



Title	Adjudicating Positive Duties: From Constitutional Structure to Rights
Lecturer(s): Contact email address:	Mariam Begadze Begadze.Mariam@phd.ceu.edu
<u>Brief description</u>	<p>The judicial review of law/state action in classic Kelsenian constitutional courts has acquired broad acceptance. In contrast, despite ample empirical evidence both in constitutional and administrative law, the constitutional review of state inaction has remained in the shadows. This stems from a familiarity with negative liberty as opposed to a positive one and is not because of any inherent or insurmountable obstacle to establishing unconstitutional inaction through judicially manageable standards. The course will look at the existing jurisprudence on adjudication of positive state duties from supranational and domestic courts, be they derived on civil and social rights, or other structural issue and will try to identify common lines of reasoning for establishing impermissible state inaction. The jurisprudence cutting across issues such as president's impeachment, judicial independence, civil and social rights provide perspectives on the adjudication of positive duties from different angles. The analytical frameworks observed in this jurisprudence will form a foundation to reflect on the elephant in the room - the Separation of Powers dilemma, namely how far-reaching positive obligations may be, and when are courts too intrusive into political branches' discretion of inaction.</p> <p>Learning outcomes</p> <p>By the end of the course students will be able to analyze:</p> <ul style="list-style-type: none">• Distinctions between negative and positive duties.• Inherent limitations of adjudicating positive duties, especially social rights-related ones and

	<p>judicial techniques of circumventing Separation of Powers objections.</p> <ul style="list-style-type: none"> • Concepts such as constitutional omission, administrative reasonableness review. • Social rights-related concepts such as progressive realization, non-retrogression, minimum core, reasonableness review. • Distinctions and similarities between types of positive duties and their adjudication. • Strengths and limitations of procedural protection. • Distinctions and similarities between proportionality and reasonableness review in the context of positive duties.
<p>Schedule</p>	<p>Class 1. Positive duties among Generations of Rights</p> <p>CoE, The evolution of human rights https://www.coe.int/en/web/compass/the-evolution-of-human-rights [4 pages]</p> <p>Möller, Kai, The Global Model of Constitutional Rights, Oxford Constitutional Theory (Oxford, 2012; online edn, Oxford Academic, 24 Jan. 2013), 29-43.</p> <p>Class 2. Legislative Omission</p> <p>Conference of European Constitutional Courts, Problems of Legislative Omission in Constitutional Jurisprudence, 38-69.</p> <p>LORENZO BRAGADO AND OTHERS v. SPAIN 2023 ECtHR (excerpt)</p> <p>Group I: choose a case from Reading I (from p. 71) and present it. Try to find the full version and/or secondary sources that will help you present arguments of both parties more comprehensively. Upload a 3-page summary 2 days before class (double-spaced).</p>

Class 3. Legislative Omission continued

Economic Freedom Fighters and Others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)

Glenister v President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC)

Class 4: Administrative Review of Inaction

Antonios Kouroutakis, Inaction as a State Response to the Coronavirus Outbreak: Unconstitutionality by Omission 2022 (pp. 94-108).

Daniel W. L. Wang, "From Wednesbury Unreasonableness to Accountability for Reasonableness," The Cambridge Law Journal 76, no. 3 (November 2017): 642–70.

Nzolameso (Appellant) v City of Westminster (Respondent)

Class 5: Procedural Rights

Oddný Mjöll Arnardóttir, The "procedural turn" under the European Convention on Human Rights and presumptions of Convention compliance, 9–35

BAKRADZE v. GEORGIA 2024 EctHR (excerpt)

1st assignment: using the examples in the reading materials and or any other source, discuss the advantages and disadvantages of the procedural focus in human rights adjudication (3 pages double-spaced).

Class 6. Positive Civil and Political Rights

Osman v United Kingdom

Tagayeva and others v Russia

Stoyanova v. Bulgaria

Bevacqua and S. v Bulgaria

Dordevic v Croatia

Group II: present the decision in *Fernandes de Oliveira v Portugal*. Upload a 3-page summary 2 days before class (double-spaced).

Class 7. Positive Civil and Political Rights continued

Hämäläinen v Finland

Hatton and Others v United Kingdom

The European Court of Human Rights and Social Rights – Emerging Trends in Jurisprudence? [19 p.]

Group III: Present the decision in *Fadeyeva v Russia*. Upload a 3-page summary 2 days before class (double-spaced).

Class 8: Socially-oriented Civil Rights

M.S.S. v Belgium and Greece [GC]

Budina v Russia

Lopes de Sousa Fernandes v. Portugal [GC], no. 56080/13 (excerpt).

Summary of health rights cases

<https://ohrh.law.ox.ac.uk/the-european-court-of-human-rights-and-the-emerging-right-to-health/>

Group IV: Present the decision *Verein KlimaSeniorinnen & Others v. Switzerland*. Upload a 3-page summary 2 days before class (double-spaced).

Class 9. International Framework on Social Rights

Saul, Ben, David Kinley, and Jacqueline Mowbray, 'Article 2(1): Progressive Realization of ICESCR Rights', *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials*, 1 (Oxford 2014) – 32 pp.

Group V – Looking at the reading material, relevant General Comments of CESCR(GC 3, GC14, GC 19) and other sources, present the principles of progressive realization and its limits expressed in the concepts of minimum core and non-retrogression. Upload a 3-page summary 2 days before class (double-spaced).

Class 10. Positive Social Rights

Williams LA, 'The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study' (2010) 3 Constitutional Court Review 141 [excerpt]

Case Study: Asylum Seekers Benefits Case

Class 11. Positive Social Rights continued

T-780 Colombian Constitutional Court [excerpt]
Mila Versteeg, "Can Rights Combat Economic Inequality?," Harvard Law Review 133, no. 6 (April 2020): 2017-2061 [14-37]

Case Study: Treatment Action Campaign

Class 12: Proportionality and Reasonableness Review on Positive Duties

Stephen Gardbaum, Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far? 221 – 247 [27 pp.]

Class Discussion and Wrap-up

Final Assignment: choose one positive social rights case (discussed in class or any other) and identify a court decision on positive civil or political rights or structural issues, which use an analogous reasoning for holding state inaction incompatible with the broad standards of the constitution/convention (5-10 pages double-spaced).

Materials/Recommended readings	
Assessment/Exam	<p>There are 2 written assignments (70%) for this course. 1 mini essay (3-5 pages) is assigned 30% and the Final paper (5-10 pages) takes up 40% of the grade.</p> <p>30% of the grade will be formed based on group presentations (+ its summary) and in-class participation.</p> <p>.</p>