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Positive Obligations within the European Fundamental Rights Protection System: The Unleashing of a Beast or Realization of a 21st Century Fundamental Rights Protection?

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A. Introduction

I. Positive Obligations as a Common Theme in today's development of Fundamental Rights Protection

The European Multi-Level Fundamental Rights Protection System is constantly topic of academic thinking and has been for decades. The interaction and dialogue between the different systems has led to a lot of innovation in the field of fundamental rights. While some of these cross-influences are already very far developed – one might think of the principle of proportionality[1] – others cross-influence might only be starting. One of these – and the focus point of this paper – is the so-called doctrine of positive obligations. The core idea of this fundamental rights doctrine is that many, most, or all fundamental rights do not only convey a negative dimension and disallow the public authority to interfere in the individual's private sphere, but also oblige the state to provide a protection of the individual from infringement of these rights e.g., through private actors. Even though this idea is not new, it has become more prominent in public (legal) debate in the recent years. Especially in regard to protection measures against the Corona-Virus starting in 2020, the positive obligation of the State(s) to protect life and physical well-being of its citizens was the prominent counter-interest to legitimate infringements of many other fundamental rights[2]. Another prominent example in which positive obligations of states are frequently assessed are countermeasures against climate change: What obligations of the state arise under fundamental rights regarding life, liberty and property to protect from the devastating effects of climate change?

To navigate the space between the realms of constitutional law and politics in regard to the doctrine of positive obligations in the European context is the goal of this paper.

II. What are positive obligations?

As this paper covers more than just one system of legal norms, a very abstract working definition of positive obligations shall be given: This paper understands positive obligations of

[1] Cf. e.g. E. Ellis (Ed.): The Principle of Proportionality in the Laws of Europe, Oxford 1999.
[2] E.g. BVerfGE 159, 223-355 – *Bundesnotbremse I*, § 58.

fundamental rights to be obligations of states/public authorities to act on behalf of individuals derived through stipulation in or interpretation of fundamental rights[3].

III. Thesis and Methodology of this Paper

1. Thesis and Structure

This paper will explore this development within the context of European fundamental rights protection and analyze its structural boundaries. While the national constitutional context could yield an interesting point of comparison, e.g. German constitutional jurisprudence and academic writing offer elaborate fundamental rights theories on the basis of the German basic law (positive obligations usually being discussed under the term *Schutzpflichtendimension der Grundrechte*)[4], this paper will focus on the supranational European context to offer a detailed analysis of the specific challenges in fundamental rights protection above the national level. Hence, this paper will show differences and similarities between the systems of the European Convention of Human Rights and the European Charter of Fundamental Rights.

The overarching thesis of this paper is to show that the doctrine of positive obligations of fundamental rights can be employed in both systems, yet the potential for its development and its boundaries widely differ, which has to be considered by the interpreting court of each fundamental rights document.

In detail, this paper will show that the European Court of Human Rights (in the following: "ECtHR") was one of the major drivers of this development and found juridically sound ways around the obstacles this approach to interpretation holds (B.I.,II.). In a second step, it will point out, that current developments move into a dangerous direction and the ECHR must be careful not to lose its legitimacy and therefore its position of efficiently enforcing fundamental rights

[3] With a detailed account of definition attempts in EU and international law *M. Beijer:* The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations, Cambridge 2017, pp. 12 et seq.

[4] Fundamentally *C. Calliess,* § 44: Schutzpflichten, in: D. Merten/H.-J. Papier (Ed.): Handbuch der Grundrechte in Deutschland und Europa. Band II. Grundrechte in Deutschland. Allgemeine Lehren I., Heidelberg 2006, pp. 993 et seq.; with an updated English translation *C. Calliess:* Fundamental Rights Protection in Germany: The Multifaceted Dimensions of Freedom Defined by the Duty to Respect and the Duty to Protect, in: Berliner Online-Beiträge zum Europarecht, Nr. 132, in particular pp. 9 et seq.

by actively implementing a progressive agenda without taking into consideration political backlashes (B. III.).

In the second part of this paper, the development within the context of EU law will be set in contrast to the findings in the first part. This focusses on the potential of such a development under the EU-Charter of Fundamental Rights (C.I.). The paper's thesis here is twofold: It will first show that the textual starting point of the Charter is different to the ECHR. Yet, this does not exclude the adaption of positive obligations under the Charter (C.II.). Second, it will show that the challenges an employment of this figure faces are different to that of the ECHR, and that the boundaries of such a development are not as restrictive as they seem at first sight (C.III.).

2. Methodic Approach of this Paper

The paper will follow a dogmatic approach and view the issues in their institutional contexts, only taking a sociologist view when reviewing the dangers to the legitimacy of the ECHR.

B. Positive Obligations within the system of the ECHR

The first part of this paper will be divided into three parts: First, it will summarize the development of the implementation of positive obligations of fundamental rights within the case law of the European Court of Human Rights (subsequently: "the ECtHR") (I.). Second, it will assess the theoretical and institutional challenges the application faces and what methods the ECtHR has developed or might use to balance out its own jurisprudence in order to hold onto its legitimacy and safeguard state interest (II.). Third, the findings of the second part will be applied to the recent judgement of the ECtHR in *Fedotova v. Russia* (III.).

I. Overview of the history and current state of development of positive obligations of the ECHR

1. The first leading cases

Positive obligations have long been part of the case law by the ECtHR in interpreting the European Convention of Human Rights (subsequently "the Convention"). Yet it remains unclear and disputed in legal scholarship when precisely the ECtHR started using the doctrine. Some

early mentions can be found in decisions rendered in the course of the 1970s, in which the ECtHR – rather in an *obiter dictum* than concerning the *ratio decidendi* – holds that there might be a positive dimension to some of the protected fundamental rights within the Convention[5]: One example of this is *Airey v. Ireland*, in which the ECtHR held that "[the] fulfilment of a duty under the Convention on occasion necessitates some positive action on part of the State."[6] An even earlier reference can be found in *Marckx v. Belgium*[7]. Here the ECtHR holds in its interpretation of Article 8 ECHR that "there may be positive obligations inherent in an effective 'respect' for family life"[8]. Judge Matscher even further expands in his partly dissenting opinion that

> *"the implementation of many fundamental rights – and notably family rights – calls for positive action by the State in the shape of enactment of the substantive, organizational and procedural rules necessary for this purpose"*[9].

Interestingly, he describes its own the ECtHR's own assumption here as "generally accepted" while making no reference to prior case law (indeed, none can be found) nor to literature or case law of any other national court[10].

Notwithstanding these early mentions of positive obligations, some consider the 1981 decision of *Young, James and Webster v. UK* to be the first *leading* case on this dogmatic figure[11]. The matter dealt with the termination of workers that refused to join the assigned workers' union (so-called closed-shop rules), which the ECtHR held to be a violation of Article 11 ECHR. Here, the ECtHR does not explicitly use the term "positive obligation" nor goes into detail about what kind of obligation the UK is under in this case[12]. Thus, others consider the decision to be rendered on the "double" negative dimension of Article 11 – negative as opposed to a positive

[5] *Beijer,* The Limits (Fn. 3), p. 38 finds the leading case of positive obligations to be in ECtHR, No. 2126/64 – *Belgian Linguistic case*, even though by formulation of the ECtHR it remains rather dubious in regard to positive obligations; with a similar assessment *D. Xenos:* The Positive Obligations of the State under the European Convention of Human Rights, Abington (UK) 2012, p. 22.
[6] ECtHR, No. 6289/73 – *Airey v. Ireland*, para. 25.
[7] ECtHR, No. 6833/74 – *Marckx v. Belgium*.
[8] Ibid, para. 31.
[9] Ibid, p. 53.
[10] Ibid.
[11] For example *H. Krieger,* Kapitel 6. Funktionen von Grund- und Menschenrechten, in: O. Dörr/R. Grote/T. Marauhn (Ed.), EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz. Band I, 3. Ed., Tübingen 2022, para. 26.
[12] ECtHR, No. 7601/76; 7806/77 – *Young, James and Webster v. The United Kingdom*, para. 48-57.

obligation of the fundamental right as well as negative in the sense that the freedom of association not only includes the freedom to join an association but also the freedom not to do so[13].

Undisputedly, the ECtHR bases its 1985 decision Case of *X. and Y. v. the Netherlands* on the doctrine of positive obligations[14]. This case – as many future cases – deals with a violation of Article 8 ECHR: the right to respect for private and family life. The ECtHR ruled in a case of child abuse that the Netherlands had violated Article 8 ECHR by *not* introducing a criminal statue to address the situation framed by the facts of the case. The ECtHR holds that:

> *"The Court recalls that although the object of Article 8 […] is essentially that of protecting the individual against arbitrary interferences by the public authorities, it does not merely compel the State to abstain from such interferences: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life […]. These obligations may involve the adaption of measures designed to secure respect for family life even in the sphere of the relations of individuals."*[15]

Here, one may find the very first detailed description of what a "positive obligation" might be within the ECtHR's jurisprudence: The violation of a Charter provision through the non-adoption of a criminal statue[16].

As a next step within this development, the decision *"Ärzte für das Leben" v. Austria* can be viewed. In this decision, the ECtHR got to clarify their approach to positive obligations. An Austrian association of doctors held a demonstration against abortion but was overtaken and physically assaulted by counterdemonstrators[17]. The doctors' association alleged the lack of necessary police protection as. a violate of their right to assembly under Article 11 ECHR. The ECtHR held that:

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[13] *R. Scholz,* Nochmals: "Closed shop" und Europäische Menschenrechtskonvention, in: Archiv des öffentlichen Rechts 107 (1982), pp. 126-140 (127-128); *Xenos:* The Positive Obligations (Fn. 4), p. 118.
[14] ECtHR, No. 8978/80 – *X and Y v. the Netherlands.*
[15] Ibid., para. 23.
[16] A similar approach was developed by the German Federal Constitutional Court in BVerfGE 38, 1 (20) – Schwangerschaftsabbruch I; on the larger issue of the relationship between human rights and criminial law confer to *L. Lazarus:* Positive Obligations and Criminal Justice: Duties to Protect or Coerce?, in: University of Oxford, Legal Research Paper Series, Paper No 41/2013.
[17] ECtHR, No. 10126/82 – Plattform „Ärzte für das Leben" v. Austria, para. 8-14, with an overview of the facts cf. *Krieger,* Kap. 6 (Fn. 10), para. 28.

> *"Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be […]."*[18]

Here, the ECtHR gives a first kind of reasoning in the adoption of positive obligations, which it considers to be the achievement of "genuine, effective freedom"[19], thus basing positive obligation on a strong *teleological approach* to the rights embodied in the Convention[20].

Of additional interest here is another reference made by the ECtHR in this decision regarding its approach to the figure of positive obligations: "The ECtHR does not have to develop a general theory of the positive obligations […], but […] it has to give an interpretation of Article 11."[21] Here, the ECtHR already clarifies its future approach to positive obligations: It employs them on a case-by-case basis without developing a broader dogmatic theory to underline the using of positive obligation.

2. Further development: A broader application and legal reasoning detailed

As announced by the ECtHR itself, it never went on to explain the further implications of its jurisprudence on positive obligations. Yet, from the rendering of the decisions in these leading cases on, the case law on positive obligations became very broad – up to a degree to which it took an entire PhD-thesis to summarize the current state of positive obligations[22]. Two developments shall be demonstrated in the following: The expansion of positive obligations in width (a) and in depth (b).

[18] ECtHR, No. 10126/82 – Plattform „Ärzte für das Leben" v. Austria, para. 32; *Krieger,* Kap. 6 (Fn. 10), para. 32.
[19] ECtHR, No. 10126/82 – Plattform „Ärzte für das Leben" v. Austria, para. 32.
[20] Cf. *Beijer:* The Limits (Fn. 3), pp. 46-50.
[21] ECtHR, No. 10126/82 – Plattform „Ärzte für das Leben" v. Austria, para. 32; confer for a theoretical approach to the issue *H. Shue* Basic Rights. Subsistence, Affluence, and U.S. Foreign Policy, 40th Anniversary Edition 2020, pp. 35 et seq.
[22] *A. Mowbray:* The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights, Portland (Oregon) 2004.

a) Positive obligations without borders

Notably, as shown above, the ECtHR took it upon itself to fully establish a doctrine of positive obligations in a case involving Article 8 ECHR, in which already the wording "right *to* private and family life" somewhat insinuates a positive dimension[23]. In the following case law, the ECtHR expanded its application of the doctrine to almost all fundamental rights entailed in the Convention. In "*Ärzte für das Leben" v. Austria*, the ECtHR establishes a positive obligation of Article 11, already referring to its own precedent to support its line of argument[24]. In the following years, the ECtHR has found a positive dimension to almost all rights provided by the ECHR[25]: Article 2[26], 3[27], 4[28], 5[29], 8[30], 9[31], 10[32], 11[33].

b) Into the deep: No theory, but a developing line of reasoning

As we have seen so far, the ECtHR did not build quite a strong argument for positive obligations in their first line of decisions on the matter. In the very first referencing, the parts of the ECtHR merely referred to such a figure being "generally accepted"[34], the first leading decision did not really give a line of reasoning at all (supra B.I.1.). Only in the 1989 decision of *"Ärzte für das Leben"*, the ECtHR offered a teleological interpretation of Article 11 and declared the

[23] Emphasis also taken by the ECtHR in ECtHR, No. 6833/74 – *Marckx v. Belgium,* para. 31.
[24] Again ECtHR, No. 10126/82 – Plattform „Ärzte für das Leben" v. Austria, para. 32 („mutatis mutandis, the X and Y v. the Netherlands judgment […]").
[25] For an exhaustive overview until the year of 2004 *Mowbray,* Positive Obligations (Fn. 21), pp. 7-220.
[26] First leading case ECtHR, No. 23413/94 – *L. C. B. v. the United Kingdom*; with an overview over the broad topics of criminal justice, use of firearms, public health and safety, suicide and euthanasia, detainees and procedural obligations cf. *W. Schabas,* The European Convention on Human Rights. A Commentary, Oxford 2015, pp. 126-139.
[27] E.g. ECtHR, No. 2346/02 – *Pretty v. the United Kingdom*, with a short overview pp. 191-194; with a more detailed structure in regard to subtopics *S. Sinner* in: U Karpenstein/F. Mayer (Ed.), EMRK. Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar, 3rd Ed. Munich 2022, Art. 3 §§ 21-30.
[28] Most recently ECtHR No. 77587/12, 74603/12 – *V.C.L. and A.N. v. the United Kingdom* on human trafficking; more broadly *V. Aichele,* in: Karpenstein/Mayer, EMRK (Fn. 26), Art. 4 §§ 25-35.
[29] *Schabas, ECHR (Fn. 25),* pp. 228-229; *Elberling,* in: Karpenstein/Meyer, EMRK (Fn. 26), §§ 13-16.
[30] Cf. much of the case law already analyzed, for an overview *Schabas, ECHR (Fn. 25),* pp. 367-401; *J. Pätzold*, in: Karpenstein/Meyer, EMRK (Fn. 26), Art. 8 § 4; for detailed analysis and development *Mowbray,* Positive Obligations (Fn. 21), pp. 127-188.
[31] *Schabas, ECHR (Fn. 25),* pp. 421-422; *A. von Ungern/Sternberg,* in: Karpenstein/Meyer, EMRK (Fn 26), Art. 9 §§ 51-53.
[32] E.g. ECtHR, No. 39293/98 – *Fuentes Bobo v. Spain*; ECtHR, No. 23114/93 – *Özgür Gündem v. Turkey*; *Schabas, ECHR (Fn. 25),* pp. 453-454.
[33] Even with the non-consideration of ECtHR, No. 7601/76; 7806/77 – *Young, James and Webster v. The United Kingdom* an affirmative approach can be found in ECtHR, No. 10519/03 – *Barankevich v. Russia*; with an overview and more case references *Schabas, ECHR (Fn. 25),* pp. 492-494.
[34] ECtHR, No. 6833/74 – *Marckx v. Belgium*, p. 53.

acceptance of a positive obligation necessary for the purpose of "genuine, effective freedom" to support its argument[35].

In the following years, the ECtHR expanded the foundations of positive obligations in many different ways:

aa) Systematic interpretation with Article 1 ECHR

One of the arguments brought forth forward most commonly by the ECtHR is the systematic interpretation of the provision in question in conjunction with Article 1 ECHR. It holds that

> *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.".*

This obligation of the States to "secure" the rights and freedoms, indicating positive measures to be taken, is what the ECtHR uses to build a supporting argument for positive obligations throughout all provisions of the Convention[36]. An approach also mirrored in the jurisprudence on positive obligations (*Schutzpflichten*) by the German Federal Constitutional Court[37].

bb) A strong teleological approach: the dynamic method of interpretation

An additional pillar in the ECtHR's temple of positive obligations is the methodology employed, somewhat underlying all arguments brought forward so far. The ECtHR operates on the presumption that the Convention is not static but a living instrument that – due to its aim of providing real and effective fundamental rights protection – new understandings must be

[35] ECtHR, No. 10126/82 – Plattform „Ärzte für das Leben" v. Austria, para. 32.
[36] ECtHR, Nos. 29392/95 – *Sørensen and Rasmussen v. Denmark*, para. 57; *B. Dickson:* Positive Obligations and the European Court of Human Rights, in: Northern Ireland Legal Quarterly 61 (2010), pp. 203-208 (204); *Schabas, ECHR (Fn. 25),* p. 90-91; *Beijer:* The Limits (Fn. 3), pp. 50-51.
[37] With an in-depth analysis *K. Stern,* Die Schutzpflichtendimension der Grundrechte. Eine juristische Entdeckung, in: Die öffentliche Verwaltung 2010, pp. 241-249 (244).

developed[38]. The ECtHR argues that for a full effect of its fundamental right protections, it has to adapt interpretations to new circumstances[39]. The challenges faced in 1950 are not the same as in 1980 or 2023. Thus, the interpretation of the provisions of the Convention cannot stay the same. This approach finds its normative basis in the preamble and Articles 19 and 46 of the Convention[40]. The preamble sets out the aim of the Council of Europe to be the achievement of greater unity between its members for which the ECtHR considers the development of fundamental rights to be of enormous importance[41]. Additionally, Article 19 of the Convention institutes the ECtHR to ensure the observance of the provision of the Convention by all contracting parties while Article 46(2) ECHR introduces the binding force of judgements of the ECtHR. From these provisions, the ECtHR deduces its own duty to interpret the Convention broadly based on its purposes and even to further develop parts of it[42]. This general methodological approach of the ECtHR also finds its expression in the jurisprudence on positive obligations[43], in particular in the strong teleological approach highlighted above (supra B.I.1.).

cc) Anything goes – particular foundations for certain provisions

As previously shown, the ECtHR never intended to deliver a general theory of positive obligations. Thus, it is not surprising that the reasoning given for the different fundamental rights does not always follow the same path. Three examples:

As detailed above, the ECtHR employs in regard to Article 8 ECHR – the protection of private and family life – a reference to the wording of the provision, emphasizing that the text already hints at a positive side of a fundamental right[44].

[38] For example in ECtHR, No. 5029/71 – *Klass and Others v. Germany*, para 43; *G. Letsas:* The ECHR as a living instrument: its meaning and legitimacy, in: A. Føllesdal/B. Peters/G. Ulfstein (Ed.), Constituting Europe. The European Court of Rights in a National, European and Global Context, Cambridge (a.o.) 2013, pp. 106-141; *S. Theil:* Is the 'Living Instrument' Approach of the European Court of Human Rights Compatible with the ECHR and International Law?, in: European Public Law 23 (2017), pp. 587-614.
[39] ECtHR, No.5856/72 – *Tyrer v. the United Kingdom,* para. 31; *Schabas, ECHR (Fn. 25),* p. 48.
[40] *C. Grabenwater/K. Pabel,* Europäische Menschenrechtskonvention. Ein Studienbuch, 7th Edition, Munich 2021, § 5 para. 14-16.
[41] With a summary of the relevant case law *Schabas, ECHR (Fn. 25),* p. 65-66; on the broader use of a preamble in interpretation cf. *L. Ograd,* The preamble in constitutional interpretation, in: International Journal of Constitutional Law, 8 (2010), pp. 714-738.
[42] *Schabas, ECHR (Fn. 25),* p. 48.
[43] *H. Krieger:* Positive Verpflichtungen unter der EMRK: Unentbehrliches Element einer gemein-europäischen Grundrechtsdogmatik, leeres Versprechen oder Grenze der Justiziabilität, in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 74 (2014), pp. 187-212 (189); *Beijer:* The Limits (Fn. 3), pp. 46-47.
[44] *Schabas, ECHR (Fn. 25),* p. 367; *Beijer:* The Limits (Fn. 3), p. 50.

(2) Another case to exemplify this tendency is *Campbell and Cosans v. UK*. In this case revolving around Article 2 of the First Additional Protocol to the Convention – the right to education – the ECtHR interprets the wording "[…] respect the right […]" in the context of its drafting:

> *"As is confirmed by the fact that, in the course of the drafting of Article 2 (P1-2), the words "have regard to" were replaced by the word "respect" […], the latter word means more than 'acknowledge' or 'taken into account'; […] it implies some positive obligation on the part of the State."*[45]

(3) Lastly, regarding positive obligations deriving from Article 4 of the Convention, the ECtHR referred to the broader framework of international law to support its interpretation. Article 4 includes in its wording the prohibition of slavery and forced labor. Here the ECtHR interprets the provision in the broader context of international law – in particular the Palermo Protocol and the Anti-Trafficking Convention – to also prohibit human trafficking and put the respective state under a positive obligation to put in place a legislative and administrative framework to address this issue[46].

These decisions show the tendency of the ECtHR to take any possible argument in and affirms its strategy of a case-by-case development of positive obligations instead of the delivery of a broader theory.

c) Interim Result on the development of positive obligations

As we have seen thus far, the origins of this legal doctrine of "positive obligations" are rather dubious. The ECtHR has been referring to it a long time but went into a little more detail about its approach to the figure in the course of the 1980s[47]. After its literal embrace of the doctrine in *X. and Y. v. the Netherlands* in 1985, the ECtHR expanded its employment of positive obligations vastly over the course of the next years, framing it with a more detailed reasoning while

[45] ECtHR, No. 7511/76; 7743/76 – *Campbell and Cosans v. the United Kingdom,* para. 37.
[46] ECtHR, No. 25965/04 – *Rantsev v. Cyprus and Russia,* para. 277; ECtHR, No. 21884/15 – *Chowdury and Others v. Greece*, para. 105-109.
[47] Matching a new emerging understanding of the history of human rights' history, see already in the work of *R. C. Johansen:* Human Rights in the 1980s. Revolutionary Growth or Unanticipated Erosion?, in: World Politics 35 (1983), pp. 286-314; putting it in a larger historic framework *S. Moyn,* The Last Utopia, Boston 2010, pp. 176-211.

never developing an all-around theory of positive obligations of the fundamental rights in the Convention.

3. Further and current state of development

Over the course of the years and decades following 1985, the ECtHR started to broadly refer to positive obligations, this to a degree where it is even hard to find scholarly works trying to summarize the case law as it is[48]. Two current developments give rise to the subsequent assessment of the challenges and boundaries of the employment of positive obligations.
The first one being the employment of positive obligations on issues of social justice, for example LGBTQI+-rights. Most recently, the ECtHR delivered a decision in the case of *Fedotova and Others v. Russia*[49]. In this case, the ECtHR found a violation of a positive obligation arising from Article 8 ECHR in the fact that Russian law and administrative practice did not provide a possibility for same-sex couples to register their relationship. The decision faced a huge political backlash from Russia, going as far as for the President of the Duma to demand the resignation of the judges responsible for the decision[50].

The second noteworthy development can be found in the wider field of climate litigation. While the ECtHR has not (yet) decided on any case involving positive obligations regarding the protection of climate and environment[51], some national courts as well as legal scholarship have taken up the doctrine of positive obligations to assess and address this issue[52].

[48] Already employing a shortened approach in tracing the development of positive obligation within the ECHR case-law *Beijer:* The Limits (Fn. 3), pp. 37-70.
[49] ECtHR, No. 40792 – *Fedotova and Others v. Russia.*
[50] Board of Editors (Ed.): International Law. Human Rights. European Court of Human Rights Holds that Russia must give legal recognition to same-sex couples, in: Harvard Law Review 135 (2022), pp. 1488-1495 (1491).
[51] Yet there is already a case pending – No. 53600/20 – *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland,* which has been referred to the Grand Chamber for judgment. Additionally, the ECtHR has been petitioned in No. 29271/20 – *Duarte Agostinho and Others v. Portugal and 32 other States;* No. 24068/21 – *Greenpeace Nordic and Others v. Norway.*
[52] *A. Gouritin:* Potential Liability of European States Under the ECHR for Failure to Take Appropriate Measures with a View on Adaption to Climate Change, in: M. Faure/M. Peeters (Ed.), Climate Change Liability, Cheltenham (UK) 2011, pp. 134-164; *N. Kobylarz:* The European Court of Human Rights, an Underrated Forum for Environmental Litigation, in: H. Tegner Anker/B. Egelund Olsen (Ed.), Sustainable Management of Natural Resources. Legal Instruments and Approaches, Cambridge a.o. 2018, pp. 99-120; *K. F. Braig/S. Panov:* The Doctrine of Positive Obligations as Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a *Hilfssheriff* in Combating Climate Change?, in: Enviromental Law and Litigation 35 (2020), pp. 261-298; *P. L. Enderle:* Menschenrechtsbasierte Klimaklagen im internationalen System, in: Die öffentliche Verwaltung 2023, pp. 370-380 (i.e. 380).

These two areas exemplify the underlying issue of this paper: With the doctrine of positive obligation the ECtHR has the opportunity to reign in on a lot of current political issues and – as commonly phrased in the US context – "legislate from the bench" by requiring certain measures to be taken by the Contracting State. While not trying to argue for or against the sensibility of this approach, the subsequent chapter of this paper will evaluate the theoretical and methodological challenges such an employment of the doctrine of positive obligation faces in this context, how the ECtHR can address them, and where the outer boundaries of this approach lie.

II. Challenges this development faces

These challenges are often mirrored in criticism of the ECtHR and the idea of positive obligations in general. This chapter will try to divide up the arguments against/challenges this development faces and in turn address which measures or safeguard are, can, or must be taken by the ECtHR. It will try to locate the possibility and boundaries of positive obligations within the context of democratic institutions and legal methodology.

The first part will address the methodical issue: How far can the teleologic-evolutive method of interpretation of the ECtHR go and where does it find its boundaries? (1). The second part will assess the implications of the fact that the ECHR is an instrument of international law and how, in particular, the so-called notion of consensus as well as the vertical separation of powers *vis-a-vis* the national states might set boundaries for the development and employment of positive obligations (2) and what tools the ECtHR has developed to address these issues.

1. Methodological boundaries: Original intend vs. "living instrument"

How law is to be interpreted is one of the most important – and widely debated – underlying questions of any application of the law. While in the context of United States (constitutional) law, an originalist approach of interpretation is *en vogue* amongst a surprising number of jurists, European legal methodology is at large more broadly oriented[53]. Not one, but all four methods of interpretation of a legal text are usually employed (textual, historic, systematic,

[53] *Schabas, ECHR (Fn. 25),* pp. 33-50; on an originalist view within the ECHR-system *Beijer:* The Limits (Fn. 3), pp. 72-73.

teleological)[54]. All of these methods are also used by the ECtHR in the interpretation of the Convention as is already confirmed by the case law analyzed above. In particular, the ECtHR bases its development of positive obligations – as many other new developments – on its so-called evolutive method of interpretation as part of its teleological interpretation of the Convention. It adapts its interpretation of the text of the Convention to new challenges and developments in international fundamental rights protection, to – as referred to in detail above – institute "[g]enuine, effective freedom"[55] throughout the years of application of the Convention.

While such an approach can of course be criticized from a firm originalist standpoint, arguing that the ECtHR is bound by the understanding of fundamental rights of the drafters of the Convention, it shall be presumed that a teleological approach to the interpretation of legal texts, especially of fundamental rights is not only allowed but necessary in texts of international law[56].

The question that remains is: Where does this approach find its boundaries? As a text of international law, the rules on the interpretation in the Vienna Convention on the Law of Treaties apply[57]. Relevant factors for the interpretation are "the meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[58] as well as the "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"[59]. This already demonstrates the general validity of an evolutive approach to interpretation in international law. Yet it also sets some boundaries that are inherent in the general concept of interpretation of legal texts.

Applying these provisions of the Vienna Convention, it is clear that, first, the terms of the treaties set the boundaries for its application. The ECtHR cannot go beyond what the provisions of the treaties provide. This issue, the ECtHR implicitly addresses in their attempt to found positive obligations not only in the dynamic teleological interpretation of the Convention but also

[54] *M. Poiares Maduro:* Interpreting European Law: Judicial Adjucation in a Context of Constitutional Pluralism, in: European Journal of Legal Studies 1 (2007), pp. 137-152 (146-147); tracing back the history of legal interpretation through the course of Roman Law *H. Honsell:* Die rhetorischen Wurzeln der juristischen Auslegung, in: Zeitschrift für die gesamte Privatrechtswissenschaft 2016, pp. 106-128.
[55] Once more ECtHR, No. 10126/82 – Plattform „Ärzte für das Leben" v. Austria, para. 32; on the broader approach of the ECHR see *A. Mowbray:* The Creativity of the European Court of Human Rights, in: Human Rights Law Review 5 (2005), pp. 57-79 (72-78).
[56] As stipulated by Article 31, 32 of the Vienna Convention on the Law of Treaties; cf. *Schabas, ECHR (Fn. 25),* pp. 34-46.
[57] After its adoption in 1969, the ECtHR started basing its interpretation on these provisions, ECtHR, No. 4451/70 – *Golder v. the United Kingdom,* para. 29-33; further *Schabas, ECHR (Fn. 25),* p. 35-36.
[58] Art. 31(1) of the Vienna Convention on the Law of Treaties.
[59] Art. 31(3)(b) of the Vienna Convention on the Law of Treaties.

in its wording and system (supra B.2.b.). Additionally, the fact that there has generally been no big public debate on the ECHR-system as overreaching in the aftermath of the decision on positive obligations hints at a general acceptance by the contracting states[60]. Also in legal scholarship, the reception of said decisions was usually positive[61]. The most supportive argument for a certain state practice in regard to positive obligations must be the reception of the doctrine within national (constitutional) courts: In Germany, France, the Netherland, Italy and even the UK, this development has been taken up and implemented, not only in compliance with judgements of the ECHR but also within their own system of fundamental rights protection[62].

2. Structural Boundaries

a) Notion of Consent

A second area in which troubles for this development arise is the international law principle of consent. In international law, states are sovereign subjects and can – outside of international organizations[63] and customary international law[64] – not be bound by international law to which they did not agree[65]. Unlike individual people within a state, states cannot be subject to rules which are not supported by their consent[66]. This notion is of course deeply linked to the section on methodology above (supra B.II.1.) and the section on the separation of powers *vis-a-vis* the contracting states below (b), because of its classification as an international law principle it is addressed separately yet shortly here.

Criticism of the doctrine of positive obligations based on this principle usually revolves around two arguments: (1) While the drafters of the Convention did not intend to create a completely inflexible mechanism of fundamental rights protection and the purpose of the Convention clearly includes the judicial development in regard to e.g. technological development or the

[60] *Krieger,* Kap. 6 (Fn. 10), para. 33.
[61] Ibid.; cf. for example in the case of X. and Y. v. the Netherlands to *A. M. Connelly:* Problems of Interpretation of Article 8 of the European Convention on Human Rights, in: International & Comparative Law Quarterly 2008, pp. 567-593 who only criticizes other aspects to the interpretation of Article 8, yet not the employment of positive obligations, merely attributing a "socialist philosophy" (p. 575) to the approach.
[62] Accounting the development in each country and providing the relevant case law *Krieger, Positive Verpflichtungen (Fn. 42)*, p. 191.
[63] Cf. *S. Schmahl:* Die Internationalen und die Supranationalen Organisationen, in: V. Graf Witzhum/A. Proelß (Ed.), Völkerrecht, 8. Ed., Frankfurt (u.a.) 2019, pp. 319-462 (§ 15, § 74).
[64] *C. F. J. Doebbler,* Dictionary of Public International Law, Lanham (Maryland, USA) 2018, p. 8 (Art. "Introduction").
[65] *Doebbler,* Dictionary (Fn. 64), pp. 154-155 (Art. "Consent"); *W v. Graf Witzhum:* Begriff, Geschichte und Rechtsquellen des Völkerrechts, in: ibid./A. Proelß (Ed.) (Fn. 62), § 15.
[66] *Krieger, Positive Verpflichtungen (Fn. 42)*, pp. 193-194.

new challenges of mass media, the mission of the ECtHR does not include the invention of new dimensions of fundamental rights[67]. The Convention is based on the idea of civil and political rights – rights against state action – and the instituting of positive obligations throughout the Convention goes beyond what the contracting states have agreed to[68] and thus goes against the notion of consent on which international law is based. (2) As a supporting argument, the fact that many of the contracting states of the Convention have later agreed on the European Social Charter, covering many of the aspects the ECtHR's case-law on positive obligations addresses is brought forward[69]. Yet, the European Social Charter clearly states that the provisions do not give rise to any entitlement for individuals against the contracting state and no court but rather an observatory body has been installed as a supervisory mechanism[70].

This very issue the ECtHR explicitly addressed in one of its judgements: The applicants to the ECtHR were to be expulsed from the UK and claimed that an expulsion would run contrary to Article 3 of the Convention. The ECtHR followed the UK's argument, issuing:

> *"The interpretation of the Conventions […] was confined by the consent of the Contracting States. […] It was inconceivable that the Contracting States would have agreed to such a provision. The Convention was primarily intended to protect civil and political, rather than economic and social rights. […]."*[71]

Here, the ECtHR directly addresses the criticism and eventually refuses the application of Article 3 ECHR to the underlying case. With this decision, the ECtHR has highlighted that it considers itself to be bound by the notion of consensus and generally views it as a boundary to its own development of the Convention[72]. Relevant changes must be decided by the of the contracting states.

Yet, the ECtHR does not hold itself to the same standard in all cases, especially in regard to positive obligations. In a dispute concerning the application of the freedom of association in

[67] *Krieger, Positive Verpflichtungen (Fn. 42)*, pp. 194.
[68] *Krieger, Positive Verpflichtungen (Fn. 42)*, pp. 195.
[69] Exhaustively C. Nivard (Ed.), The European Social Charter. A Commentary. Vol. 1: Cross Cutting Themes, Leiden (a.o.) 2022.
[70] *A. Panarella:* Chapter 1: The Drafting of the 1961 European Social Charter, in: Nivard, Commentary (Fn. 68), p. 35.
[71] ECtHR, No. 2656/05 – *N. v. the United Kingdom*, para. 24.
[72] *Krieger, Positive Verpflichtungen (Fn. 42)*, p. 203.

Article 11 of the Convention in regard to the question what kind of protection of trade unions a state must provide, Turkey brought forward that part of the contracting states has refrained to issue their consent to an additional protocol to the Convention to include social and economic rights[73]. On the contrary, the ECtHR turned the argument around and held that:

> *"The Court observes, however, that this attitude of member States was accompanied […] by the wish to strengthen the mechanism of the European Social Charter. The Court regards this as an argument in support of the existence of a consensus among Contracting States to promote economic and social rights."*[74]

On the contrary, it further details its approach to the notion of consensus in this regard:

> *"In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies."*[75]

With this rather broad approach to what the notion of consensus means, the ECtHR has (rightfully) drawn some criticism in legal scholarship[76].

Overall, the ECtHR's stance to the notion of consensus remains rather unclear and a uniform and clear approach to the subject cannot be identified.

[73] Cf. ECtHR, No. 34505/97 – *Demir and Baykara v. Turkey*, para. 57.
[74] ECtHR, No. 34505/97 – *Demir and Baykara v. Turkey*, para. 84.
[75] ECtHR, No. 34505/97 – *Demir and Baykara v. Turkey*, para. 86.
[76] *Krieger, Positive Verpflichtungen (Fn. 42)*, pp. 203-204.

b) Separation of powers vis a vis the national state

The second institutional issue this paper addresses is the of separation of powers. This might surprise at first sight. While the Convention system itself does set up different institutions (the Council, the ECtHR), there is no issue of separation of powers inherent in the Council of Europe system. On the contrary, the majority of the contracting states of the ECHR are liberal democracies with an established and detailed separation of powers within their systems[77]. And while the Convention and the ECtHR is not a court within these systems but outside, it still is a judicial body that can account for a lot less democratic legitimation than the national legislature. Thus, when assessing separation of powers-concerns in this regard, one need to mostly focus on vertical separation of powers in the different tiers of "lawmaking" in today's complex multi-dimension system of law-making in the broadest possible sense and to a lesser degree horizontal separation of powers.

Nonetheless, the strict application of positive obligation might – as pointed out before – lead to the duty of the national legislature to change national law. While one could argue that with the ratification of the ECHR and the acceptance of the jurisdiction of the ECtHR, the contracting states yielded their powers in these fields, the issue at hand is not quite so simple[78]: Especially in politically sensitive questions[79] as well as questions of state spending, the decisions are in the usual institutional set-up expected to be taken by the legislature as it has the highest democratic legitimacy[80] and is also historically entrusted to decide on state spending ("power of the purse")[81].

Thus, a lot of criticism of the doctrine of positive obligations revolves around this question of decision-making power within the institutional set-up of liberal democracies and its law[82],

[77] See for the aim and purpose of Council and Convention *Schabas, ECHR (Fn. 25),* pp. 1-4.
[78] See mutatis mutandis on delegation systems within a national constitutional system of separation of powers *C. Schröder:* Die Gewaltenteilung. Teil 2: Ausgestaltung nach dem Grundgesetz. Aktuelle Fragen, in: Juristische Schulung 2022, pp. 122-125 (125); more broadly on delegation within political systems *C. Volden:* A Formal Model of the Politics of Delegation in a Separation of Powers System, in: American Journal of Political Science 46 (2002), pp. 111-113; with an overview of criticism in regard to democratic legitimacy (or a lack thereof) *Beijer:* The Limits (Fn. 3), pp. 81-83.
[79] *Krieger, Positive Verpflichtungen (Fn. 42)*, p. 197.
[80] *Krieger, Positive Verpflichtungen (Fn. 42)*, p. 197.
[81] *Krieger, Positive Verpflichtungen (Fn. 42)*, p. 199; *Beijer:* The Limits (Fn. 3), pp. 68-69 on how the ECtHR adapts in some cases to this issue.
[82] *H. Collins*, On the (In)compatibility of Human Rights Discourse and Private Law, in: H. Micklitz (Ed.), Constitutionalization of European Private Law, 2014, pp. 1-44 (28-29).

supported by the fact that the ECtHR as a body of international law is even less democratically legitimized compared to national courts[83].

This criticism is faced, in turn, with countercriticism of its own: Fundamental rights are not designed to support the political-institutional set-up of a state which revolves around the idea that a majority can change legislation and make all kinds of decisions, and thereby sanctify the *status quo*[84]. On the contrary, fundamental rights are by their nature instruments to protect minorities in a majority-based system like that. Their very aim is to aid minorities and their interests within these structures of majoritarian force[85]. The decision to include such rights is the decision to restrain the power of the majority – and while this was of course originally only aimed at providing "negative" protection to defend oneself against the decision of the majority, there are plausible reasons why in some cases this might not be enough in today's ever more complex world but there might also be circumstances in which these rights demand a positive action of the majority to award said protection[86]. Additionally, the negative dimension of fundamental rights might as well lead to state spending[87]., thus argument regarding the power of the purse does not fully convince. Yet, against the latter, one might bring forward that – in tendency – this is only the exception in the negative dimension of fundamental rights, while being more generally the case in regard to positive obligations.

In conclusion, this institutional issue of separation of powers does not disallow positive obligation in their entirety and leaves quite some space for their development but does, in particular to politically sensitive issues as well as obligations that might involve high state spending, does meet the boundary of the competence of the national state – in particular the national parliament that must be upheld.

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[83] *B. Baade*, Eine Charta für Kriminelle – Zur demokratietheoretischen Kritik am EGMR und dem aktiven Wahlrecht von Strafgefangenen, in: Archiv des Völkerrechts 51 (2013), 339 et seq. (343); *Krieger, Positive Verpflichtungen (Fn. 42)*, p. 188; *Beijer:* The Limits (Fn. 3), pp. 84-86.
[84] Cf. B. A. Garner (Ed.), Black's Law Dictionary, 10th Ed., St. Paul (MN, USA) 2014, p. 525 ("democracy").
[85] With reference to positive obligations *Krieger, Positive Verpflichtungen (Fn. 42)*; more generally *B. Friedman:* The History of the Countermajoriarian Difficulty. Part One: Road to Judicial Supremacy, in: NYU Law Review 333 (1998), pp. 333-433; most recently *F. Schorkopf:* Menschenrechte und Mehrheiten, in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 2022, pp. 19-46.
[86] *J.-F. Akandji-Kombe:* Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights, in: Directorate General of Human Rights Council of Europe (Ed): Human rights Handbooks No. 7, Strasbourg 2007.
[87] *Krieger, Positive Verpflichtungen (Fn. 42)*, p. 199 employing security detention as an example.

c) Tools developed to address structural boundaries of positive obligations

To address these structural and institutional boundaries of the ECtHR's jurisdiction in general and in particular with regard to positive obligations, one dogmatic tool has been developed by the ECtHR whose application in cases of positive obligation can strike a balance between the structural boundaries outlined and the purpose of fundamental rights to grant effective protection against (and from) the majority: Scaling back the density of control through the so-called margin of appreciation.

The margin of appreciation is a dogmatic figure developed by the ECHR and today vastly applied throughout its case law[88]. It is based in the principle of subsidiarity which holds the simple truth that in some (or a lot of) cases, it is not sensible to apply the same standard throughout a large area of application but to take into a consideration local specifics. Through the 14. Protocol to the Convention it was even incorporated in the Preamble to the Convention and thus by now finds a textual foundation within the Convention[89].

The margin is a tool to give a broader prerogative to the contracting states in certain issues. This, the ECtHR achieves through scaling back of the density of control applied.

There is no legal framework on the question when the ECtHR scales back control and when it scrutinizes national measures or the lack thereof. Instead, the ECtHR handles this on a case-by-case basis[90]. There can be three broader types of control identified: First, the ECtHR can scale back its control and only look for obvious fundamental rights issues and assess if the state has not taken any measures or obviously flawed measures to prevent the hurtful behavior. Second, it might apply a "medium" control and scrutinize state measures in a bit more detail, assessing whether or not the state has taken into account all facts and factors surrounding the issue at hand and if the measures taken are generally effective[91]. Lastly, the ECtHR may apply a rigorously detailed control of the state's measures and accordingly apply a strict proportionality test as well[92].

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[88] *Mayer,* in: Karpenstein/Mayer, EMRK (Fn. 26), Einleitung, § 60; *T. Marauhn /D. Mengeler:* Kapitel 7. Grundrechtseingriff und -schranken, in: O. Dörr/R. Grote/T. Marauhn (Ed.), EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz, Band I, 3. Ed. 2022, §§ 58-59.
[89] *Schabas, ECHR (Fn. 25),* pp. 74-75; *Mayer,* in: Karpenstein/Mayer, EMRK (Fn. 26), Präambel, §§ 10-13.
[90] *Marauhn/Mengeler,* Grundrechtseingriff (Fn. 87), § 58; *Mayer,* in: Karpenstein/Mayer, EMRK (Fn. 26), Einleitung §§ 66-67.
[91] *Krieger, Positive Verpflichtungen (Fn. 42)*, pp. 210-211.
[92] Ibid.; *Marauhn/Mengeler,* Grundrechtseingriff (Fn. 87), § 59.

With this approach, the ECtHR may apply its doctrine of positive obligations to address fundamental rights issues originating in the non-action of a contracting state while at the same time being guided by the boundaries set by the notion of consensus and the separation of powers.

Unfortunately, the margin of appreciation is a dogmatic instrument developed by the ECtHR and there are no binding rules in the ECHR or another body of law to guide its application[93]. While there is a vast amount of case law governing the question when to apply what kind of control to the case[94], still no coherent strategy of the ECtHR in application of the doctrine can be determined[95]. On the contrary, the application becomes more and more ambiguous[96], some authors go as far as to describe the margin of appreciation to be "mysterious"[97]. This, in turn, leads to legal uncertainty and decreases the potential to find a way to safely apply positive obligations within the ECtHR's jurisdiction[98].

Yet, while no clear line in its case-law can be found, some promising tendencies can be identified that fence in the issues outlined above (supra B.II.1., 2.a., b.) to a certain degree:

The ECtHR especially scales back its own control in cases of social and welfare politics – which by nature are very spending-intense – such as retirement policy[99]. While seemingly following a sensible approach here, this is oftentimes accompanied by the application of a strict proportionality test, somewhat undermining the lenient approach of a wide margin of appreciation[100].

While generally applying a strict control in cases, in which fundamental rights of central value are concerned, the ECtHR even leaves a wide margin of appreciation to the state where central socio-political questions are concerned[101]:

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[93] *Marauhn/Mengeler,* Grundrechtseingriff (Fn. 87), § 58; *D. Spielmann:* Wither the Margin of Appreciation, in: Current Legal Problems 67 (2014), pp. 49-65 (49).
[94] Showing determining factors and tendencies *Marauhn/Mengeler,* Grundrechtseingriff (Fn. 87), § 59.
[95] *Mayer,* in: Karpenstein/Mayer, EMRK (Fn. 26), Einleitung §§ 65, 67; *Krieger, Positive Verpflichtungen (Fn. 42)*, p. 205; more detailed references in *G. Letsas:* A theory of interpretation of the European Convention on Human Rights, Oxford 2007, pp. 80 et seq; *Beijer:* The Limits (Fn. 3), pp. 86-88, 90.91.
[96] Cf. *E. Brems:* The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights, in: Zeitschrift für ausländisches öffenltiches Recht und Völkerrecht 56 (1996), pp. 240-314 (285); *J. Kratochvil:* The inflation of the margin of appreciation by the European Court of Human Rights, in: Netherlands Quarterly of Human Rights 29 (2011), pp. 324-357 (356-357).
[97] *Kratochvil:* The inflation (Fn. 95) p. 324.
[98] *Xenos:* The Positive Obligations (Fn. 4), p.149; *Krieger, Positive Verpflichtungen (Fn. 42)*, p. 205.
[99] ECtHR, No. 65731/01 – *Stec and others v. the United Kingdom.*
[100] *Krieger, Positive Verpflichtungen (Fn. 42)*, p. 210 referencing ECtHR, No. 30255/09 – *Bitto and others v. Slovakia*.
[101] *Mayer,* in: Karpenstein/Mayer, EMRK (Fn. 26), Einleitung § 65.

> *"Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted […]. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider […]."*[102]

As explained in the same decision, this approach is precisely aimed at safeguarding and not putting an effective end to the democratic political debate within the country concerned[103], aiming directly at the theoretical boundaries set out above.

This concept, in turn, might be limited by another dogmatic figure developed by the ECtHR: the "European consensus". Where close to all contracting states act in a certain way, accept a certain policy or offer protection for a certain kind of behavior, the margin of appreciation is once again limited and the ECtHR may set a certain standard to be required by the Convention[104]. Yet not only a factual practice by the state may lead to the acceptance of such consensus, also other bodies of national law and soft law may be used to foster the impression of such a European consensus[105]. While this invention of the ECtHR is, in turn, criticized as violating the notion of consensus[106], it can still be upheld in reference to the Charter as "living instrument" and is by now a generally accepted instrument of the ECtHR to determine the margin of appreciation in a case[107].

In following the path of these established factors the ECtHR would serve its purpose of an effective and long-lasting protection of fundamental rights best if it finds a consistent way to apply the margin of appreciation and balance the interest in an effective fundamental rights protection with safeguarding the fundamental principle the Charter is based on as well as the ECtHRs legitimacy and effectiveness.

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[102] ECtHR, No. 19010/07 – *X. v. Austria,* para. 148.
[103] ECtHR, No. 19010/07 – *X. v. Austria,* para. 239.
[104] *Mayer,* in: Karpenstein/Mayer, EMRK (Fn. 26), Einleitung, § 64; *K. Dzehtsiarou:* European Consensus and the Evolutive Interpretation of the European Convention on Human Rights, in: German Law Journal 12 (2011), pp. 1730-1745 (1733-1734); *Krieger, Positive Verpflichtungen (Fn. 42)*, pp. 203-206.
[105] *Dzehtsiarou:* European Consensus (Fn. 103), p. 1744.
[106] Supra B.II.2.a. and cf. *L. Wildhaber/A. Hjartarson/S. Dennelly:* No Consensus on Consensus? The Practice of the European Court of Human Rights, in: Human Rights Law Journal 33 (2013), pp. 248-263 (254) with further references in footnote 70.
[107] *Dzehtsiarou:* European Consensus (Fn. 103), p. 1745.

3. Interim Conclusion on institutional boundaries

As we have seen so far, the boundaries inherent in international law as well as the whole institutional set up of the ECHR-system give room for the development of positive obligations from rights set in the ECHR while at the same time setting clear boundaries. These boundaries are closely linked to the contracting states' sovereignty and thus particularly politically sensitive. With the margin of appreciation, which classifies as one of the fundamental judge-developed constitutional principles of the Convention, the ECtHR has the potential to further develop and nourish the doctrine of positive obligation and to address fundamental rights issues that lay in a non-action of a state while at the same time respecting boundaries and safeguarding the ECtHR's legitimacy. This is based on the condition that the ECtHR find a coherent way to apply its margin of appreciation to in turn limit its own discretion and foster legal certainty in regard to the application of positive obligations of fundamental rights.

III. Putting theory into practice: Fedotova v. Russia

1. The Grand Chamber's judgement

In the last part on the ECHR-system, this paper will put the outlined theoretical approach to positive obligations into practice and analyze the recent Grand Chamber Judgement of the ECtHR in the case of *Fedotova v. Russia* and how the ECtHR deals with the issue of positive obligations and its boundaries. The ECtHR decided on the matter in 2021 and most recently the Grand Chamber delivered an even more detailed decision in the case. As outlined above, the ECtHR deals with the question, if Russia is obliged to provide any kind of legal recognition for same-sex marriages.

In assessing a violation of Article 8 ECHR through the lack of potential recognition under national law, the ECtHR first – once more – develops the idea of positive obligations referring to case law as well as a strong teleological approach of interpretation[108]. Following this, the ECtHR thoroughly analyzes its own case law, in particular its decision in *Schalk and Kopf v. Austria*[109], in which the ECtHR did not find a violation of Article 8 ECHR through the non-

[108] ECtHR, Grand Chamber, Judgement of 17 January 2023, No. 40792/10, 30538/14 and 43439/14 – *Fedotova and Others v. Russia*, para. 25.
[109] Cf. ECtHR, No. 30141/04 – *Schalk and Kopf v. Austria*; for detailed analysis *L. Hudson:* A Marriage by Any Other Name? Schalk and Kopf v. Austria, in: Human Rights Law Review 11 (2011), pp. 170-179.

recognition of same sex relationships by Austria. The ECtHR concludes that the case-law has established the general existence of such an obligation for the contracting states.

In a next step, the ECtHR analyzes how broad the state's margin of appreciation is in regard to the now established positive obligation to recognize same-sex relationships. It holds that the scope of said margin is to be determined under the different factors determined by its case law[110]. It reminds itself that the margin will be wider where "particular important facet[s] of an individual's existence or identity is at stake"[111], the margin will be more restricted, while where no consensus within the Council of Europe states can be found, the margin will be wider[112]. It then holds that the underlying issue "touches on particularly important facets of their personal and social identity", hinting at a restricted margin of appreciation[113]. This the ECtHR further supports in the following, stating:

> *"Furthermore, as to the existence of a consensus, the Court has already noted a clear ongoing trend at European level towards legal recognition and protection of same-sex couples within the member States of the Council of Europe."*[114]

Here, the ECtHR disregards its own threshold of a "consensus" to be necessary to narrow the margin of appreciation, settling for an "ongoing trend" to be sufficient to achieve the same, only leaving the states with a "choice of means"[115] to achieve the protection, holding that "no similar consensus can be found as to the form of such recognition"[116], leaving the Contracting States to decide on the measures necessary to ensure the required protection[117]. With this approach, the ECtHR already shifts its view on the margin of appreciation.

However, the ECtHR goes even further. In a last adjustment to the margin, the ECtHR holds the following:

[110] ECtHR, Fedotova v. Russia (Fn. 107), para. 183.
[111] Ibid.
[112] Ibid.
[113] ECtHR, Fedotova v. Russia (Fn. 107), para. 185.
[114] ECtHR, Fedotova v. Russia (Fn. 107), para. 186.
[115] ECtHR, Fedotova v. Russia (Fn. 107), para. 188.
[116] ECtHR, Fedotova v. Russia (Fn. 107), para. 189.
[117] ECtHR, Fedotova v. Russia (Fn. 107), para. 189.

> *"However, since the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective […], it is important that the protection afforded by State Parties to same-sex couples should be adequate.[…] In this connection, the Court has already had occasion to refer in certain judgments to aspects, in particular material (maintenance, taxation or inheritance) or moral (rights and duties in terms of mutual assistance), that are integral to life as couple and would benefit from being regulated within a legal framework available to same-sex couples […]."*[118]

With its last words, the ECtHR thus narrows down the states' margin even further, practically demanding a widespread and effective recognition of same-sex couples in all fields of the law, filling the found obligation with a lot of necessarily detailed legislation[119]. This it bases on the fact that the guaranteed rights ought to be practical and effective as opposed to theoretical and illusory.

2. Assessment of the judgment

To this date, there is not a lot of legal commentary on this decision available. Its predecessor, the Chamber decision from 2021, drew both criticism and approval in legal scholarship[120] as did the Judgement of the Grand Chamber[121]. In regard to what has been outlined above, this new decision must despite of its very desirable outcome be criticized on two accounts.

a) "Clear ongoing trend"

First, the ECtHR furthers its already somewhat criticizable (supra B.II.2.c.) approach to the European consensus to narrow down the contracting states' margin of appreciation. Not a

[118] ECtHR, Fedotova v. Russia (Fn. 107), para. 190.
[119] ECtHR, Fedotova v. Russia (Fn. 107), para. 190.
[120] A surprisingly small number of assessments of the decision can be found, mostly blog posts can be referenced: Generally approving *G. Fedele:* The (Gay) Elephant in the Room: Is there a Positive Obligation to Legally Recognise Same-Sex Unions after Fedotova v. Russia?, https://www.ejiltalk.org/the-gay-elephant-in-the-room-is-there-a-positive-obligation-to-legally-recognise-same-sex-unions-after-fedotova-v-russia/ (last accessed 11 Febuary 2023); highlighting the political and legal difficulties in the enforcement of the judgment *D. Bartenev:* Will Russia Yield to the ECtHR?, https://verfassungsblog.de/will-russia-yield-to-the-ecthr/ (last accessed 11 Febuary 2023).
[121] With an all-around positive assessment *E. Gill-Pedro:* No new rights in Fedotova, https://verfassungsblog.de/no-new-rights-in-fedotova/ (last accessed 11 Febuary 2023); with a more critical assessment *Z. Vikarska:* The many troubles of the Fedotova Judgment, https://verfassungsblog.de/the-many-troubles-of-the-fedotova-judgment/ (last accessed 11 Febuary 2023).

consensus of the member states of the Council of Europe is necessary to narrow down the margin of appreciation, but a "clear emerging trend" is held to be sufficient to do so. While the original approach already – looking at a consensus in a normative as opposed to a purely empirical way (supra B.II.2.c.) – gave a lot of flexibility to the ECtHR, decreasing the legal certainty of its application, the assessment of an "ongoing trend" leads to even less certainty and opens the floodgates for all kinds of assumptions as to what such a trend might be[122]. Especially in already sensitive cases of social justice, in which some contracting states are notoriously more progressive than others, this new approach opens up the possibility for the ECtHR to accept a "clear ongoing trend" to narrow down the margin of appreciation in all kinds of highly politized areas, it could prove detrimental to the already ECHR-system of fundamental rights protection, taking away legitimacy of the ECtHR and leading to departures from the Council of Europe.

b) "rights that are practical and effective"

Another methodologically unsound argument brought forward by the ECtHR also aims to narrow down the margin of appreciation in this case. As outlined above, the ECtHR uses its understanding of the Convention rights to be "practical and effective" to narrow down the margin of appreciation in this case. Thereby it uses the very reason it employs to create a foundation for positive obligations of Convention rights to narrow down the margin of appreciation in turn and thus engages in a highly problematic circular reasoning. As shown above, the margin of appreciation is *the* dogmatic instrument to fence in an overreaching application of positive obligation and safeguard the institutional boundaries the doctrine of positive obligation faces. If this crucial restrictive instrument of positive obligations can be overcome by employing the very reasoning – and indeed also the precedent for the reasoning – behind positive obligations, the ECtHR might very well not use the margin of appreciation as restriction to positive obligations at all.

c) Interim conclusion on Fedotova

With its *Fedotova* decision, the ECtHR has once more extended its employment of the doctrine of positive obligations and – contrary to what would be necessary – not sharpened its application of the margin of appreciation as counter-instrument but rather made its application even

[122] Emphasizing the shift in approach by the ECtHR here *Vikarska,* The many troubles (Fn. 120).

more ambiguous and loosened the criteria on which it is based. Instead of developing a fairly balanced application of positive obligations, safeguarding the institutional and methodological boundaries (supra B.II.), it broadened its application of the doctrine even further, this in a still highly politized matter. It remains to be seen, how the contracting states will react and if the ECtHR has possibly damaged its reputation and high impact in questions of fundamental rights.

IV. Conclusion on the first part

Concluding on the acceptance of positive obligations of fundamental rights in the ECHR-system, one may note that the application of this doctrine by the ECtHR is widely accepted, and it only drew criticism through its recent expansion of the application of said doctrine. The ECtHR has developed instruments to deal with the theoretical and institutional boundaries its approach to positive obligation faces: It has widely expanded the legal foundation for positive obligations wherever possible and thus addressed the methodological issues regarding the highly teleological method the ECtHR had applied in their first cases on positive obligations. With the margin of appreciation, the ECtHR has an instrument at hand to properly address issues arising out of the boundaries set by the notion of consensus as well as vertical separation of powers with the contracting states. Until now, the latter is not employed in a way to safeguard these boundaries but has the potential to do so in future. On the contrary, the recent Grand Chamber decision in *Fedotova v. Russia* broadens the scope of positive obligations and scales back its tools to safeguard the legitimate boundaries of this doctrine, providing the ECtHR with the power to demand legislation of contracting states in a politically highly sensitive matter.

Opposed to the approach chosen by the ECtHR, it must make its application of the margin of appreciation consistent as to safeguard the theoretical boundaries of positive obligations and strike a fair balance between state interests and individual justice as well as to safeguard its own legitimacy in wake of rising criticism to – among others – its jurisprudence on positive obligations of fundamental rights.

C. Positive obligations within the EU's system of fundamental rights protection

The second part of this analysis will be devoted to examining the current state and possible development of positive obligations within the EU system of fundamental rights protection. In a first part, the paper will analyze the current state of development in the EU system (I.).

Following this, it will assess the textual structure of the Charter and ask whether the document constitutes a different "starting point" regarding the development of positive obligations derived from fundamental rights as compared to the ECHR and how this might affect its interpretation (II.). Then, it will evaluate the structural boundaries of a (possible) development in the EU system, the first one being a boundary in the Union's competences as stipulated by Article 51 of the Charter (III.1.), the second one being the idea of the separation of powers between the Union institutions (III.2.). In a last part, the potential influence of the ECHR on the EU-Charter will be discussed (IV.).

I. Overview over the state of positive obligations in CJEU case-law

The case law of the Court of Justice (in the following: CJEU) is a lot less developed compared to the one of the European Court of Human Rights. While we dominantly find the idea of positive obligations in its case-law on the protection of the economic freedoms (1.), the CJEU case-law on fundamental rights does not provide for a lot (2.).

1. Positive Obligations of Fundamental Freedoms

Well-known and well receipted is the idea of positive obligations on states deriving from the fundamental freedoms in Article 29 et seq. TFEU. A good example and one of the leading decisions on the matter is the CJEU case of *Schmidberger*[123]. In short, Austrian protesters were blocking the Brenner highway and stopping inter-state traffic and thus inter-state exchange of goods. *Schmidberger* sued for damages and the competent Court referred the question to the CJEU if Austria had violated the freedom of movement of goods under Article 34 TFEU. The CJEU accordingly had to address the question whether there was a measure having equivalent effect as quantitative restrictions[124]. In reference to its established case law, the CJEU references its *Dassonville* formula, holding that this is the case for provisions that directly or indirectly, actually or potentially, hinder intra-Community trade[125]. Then, the CJEU has to assess

[123] CJEU, Judgment of the Court, 12 June 2003, C-112/00 – *Schmidberger*; offering good overview on the case *C. Brown:* Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria, in: Common Markel Law Review 40 (2003), pp. 1499-1510; on the general concept of positive obligations of the free movement provisions: *H. Schepel:* Constitutionalising the Market, marketizing the Constitution, and ot Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law, in: European Law Journal 18 (2012), pp. 177-200.
[124] CJEU, Schmidberger (Fn. 123), § 55.
[125] CJEU, Schmidberger (Fn. 123), § 56, referencing CJEU, Judgement of the Court of 11 July 1974, C-8/74 – *Dassonville*, § 5.

whether such a lack of action can constitute an infringement, in essence, if positive obligations derive from the fundamental freedoms. The CJEU holds that

> *"[the Fundamental Freedoms are an] indispensable instrument for the realisation of a market without internal frontiers, Article 30 does not prohibit only measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State."*[126]

Resulting from this, the CJEU finds:

> *"The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act […]."*[127]

Here, we can see some striking similarities to the analysis of the ECtHR case-law above: Both courts use a strong teleological interpretation to find that a lack of action also constitutes an infringement of the respective right: What the ECtHR called an "effective, genuine freedom" (supra B.I.), we can find to here in the CJEU's approach to view the fundamental freedoms to be an "indispensable instrument" and thus adopting a broad interpretation[128].

2. Positive Obligations of Fundamental Rights

Compared to the body of case-law we have seen in the first part of this paper (supra B.), the case law on positive obligations of fundamental rights in the Charter is very thin.

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[126] CJEU, Schmidberger (Fn. 123), § 57; referencing the earlier decision of CJEU, Judgment of the Court of 9 December 19978, C-265/95 – *Commission v. France* § 30.
[127] CJEU, Schmidberger (Fn. 123), § 58.
[128] Today, the CJEU case law in this regard has long been established, for a summary cf. *K. Lenaerts/P. v. Nuffel /T. Corthaut:* EU constitutional law, Oxford 2021, § 17.013.

Interestingly, an academic debate on the interpretation of an early case of the CJEU currently takes place – somewhat parallel to what has been discussed above (supra B.I.1.). In the CJEU decision *T. Port* of 1996, some people see an example of positive obligations of fundamental rights[129] while others do not see a true positive dimension of fundamental rights in this case[130]. For the purpose of the analysis of this paper, this case can be set aside as it does not concern the interpretation of the Charter but is based on the "general principles of EU law" on which the CJEU based its fundamental rights before the adoption of the Charter[131]. In the remainder of the case-law, very few hints at a positive dimension of fundamental rights can be found – only a few cases of procedural obligations on the EU institutions and the Member States deriving from EU fundamental rights can be referenced[132]. Besides these not very far-reaching cases, the recent decision in the case of *Egenberger* was discussed in regard to constituting of positive obligations of fundamental rights.

Vera Egenberger applied for a position with the *Diakonie*, an aid organization run by the German protestant church[133]. She advanced to the second round of selection but was not invited to an interview because she was not member of this church[134]. She sued for damages under *§ 15 Allgemeines Gleichbehandlungsgesetz,* the German transposition of the non-discrimination directive 78/2000/EC[135]. The domestic court referred questions regarding the interpretation of the non-discrimination directive, in particular Article 4(2) which allows religious associations in their role of employers to discriminate as

> *"a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos."*[136]

[129] *Beijer:* The Limits (Fn. 3), pp., p. 264.
[130] *T. Ahmed/I. d. J. Butler:* The European Union and Human Rights. An International Law Perspective, in: European Journal of International Law 17 (2006), pp. 771-801 (794-795).
[131] On the concept and how it relates to the Charter *T. Tridimas:* Fundamental Rights, General Principles of EU Law, and the Charter, in: Cambridge Yearbook of European Legal Studies 23 (2017), pp. 361-392.
[132] *Beijer:* The Limits (Fn. 3), pp. 263-292 references a few that put procedural obligations deriving from fundamental rights, most prominently the Khadi decision (CJEU, Judgment of 3 September 2008, C-402/05 and C-415/05 – *Kadi*).
[133] CJEU, Judgment of 17th of April 2018, C-414/16 – *Egenberger,* § 26.
[134] CJEU, Egenberger (Fn. 133), § 27.
[135] Ibid.
[136] With a commentary on the German transposition *M. Benecke,* in: D. Looschelders (Ed.), beck-online.Grosskommentar BGB, Munich 2023, § 9 AGG.

and the effect of Article 17 TFEU on its interpretation. In the course of the judgement, the CJEU also addresses the impact of the fundamental rights of the Charter on the assessment of the legal issues in question:

> *"The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law […]. As regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals"*[137]

In this groundbreaking judgment, the CJEU accepts the "horizontal applicability" of fundamental rights between individuals (*Drittwirkung*)[138]. While this is not a positive obligation in the classical sense that goes as far to require a change of law as we have seen in many cases discussed so far, it is a constellation that the ECtHR considers to be a form of positive obligation[139]. It has just to be understood in the following way: While this dimension of fundamental rights is often described as "horizontal applicability", fundamental rights do not bind the relevant private actors[140]. On the contrary, they bind the state in its form of the judiciary branch (*in concreto* the civil judge hearing the case) to resolve a dispute between in a way that protects their fundamental rights[141]. Thus, there exists a positive obligation of the judge to uphold the fundamental rights in question[142]. Following this decision, in which we first find this approach,

[137] CJEU, Egenberger (Fn. 133), § 76.
[138] On the concept on the basis of this decision *A. C. Ciacchi:* The Direct Horizontal Effect of EU Fundamental Rights. ECJ 17 April 2018, Case-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. and ECJ 11 September 2018, Case-68/17, IR v JQ, in: European Constitutional Review 15 (2019), pp. 294-305.
[139] ECtHR, No. 69498/01 – *Pla and Puncernau v. Andorra,* §§ 43 et seq., *R. S. Kay:* The European Convention on Human Rights and the Control of Private Law, in: European Human Rights Review 5 (2006), pp. 446-460 (456-457).
[140] Sill unparalleled in his precision *H: Dreier,* in: ibid. (Ed.), Grundgesetz-Kommentar, 3rd Ed., Tübingen 2013, Vorbemerkung vor Artikel 1 GG, §§ 98-100, placing the case-law of the ECtHR in this context *G. Phillipson/A. Williams:* Horizontal Effect and Constitutional Constraint, in: The Modern Law Review 2011, pp. 878-910 (882).
[141] Ibid.
[142] Ibid.

the CJEU has further developed the horizontal applicability of Charter provisions and consolidated its case-law[143].

In an even more recent decision on processing of data in the electronic communications sector, the Court had to *inter alia* address issues of fundamental rights with regard to the confidentiality of communications and the storage of data[144].

On the interpretation of the scope of Article 7 of the Charter, the CJEU holds that:

> *"Thus as regards, in particular, effective action to combat criminal offences committed against, inter alia, minors and other vulnerable persons, it should be borne in mind that positive obligations of the public authorities may result from Article 7 of the Charter, requiring them to adopt legal measures to protect private and family life. Such obligations may also arise from Article 7, concerning the protection of an individual's home and communications, and Articles 3 and 4, as regards the protection of an individual's physical and mental integrity and the prohibition of torture and inhuman and degrading treatment."*[145]

Here, the CJEU adopts expressly the doctrine of positive obligations while not offering a reasoning at all. Yet, interestingly, also the CJEU bases its development of positive obligations on the right to family and private life parallel to what we have seen as a starting point in the vast case law of the ECtHR (supra B.I.).

3. Interim conclusion

While the CJEU in general accepts the idea of positive obligations in regard to the fundamental freedoms of the TFEU, the idea has not been far developed in the context of the Charter. While we see some examples of a potential positive dimension, the CJEU has not gone very far in its interpretation and development of the Charter in this regard. Even though it seems to have

[143] CJEU, Judgment of 6 November 2018, C-569/16 and C-570/16 – *Bauer;* CJEU, Judgment of 6 November 2018, C-684/16 – *Max-Planck-Gesellschaft;* from legal scholarship *R. Krause,* Horizontal Effect of the Charter of Fundamental Rights, in: Common Market Law Review 58 (2021), pp. 1173 et seq.
[144] For the facts of the case see CJEU, Judgment of 20 September 2022 – *Data retention,* §§ 22-39.
[145] CJEU, Judgment of 20 September 2022 – *Data retention,* § 64.

accepted the idea of horizontal applicability of fundamental rights, which can be understood to be a dimension of positive obligations, as well as a more express understanding of positive obligations in very recent case-law, it is thus far unclear how far reaching this concept really is[146].

We thus find some similarities in the current point of development of positive obligations under the Charter and the ECHR: The figure of positive obligations is employed and in both the scope of it is rather unclear. More dominant are the differences in development: The ECtHR is looking back at a long history of employing positive obligations in its jurisprudence and the reasoning and boundaries are somewhat defined, even if recent developments call these established practices into question. The CJEU has on the other hand only recently started to refer to this doctrine in regard to fundamental rights, leaving a lot of questions in regard to the width of employment unanswered.

II. The Charter as modern fundamental rights protection mechanism: A different starting point

A preliminary challenge to be assessed in this case in the view of the author of this paper is the theoretical conception of the Charter of Fundamental Rights as compared to the ECHR. This has to this date and to the current knowledge of the author not yet been discussed in regard to positive obligations of fundamental rights in the EU-system. The Charter was drafted during the course of the 1990s and first proclaimed on 18 December 2000. After the failing of the European constitutional project, it was adopted as a legally binding source of EU primary law in 2009[147]. Today, it is often described as the most modern fundamental rights document of the world[148]. And precisely that might be an issue here. The ECtHR was developed in the aftermath of the Second World War, more than 50 years earlier than the Charter[149]. It was developed as an instrument to alarm the other Contracting States to systematic violations of human rights within a state as to warn before states slide away from liberal democracies towards fascism –

[146] *Krieger,* Kap. 6 (Fn. 10), para. 92.
[147] Cf. Article 6(1) of the TEU; for a historical account of the entire adaption process see *T. Lock* in: M. Kellerbauer/M. Klamert/J. Tomkin (Ed.), The EU Treaties and the Charter of Fundamental Rights, Oxford 2019, Article 6, §§ 3 et seq.
[148] E.g. *F. Fabbrini:* Human Rights in the EU. Historical, Comparative and Critical Perspectives, in: Il Diritto Dell'Unione Europea 2017, p. 76.
[149] Cf. for a general of the ECHR *Schabas, ECHR (Fn. 25),* pp. 3 et seq.

just as happened a mere 20 years prior in countries such as Germany[150]. Only over time it developed to form an instrument of *individual justice* and the ECtHR to be an arbiter of detailed fundamental rights questions[151]. On the basis of a human rights document that was clearly underlined by a classic liberal understanding of Human Rights as protective rights against the state[152], it had to deal with the more and more complex situation in a world of unhinged capitalism in which oftentimes not the state, but private entities were the violator of fundamental rights protected by the Convention. Here, the ECtHR found itself in legitimate position to extend the rights in the Convention to include positive obligations to provide for an effective protection of human rights in these newly developed circumstances without there being any realistic option for the text to be recast.

On the contrary, the Charter was developed in knowledge of all of these developments and includes rights from all human rights' "generations"[153]. We can find classical liberal rights as the right to life and the right to the integrity of the person in Article 2 and 3 of the Charter, strong protective rights in regard to equality of people in Chapter 3 to provisions in Chapter IV on "Solidarity". In particular in the latter, we can find some provisions that include positive rights: Article 30 provides the worker with a right to protection against unjustified dismissal – obliging the state to offer protection against arbitrary dismissals by employers. We can also find rights to social security, social assistance, and health care in Articles 34 and 35, the latter holding that:

> *"Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities."*

[150] Ibid; detailed account in *E. Bates:* The Evolution of the European Convention on Human Rights. From its inception to the Creation of a Permanent Court of Human Rights, Oxford 2010, in particular pp. 359-390.
[151] Cf. on this with a reference to the numbers of application to the ECtHR *J. Meyer,* in Karpenstein/Meyer, EMRK (Fn. 26), Einleitung § 16.
[152] *R. Grote,* Kapitel 1. Entstehung und Entwicklung der EMRK, in: O. Dörr/R. Grote/T. Marauhn (Ed.), EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz. Band I, 3. Ed., Tübingen 2022, §§ 11, 13.
[153] *Fabbrini,* Human Rights (Fn. 148), p. 76.

Phrasing this on the basis of the ECHR and the case-law of the ECtHR, this could also be understood to be a positive obligation on the basis of the right to life and physical well-being under a wide margin of appreciation.

This is exemplified by the underlying issue: If there are some protections of positive obligations already in the Charter, does this stop the CJEU from interpreting the general provision to include such obligations as well or does this lead to a certain blocking effect under the idea of *lex specialis*?

While these aspects have to be taken into consideration in the interpretation of the more "liberal" provisions of the Charter, the question asked has to be answered negatively on three grounds: The first one is given by a textual reference in the Charter itself. Article 51(1) holds:

> *"The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."*

While the details of how to interpret this provision are rather ominous at this point, it is generally acknowledged that it hints at some dimension of protection of positive obligations, even if it remains unclear how far reaching this provision is[154].

Second, the drafters of the Charter have only included a limited number of specified positive obligations. And while *lex specialis* might then apply in certain circumstances, e.g. to derive a more advanced positive obligation under Article 2 – the right to life – in regard to health care protection as compared to what is stipulated in Article 35, a general blocking effect on a positive dimension on all aspects of all other rights cannot be derived from these special provisions. The third argument derives from the fact that some provisions are verbatim identical with the ECHR and Article 52(3) makes an explicit reference to the protections standard under the case-law of

[154] With analysis focused on „horizontal applicability" and further references *Lock,* in: Kellerbauer/Klamert/Tomkin, The EU Treaties (Fn. 147), Article 51, §§ 20-25.

the ECtHR. The specific relationship will be discussed below (C.IV.). Closely linked in formulation are for example Article 7 of the Charter and Article 8 of the ECHR. The first stipulates:

> *"Everyone has the right to respect for his or her private and family life, home and communications."*

The second:

> *"Everyone has the right to respect for his private and family life, his home and his correspondence"*

The Charter here clearly draws on one of the Articles of the ECHR on which the ECtHR bases the majority of its case-law on positive obligations (supra B.). A *a priori* exclusion of the possibility of positive obligations under the Charter thus does not seem sensible on the ground of its state of textual development.

III. Institutional challenges

As we have seen, there are no grounds to exclude the possibility of deriving positive obligations from the provisions of the Charter. Thus, in a next step of assessing the Charter, it is necessary to evaluate which boundaries are inherent to the EU system of fundamental rights protection.

1. Competence and Article 51 of the Charter: Narrow boundaries or room for development?

The first potential limit to be analyzed in this regard is Article 51 "Scope" of the Charter. It holds:

> *"1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.*

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

It is to be read in conjunction with the general allocation of competences between the Union and its Member States[155]. Employing the principle of conferral, the Union has only the competences that have been referred to it by the Member States[156]. Competences are listed in Article 2 and subsequent of the TFEU[157]. This idea is taking up by Article 51 and sets very clear boundaries for the application of the Charter: It only binds the institutions of the Union (which naturally only act within their competences) and the Member States when implementing Union law. The latter has been a constant subject in academic debate and the jurisprudence of the CJEU with a lot of different approaches being suggested[158]. In the end, this might have an effect on the details of interpreting the Charter but the general result of the effect on Article 51 stays the same: Through the limited scope of the Charter (no matter if very strictly or more loosely limited) there is a clear structural boundary. A development of positive obligations outside of these on the basis of the Charter would be *ultra vires* and could not hold up in the institutional set up of the Union. Within the scope set by Article 51 of the Charter, we do not find a boundary on the development of positive obligations on the basis of the Charter of Fundamental Rights in Article 51.

2. Separation of powers within the Union

Once overcoming the underlying issue of competence outlined above, the remaining issue at hand is once more the separation of powers, here in its more commonly understood meaning in a vertical dimension: In how far can the CJEU as judicial branch within the Union find the other "branches" – meaning the other Union institutions such as the Commission and the Council but also the Member States as responsible for the implementation of EU law – to be under positive obligations deriving from the Charter?[159]

[155] *Lock* in: Kellerbauer/Klamert/Tomkin, The EU Treaties (Fn. 147), Article 51, §§ 1-2; *Jarass,* Charta der Grundrechte der EU, 4th Ed., Munich 2021, Art. 51, §§ 10-14; *A. Hatje,* in: J. Schwarze et al. (Ed.), EU-Kommentar, 4th Ed., Tübingen 2019, Art. 51, §§ 28-30.
[156] *C. Calliess,* in: ibid./M. Ruffert (Ed.), EUV/AEUV. Kommentar, 6. Ed., Munich 2022, Art. 5 EUV, §§ 7 et seq.
[157] For a commentary on the different kind of competences as well the different substantive competences of the EU *Calliess,* in: ibid./Ruffert, EUV/AEUV (Fn. 156), Art. 2 et seq. AEUV.
[158] With a detailed overview of the CJEU jurisprudence on the matter *Beijer:* The Limits (Fn. 3), pp. 150; including concepts in legal scholarship and by the GFCC *Kingreen,* in: Calliess/Ruffert, EUV/AEUV (Fn. 156), Article 51, §§ 8-18.
[159] Asking the same question *Beijer:* The Limits (Fn. 3), pp. 150 et seq.

a) Towards the Union Institutions

The major part of the EU's institutional law is set by the TEU. It establishes the different bodies of the Union and explains their role within the set-up of the Union. Of major importance are the Commission (Article 17 TEU), the Council (Article 16 TEU), the European Council (Article 15 TEU), and the European Parliament (Article 14 TEU)[160].

Contrary to the traditional model of most liberal democracies today, it is not centered around the parliament but around the Commission as the only body that can initiate the legislative proceeding[161]. Council and Parliament are then involved only in the process of setting the new Union law[162]. This is process can then be reviewed by the CJEU as has long been established. While the set-up is thus different from the one within national states, the role of the CJEU in this is comparable. It has the power to review and interpret the laws set by the Union. In regard to a potential development of positive obligations, the CJEU would have to take this general allocation of power within the system into account and – comparable to the approach by the ECtHR – take into account where questions of high political sensibility and social dimension are in play and thus maybe left to answer to the more politically legitimate branches in the EU system, especially involve the European Parliament. As there have not been a lot of conflicts regard to the institutional set up – especially as to the width of the competence of the CJEU – there is not a lot to draw on for the purpose of this analysis[163].

b) Towards the Member States

The separation of powers in a more vertical dimension towards the Member States does not hold a lot of own merit as it is proceduralized in Article 51 of the Charter discussed above (supra C.III.1.). Additionally, the CJEU is bound by the principle of subsidiary (Article 5(1) TEU)[164] and of sincere cooperation (Article 4(3) TEU)[165] which may not set additional boundaries but are to be taken into consideration when interpreting the Charter and its scope.

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[160] Cf. for an overview of EU institutional law *R. Schütze:* An Introduction to European Law, 3. Edition, Oxford 2020, pp. 9-36.
[161] *Lenaerts/ v. Nuffel /Corthaut,* EU (Fn. 127), § 17.014.
[162] *Schütze:* European Law (Fn. 160), pp. 37-50.
[163] As one of the few works on the matter *L. Norman:* The Mechanisms of Institutional Conflict in the European Union, New York (USA) et al. 2017 can be referenced.
[164] With a detailed account *F. Fabbrini:* The Principle of Subsidiarity, in: T. Tridimas/R. Schütze (Ed.), Oxford Principles of EU Law, Oxford 2018, pp. 221-242.
[165] *B. Guastaferro:* Sincere Cooperation and Respect for National Identities, in: Tridimas/Schütze (Fn. 164), pp. 350-382.

c) Interim Conclusion

The principle of separation of powers clearly exists on Union level, both between the Union institutions and the Union and its Member States. On EU-level, this principle must limit the potential development of positive obligations on the basis of the Charter in a comparable way to a national state or the ECtHR. For this it would have to develop dogmatic instruments to limits its own power and safeguard its role and legitimacy within the EU system. The principle of separation of powers towards the Member States does – on the other hand – not provide any new boundaries as compared to the analysis of Article 51 of the Charter above (supra C.III.1.).

IV. Potential influences of the ECHR on the EU-Charter system

The last and probably most challenging legal question to be addressed in the course of this paper is in what regard the ECHR system of fundamental rights protection may influence the development of positive obligations on the basis of the Charter. Here the analysis is to be divided into two parts: An analysis under the existing framework as we find it today (1.) and an analysis after a potential accession of the EU to the ECHR (II.).

1. Current framework

Even though stipulated in the 2009 Treaty framework (Article 6 TEU), the EU has to date not joined the ECHR[166]. Thus, the ECHR enjoys no kind of direct applicability within the EU legal order[167]. Yet, the ECHR and the case-law of the ECtHR have long been and are until today of major importance to the fundamental rights protection within the Union legal order. Before being recognized in the EU treaties in 2009, the CJEU protected fundamental rights through its concept of "general principles of EU law"[168], which it considered to be part of EU primary law, giving a lot of flexibility to the CJEU. Starting with its decision in *Stauder*[169] in 1969, the CJEU has continuously extended its case-law on fundamental rights[170]. Generally speaking, a right

[166] On a pathway to joining the ECHR *C. Krenn:* Autonomy and Effectiveness as Common Concerns: A path to ECHR accession after Opinion 2/13, in: German Law Journal 16 (2015), pp. 147-167.
[167] *D. Ehlers,* § 11. Verhältnis von Unionsrecht und EMRK-Recht, in: R. Schulze/A. Janssen/S. Kadelbach (Ed.), Europarecht. Handbuch für die deutsche Rechtspraxis. 4th Ed., Baden-Baden 2020, § 41.
[168] With an account of this the underlying process *N. Türküler Isiksel:* Fundamental rights in the EU after *Kadi and Al Barakaat,* in: European Law Journal 16 (2010), pp. 557-577 (554 et seq.).
[169] CJEU, Judgment of 12 November 1969, C-29/69 – *Stauder;* with an annotation in the aftermath of the judgment *M. Zuleeg,* Fundamental Rights and the Law of the European Communities, in: Common Market Law Review 8 (1971), pp. 446-461.
[170] *Fabbrini,* Human Rights (Fn. 148), pp. 73-75.

would be accepted by the CJEU if it was rooted in the constitutional tradition common to the Member States [171] as well as international treaties for the protection of human rights to which the Member States are signatories[172]. And of major importance in assessing this question was the ECHR as all Member States are contracting parties to it[173].

Today, the Charter is the relevant framework of fundamental rights protection in the EU. Here, we can also find an explicit reference to the ECHR in Article 52 and 53 of the Charter.

Article 52(3) holds:

> *In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*

Article 53 stipulates:

> *Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and inter- national law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.*

The Charter thus – in pursuit of its aim to offer effective and state-of-the-art fundamental rights protection, incorporates the protection level established through the case-law of the ECtHR. The application and interpretation of these provisions is to date not quite cleared up and has not

[171] E.g. CJEU, Judgment of 14.5.1974, C-4/73 – *Nold*, § 13.
[172] Ibid.
[173] *T. Griegerich,* Kapitel 2. Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten, in: O. Dörr/R. Grote/T. Marauhn (Ed.), EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz. Band I, 3. Ed., Tübingen 2022, para. 28-31.

been invoked towards the incorporation of positive obligation yet might be an interesting way to explore a potential widening of the Charter towards positive obligations[174].

2. Post EU-accession to the ECHR

How the EU legal order looks like after an accession to the ECHR depends heavily on how an agreement between the EU and the Council of Europe might look like. As to the special legal features of the Union and the ruling of the CJEU on the last attempt of the EU to join the ECHR[175], we just know that its accession will be different from one of a regular national state and a lot of special rules will have to be in place to comply with the standards set by the CJEU[176]. While this confining of the influence of the ECHR as well as a limited review power of the ECtHR may of course stop the full might of the ECtHR's approach to positive obligations to also take over within the EU-system, an increased and direct dialogue between the courts might – at least in the author's view – also enhance the idea of positive obligations within the EU legal order.

D. Conclusion

Today, the concept of positive obligations of fundamental rights is an idea deeply rooted in European fundamental rights protection systems. In the European context, it has been instituted early on in the case-law of the ECtHR and been a major part of its interpretation of the Convention ever since. In a lot of past and present cases, this idea helped to give effective protection to individuals petitioning where they had not been able to achieve justice under national law. Today, the ECtHR has expanded its employment of this dogmatic figure in a very broad manner. To safeguard institutional boundaries, it has to find a more consistent way to apply this idea in future and safeguard its own legitimacy in its broad jurisdiction on the matter. The CJEU finds itself in a completely different position. Contrary to the ECtHR, it has been very careful in regard to developing positive obligations within the fundamental rights stipulated in the Charter. To a degree, this might be due to the limit scope of the Charter as well as its inclusion of some positive rights. It remains to be seen how the CJEU will approach this subject in future.

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[174] On this difficult relationship *Lock,* in: Kellerbauer/Klamert/Tomkin, The EU Treaties (Fn. 147), Article 52, §§ 22-28.
[175] CJEU, Opinion 2/13 of 18 December 2014.
[176] *Krenn,* Pathway (Fn. 166), pp. 166-167.

Generally, it can be held that – even though deeply linked – both European fundamental rights protection instruments are in a very different position as to the inclusion of positive obligations in their case law. Also, the challenges met are – due to this different position – very different: The ECtHR has to try to recapture this dogmatic instrument and try to subdue it to a more consistent application to safeguard the general boundaries identified and with it its own legitimacy and effectiveness. The CJEU, on the other hand, has not yet dived deep into the development of positive obligations which might as well be due to the more restrictive boundaries set by the limited competences of the Union as well as the more advanced rights protection already included textually compared to the ECHR.

In conclusion, the overarching thesis of this paper can– for the most part – be verified: In both fundamental rights protection regimes, there is a place for positive obligations, while the starting point and boundaries of their developments are vastly different. However, this thesis has to be modified to include another finding of this paper: The development of positive obligations has to be well reasoned and its boundaries safeguarded by dogmatic tools that the courts have to develop and apply consistently to safeguard this bedrock of modern-day fundamental rights protection.