani standard zaštite ljudskih prava na globalnom nivou.