



JOURNALISM AT RISK

Threats,
challenges and
perspectives

” Defending
a favourable
environment for
public debate

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

JOURNALISM AT RISK

Threats,
challenges and
perspectives

” Defending
a favourable
environment for
public debate

French edition:
*Le journalisme à l'épreuve – Menaces,
enjeux et perspectives*
ISBN 978-92-871-8150-3

*The opinions expressed in this work
are the responsibility of the authors and
do not necessarily reflect the official policy
of the Council of Europe.*

All rights reserved. No part of this
publication may be translated,
reproduced or transmitted, in any form
or by any means, electronic (CD-Rom,
Internet, etc.) or mechanical, including
photocopying, recording or any
information storage or retrieval system,
without prior permission in writing from
the Directorate of Communication
(F-67075 Strasbourg Cedex or
publishing@coe.int).

Cover design: Documents and
Publications Production Department
(SPDP), Council of Europe
Layout: Jouve, Paris

Council of Europe Publishing
F-67075 Strasbourg Cedex
<http://book.coe.int>

ISBN 978-92-871-8120-6
© Council of Europe, October 2015
Printed at the Council of Europe

Contents

NOTE FROM THE EDITOR	
<i>Onur Andreotti</i>	5
FOREWORD	
<i>Nils Muižnieks</i>	7
POSITIVE OBLIGATIONS CONCERNING FREEDOM OF EXPRESSION: MERE POTENTIAL OR REAL POWER?	
<i>Tarlach McGonagle</i>	9
THE INTERNATIONAL HUMAN RIGHTS PROTECTION OF JOURNALISTS	
<i>Sejal Parmar</i>	37
DOES THE REMEDY JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS DO ENOUGH FOR MEDIA FREEDOM?	
<i>Başak Çali</i>	81
FREEDOM OF JOURNALISTIC NEWS-GATHERING, ACCESS TO INFORMATION AND PROTECTION OF WHISTLE-BLOWERS UNDER ARTICLE 10 ECHR AND THE STANDARDS OF THE COUNCIL OF EUROPE	
<i>Dirk Voorhoof</i>	105
THE SILENCING EFFECT ON DISSENT AND FREEDOM OF EXPRESSION IN TURKEY	
<i>Kerem Altıparmak, Yaman Akdeniz</i>	145
PUBLIC-SERVICE MEDIA IN EUROPE: A QUIET PARADIGM SHIFT?	
<i>Katharine Sarikakis</i>	173
ETHICAL JOURNALISM: AN INSPIRATION FOR RESPONSIBLE COMMUNICATIONS IN EUROPE	
<i>Aidan White</i>	195
JOURNALISM'S DILEMMAS: INTERNET CHALLENGES FOR PROFESSIONAL JOURNALISM AND MEDIA SUSTAINABILITY	
<i>Eugenia Siapera</i>	223
THE INTERNET OR THE SUDDEN EMERGENCE OF THE READER: THE EXPERIENCE OF RUE89	
<i>Pierre Haski</i>	261

Note from the editor

There are concepts in the case law of the European Court of Human Rights which contain an entire universe; concepts that need to be explored, defined, understood, debated.

These concepts, bearers of universal values, find for many their origins in violations of human rights sometimes stemming from tragic events such as the murder of a journalist.

The authors of this book were invited to reflect on the concept of “favourable environment for the participation of all in public debate”,¹ in particular of journalists, and the “pre-eminent role in a State governed by the rule of law”² that the Court acknowledges as belonging to them.

Each author took a closer look at one of the aspects of such an environment and highlighted not only the pressing problems, but also the standards and principles prevailing in the European and even international landscape, as well as the gaps and the potential of the existing protection mechanisms.

They attempted to identify the meaning of “favourable environment” in terms of complex and constantly changing legal, political, economic and socio-cultural realities, especially in the context of technological advances. The diversity of their approaches blends the legal perspective with other approaches around a discussion of journalistic freedom, enriching thereby the exploration of the concept of “favourable environment”.

The said “favourable environment” for public debate is necessary fertile ground for democracy, human rights and the rule of law, the three pillars of the Council of Europe. The thread that connects independent journalism to these three pillars is present in all chapters, regardless of the distinctive approach brought to the debate by each author.

-
1. “States are obliged to put in place an effective system of protection for authors and journalists as part of their broader obligation to create a favourable environment for participation in public debate by everyone and to enable the expression of opinions and ideas without fear, even when they are contrary to those held by the authorities or by a significant section of public opinion and even if they are annoying or shocking for the latter.” (*Dink v. Turkey*, Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, § 137, 14 September 2010).
 2. The Court has repeatedly stressed the pre-eminent role of the press in a democratic state governed by the rule of law (among many others, *Castells v. Spain*, 23 April 1992, § 43, Series A no. 236; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239; *Goodwin v. the United Kingdom*, 27 March 1996, § 39, Reports 1996-I; *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298; *Fatullayev v. Azerbaijan*, no. 40984/07, § 88, 22 April 2010; *Financial Times Ltd and Others v. the United Kingdom*, No. 821/03, § 59, 15 December 2009; and *De Haes and Gijssels v. Belgium*, 24 February 1997, § 37, Reports 1997-I).

At the funeral of the journalist Hrant Dink, Rakel Dink, his wife, turned to thousands of people who were gathered outside the *Agos* newspaper building and said:

Whoever the assassin is ... I know he was once a little child. My brothers, my sisters, nothing will be possible as long as we do not question the darkness that has transformed a small child into a killer.³

This book hopes to shed some light, albeit small, on that threatening darkness.

Onur Andreotti
Co-ordinator

Council of Europe Task Force for Freedom of Expression and Media

3. "Yaşı kaç olursa olsun, 17 veya 27, katil kim olursa olsun, bir zamanlar bebek olduklarını biliyorum. Bir bebekten bir katil yaratan karanlığı sorgulamadan hiçbir şey yapılamaz kardeşlerim." <http://t24.com.tr/haber/aramizdan-ayrilali-8-yil-oldu-hrant-dinki-bu-kez-ailesi-anlatiyor,284263>

Foreword

Nils Muižnieks, Council of Europe Commissioner for Human Rights

In recent years I have observed a progressive deterioration of the conditions in which media professionals work, with a clear acceleration in 2014 when hundreds of journalists, photographers and camera operators were killed, injured, arrested, kidnapped, threatened or sued. The conflict in Ukraine stands out in this context, with six journalists killed while covering the events there. A report by the International Federation of Journalists identifies 2014 as the deadliest year for journalists in Europe in decades.

The rising death toll is the most extreme manifestation of an increasingly difficult working environment for journalists, which also features physical attacks, acts of intimidation, judicial harassment, imprisonment, muzzling legislation, smear campaigns and abuse of financial levers.

Investigations into crimes against journalists often drag on for years. At best they bring to justice the actual perpetrators, but rarely the masterminds. Media freedom is also a victim of political tensions and armed conflicts, with media outlets sometimes forced into becoming propaganda tools or simply shut down. New anti-terrorism legislation under discussion in several European countries risks increasing the vulnerability of the media to undue government control and to pressures on journalists over their sources.

One of the most widespread threats to media freedom that I have encountered is police violence against journalists who try to cover demonstrations. However, courtrooms are also all too often used to muzzle journalists. In the majority of European countries, defamation and libel are still part of criminal law and inadequate media legislation is used to stifle dissent. Throughout Europe, many journalists are still imprisoned because of their journalistic activity. According to the Committee to Protect Journalists, nine journalists were still behind bars in Azerbaijan, seven in Turkey, one in the Russian Federation and one in the “former Yugoslav Republic of Macedonia” as at 1 December 2014.

The trouble does not end here. A more subtle threat comes from powerful holdings or oligarchs that deal a great blow to media diversity and pluralism, as well as editorial independence, by concentrating media ownership. Inadequate legal frameworks and unfair taxes on advertising revenues can also harm media pluralism and be used in a selective way to silence dissenting voices.

In addition to these problems, public service media in Europe have suffered from both debilitating budget cuts and undue political pressure. This is particularly worrying because reduced state support and outright manipulation of public information have serious negative consequences in terms of diversity and quality of content provided to the public.

All evidence points to the urgency of taking action. Two fundamental steps that should be taken are the release of all journalists imprisoned because of views they have expressed and the eradication of impunity by effectively investigating all cases of violence against journalists, including those involving state actors such as law-enforcement officials. Such a move should be reinforced by specific instructions and training for the police on the protection of journalists. In addition, legislation must change: defamation and libel must be fully decriminalised and dealt with through proportionate civil sanctions only. Lastly, more efforts have to be made to preserve media diversity and pluralism. This includes providing adequate public resources to support media outlets, without compromising editorial independence, and enforcing laws and transparency regulations on media ownership.

By defending journalists' safety and preserving a free and diverse press we make democracy stronger.

Chapter 1

Positive obligations concerning freedom of expression: mere potential or real power?

Tarlach McGonagle¹

*Anything can happen. You know how Jupiter
Will mostly wait for clouds to gather head
Before he hurls the lightning? Well, just now
He galloped his thunder-cart and his horses
Across a clear blue sky. It shook the earth ...²*

(Seamus Heaney)

INTRODUCTION

There was no bolt of lightning, no thunder-clap, no King of the Gods present to herald the occasion. Instead, the European Court of Human Rights (the Court) announced in a very inauspicious manner its most far-reaching statement to date of the positive obligations of Council of Europe member states to secure the right to freedom of expression. The Court enunciated that member states are essentially under an obligation to facilitate inclusive and pluralistic public debate. The more detailed and nuanced formulation is tucked away in paragraph 137 of the Court's judgment in *Dink v. Turkey*:

States are obliged to put in place an effective system of protection for authors and journalists as part of their broader obligation to create a favourable environment for participation in

1. Senior Researcher, Institute for Information Law (IViR), Faculty of Law, University of Amsterdam, and Rapporteur, Council of Europe Committee of Experts on the Protection of Journalism and the Safety of Journalists (MSI-JO). While this article has been written in a personal capacity, the author would like to acknowledge with gratitude that the section "The outer ramparts of freedom of expression" has benefitted from exchanges on relevant issues within MSI-JO and on an ongoing basis with Onur Andreotti.
2. Seamus Heaney, "Anything can happen", after Horace, Odes I, 34, in Heaney S. (2004:11).

public debate by everyone and to enable the expression of opinions and ideas without fear, even when they are contrary to those held by the authorities or by a significant section of public opinion and even if they are annoying or shocking for the latter.³

Yet even if the announcement was without fanfare, there is a growing recognition that this statement has tremendous potential and may yet prove seminal.

This chapter will first briefly examine the theoretical and normative bases for the positive obligations doctrine and then trace its hesitant development in the case law of the Court. Next, it will show how the Court slowly became more comfortable with the doctrine and more confident when applying it to cases involving freedom of expression, culminating in its *Dink* judgment. The driving argument of the chapter is that the positive obligations doctrine has enormous potential for strengthening the right to freedom of expression and that the Court must now tease out its implications in concrete cases in a very scrupulous way, if the doctrine's full potential is to be realised.

This argument will be advanced by exploring the various positive obligations that are brought together in para. 137 of the *Dink* judgment. For organisational clarity and convenience, the chosen headings correspond to para. 137's main focuses: a favourable environment for participation in public debate by everyone; the expression of opinions and ideas without fear, and opinions and ideas that offend, shock or disturb.

THEORETICAL AND NORMATIVE BASES

All international human rights treaties share the primary objective of ensuring that the rights enshrined therein are rendered effective in practice. There is also a predominant tendency in international treaty law to guarantee effective remedies to individuals when their human rights have been violated. In order to achieve these objectives, separately and dually, it is not always enough for the state to simply refrain from interfering with individuals' human rights: positive or affirmative action will often be required as well. It is therefore important to acknowledge the concomitance of negative and positive state obligations to safeguard human rights. Although widely accepted nowadays, this viewpoint has encountered considerable resistance in the past. The European Convention on Human Rights (ECHR or the Convention) is a case in point.

It is clear from the drafting history of the ECHR that the priority or primary concern was to identify a list of rights and freedoms that would be protected by the Council of Europe's system of collective enforcement. In turn, the system of collective enforcement would "extend solely to rights and freedoms" which, *inter alia*, "imposed on the States only obligations 'not to do things,' which would thus be susceptible

3. Author's translation of *Dink v. Turkey*, para. 137: "... les Etats sont tenus de créer, tout en établissant un système efficace de protection des auteurs ou journalistes, un environnement favorable à la participation aux débats publics de toutes les personnes concernées, leur permettant d'exprimer sans crainte leurs opinions et idées, même si celles-ci vont à l'encontre de celles défendues par les autorités officielles ou par une partie importante de l'opinion publique, voire même sont irritantes ou choquantes pour ces dernières".

to immediate sanction by a court".⁴ Such obligations of abstention are commonly called negative obligations. Nevertheless, in the text of the Convention that was ultimately adopted, various articles expressly provide for positive state obligations. For instance, Article 6 (right to a fair trial) and Article 13 (right to an effective remedy), both clearly presuppose affirmative action on the part of states, if the rights they guarantee are to be realised in practice.

Besides these explicit positive obligations that are enshrined in the text of the ECHR, the Court has, over the years, identified various positive obligations that are implied by the text. Alastair Mowbray has identified a number of phases in the development of the positive obligations doctrine in the Court's case law.⁵ First, there was the Court's early case law that developed the Convention's explicit positive obligations, followed by a phase from the late 1970s to the early 1990s in which the Court developed various positive obligations under Article 8(1)'s requirement to "respect" family and private life. The 1990s were then characterised by the development of positive obligations under Article 2 (right to life), Article 3 (prohibition of torture) and Article 5 (right to liberty and security). Since then, the Court has been expanding these positive obligations and creating new ones.⁶ This chapter will ultimately posit that the *Dink* judgment could potentially mark the beginning of a new phase in the development of the positive obligations doctrine, at least in respect of the right to freedom of expression.

There are slightly divergent views about when and how the Court started to develop its doctrine of positive obligations. For instance, the current President of the Court, Dean Spielmann, points to the *Belgian Linguistic* case⁷ as the judgment in which the Court "inaugurated" the doctrine,⁸ whereas others tend to take the *Marckx* judgment⁹ as the relevant starting point.¹⁰ Both views are accurate in their own way and can be reconciled by noting that the reference to positive obligations in *Belgian Linguistic* is made in a roundabout way, whereas in *Marckx*, the reference is more direct. In *Belgian Linguistic*, the Court held that "it cannot be concluded that the State has no positive obligation to ensure respect for such a right as protected by" Article 2, Protocol 1, ECHR (right to education).¹¹ The judgment otherwise subscribes to the judicial thinking that typified the times, namely that most of the state obligations under the Convention are "essentially" negative in character.

In *Marckx*, however, referring specifically to the *Belgian Linguistic* case, the Court affirmed that while the object of Article 8 "is 'essentially' that of protecting the individual against arbitrary interference by the public authorities," "[n]evertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in

4. Teitgen P.-H. (1993:10).

5. Mowbray A. (2004:227).

6. Mowbray A. (2004:229).

7. *Belgian Linguistic* case.

8. Spielmann D. (2007:434).

9. *Marckx v. Belgium*.

10. E.g., Dijk P. (van) (1998:18).

11. *Belgian Linguistic* case, p. 27, § 3.

an effective 'respect' for family life".¹² The *Airey* judgment followed swiftly afterwards, providing the Court with the opportunity to further sharpen this formula and to broaden its object by mentioning private life as well as family life.¹³

Whatever the precise historical origins of the doctrine, its normative basis is clear. Article 1 ECHR, obliges States Parties to the Convention to "secure to everyone within their jurisdiction the rights and freedoms" set out in the Convention. The obligation to "secure" these rights is unequivocal and necessarily involves ensuring that the rights in question are not "theoretical or illusory", but "practical and effective".¹⁴ Against this backdrop and based on an analysis of the Court's relevant case law, it has been observed that "various forms of positive obligations have been imposed upon different governmental bodies in order to secure a realistic guarantee of Convention rights and freedoms".¹⁵ What exactly a "realistic guarantee" entails is best determined on a case-by-case basis, although certain trends can tentatively be identified per Convention article.¹⁶ The examples discussed below have been selected on the basis of their relevance for the positive state obligations set out in para. 137 of the *Dink* judgment.

The Court's espousal of the doctrine was initially cautious. It has repeatedly declined to "develop a general theory of the positive obligations which may flow from the Convention",¹⁷ preferring instead to determine the existence and scope of positive obligations on a case-by-case basis.¹⁸ As the Court's judgments are "essentially declaratory", the Court "leaves to the State the choice of the means to be utilised in its domestic legal system for performance of its obligation under Article 53",¹⁹ assuming, of course, that the circumstances allow for such choice.²⁰ States are in any case obliged to take "reasonable and appropriate measures" to secure the Convention's rights and freedoms.²¹ This often involves "an obligation as to measures to be taken and not as to results to be achieved".²² States enjoy a certain margin of appreciation in this regard. The margin of appreciation can be wide, especially concerning positive obligations, for instance, in the context of Article 8, where "the notion of 'respect' [for family life] is not clear-cut" and "having regard to the diversity of the practices followed and the situations obtaining in the contracting states, the notion's requirements will vary considerably from case to case".²³

12. *Marckx v. Belgium*, § 31.

13. *Airey v. Ireland*. See, in particular, § 32.

14. *Ibid.*, § 24.

15. Mowbray A. (2005:78).

16. See generally: Mowbray A. (2004).

17. *Plattform "Ärzte für das Leben" v. Austria*.

18. *Rees v. the United Kingdom*.

19. *Marckx v. Belgium*, § 58.

20. C.f. (in respect of remedial measures to meet the State's obligations) *Youth Initiative for Human Rights v. Serbia*, § 31. The Court was of the opinion that "the violation found in this case, by its very nature, does not leave any real choice as to the measures required to remedy it".

21. *Plattform "Ärzte für das Leben" v. Austria*, §34.

22. *Ibid.*

23. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*. See also *Rees v. the United Kingdom*, §§ 35-37 and *Plattform "Ärzte für das Leben" v. Austria*, §34.

At present, the criteria applied by the Court in determining whether a state has failed to honour specific positive obligations remain somewhat unclear, although some guidance is given by the following passage:

the boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty on the State or in terms of interference by a public authority which needs to be justified, the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests at stake.²⁴

The Court has held that the legitimate aims of restrictions on, for example, the rights to privacy and freedom of expression (as set out in Articles 8(2) and 10(2)) may be relevant for assessing whether or not states have failed to honour relevant positive obligations.²⁵ The Court has also found that the margin of appreciation is, in principle, the same for Articles 8 and 10, ECHR.²⁶ In all cases involving competing rights guaranteed by the Convention, a fair balance has to be struck between the rights involved, as relevant for the particular circumstances of the case.²⁷

Having set out some general considerations concerning the positive obligations doctrine, it is clear that the development of this doctrine is one of the main reasons why the ECHR can be seen as "part of a building project, not merely a fire-fighting operation".²⁸ Its aim is "the construction of a better rights framework, not just the prevention of the destruction of whatever framework already exists".²⁹ Attention will now turn from general considerations to a specific aspect of the doctrine that has proved contentious in the past: the extent to which states' positive obligations govern the private sphere and relations between private individuals.

Positive state obligations and private actors

The ECHR, like the whole international legal system for the protection of human rights, is built on the linear relationship between individuals (rights-holders) and states (duty-bearers). The recognition that different types of non-state/private actors should also be (explicitly) positioned within the system has come about in a gradual and frictional manner. And even that reluctant recognition has only been achieved through the dynamic interpretation of existing legal norms and the interplay between those norms and policy-making documents.

The questions of whether or how international human rights treaties protect individuals against other private persons do not invite straightforward answers. A leading

24. *VgT Verein gegen Tierfabriken v. Switzerland* (No. 2), §§ 82. See also *Von Hannover v. Germany* (No. 2), §99.

25. *Rees v. the United Kingdom*; *Von Hannover v. Germany* (No. 2).

26. *Von Hannover v. Germany* (No. 2), § 106.

27. For a detailed, critical analysis of the Court's current approach to the application of positive obligations, see: Lavrysen L. (2013).

28. Dickson B. (2010:204).

29. *Ibid.*

textbook on the ECHR captures the conceptual difficulties involved when it cautions against describing such protection (in the context of the ECHR) as *Drittwirkung*, a doctrine under which “an individual may rely upon a national bill of rights to bring a claim against a private person who has violated his rights under that instrument”.³⁰ Such a “horizontal application of law ... can have no application under the Convention at the international level, because the Convention is a treaty that imposes obligations only upon states”.³¹ It further clarifies that “insofar as the Convention touches the conduct of private persons, it does so only indirectly through such positive obligations as it imposes upon a state”.³²

The breakthrough for recognising the indirect horizontal applicability of certain provisions of the ECHR came in the *Young, James and Webster* judgment in 1981. In that case, the Court held that if a violation of one of the rights enshrined in the ECHR “is the result of non-observance of [the State’s] obligation [under Article 1, ECHR] in the enactment of domestic legislation, the responsibility of the State for that violation is engaged”.³³ This remark about the engagement of state responsibility was of general import, but in its subsequent jurisprudence, the Court progressively extended it to other articles of the Convention.

Thus, in its *Airey* judgment, the Court had stated that “although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life”.³⁴ Later, in *X. and Y. v. The Netherlands*, the Court supplemented that statement by admitting that such “obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves”.³⁵ This is an important extension of the principle as articulated in anterior case law; it confirms a degree of horizontal applicability of relevant rights. Yet, the Court “does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals *inter se*”.³⁶

Following this exposition of some of the more general features of the positive obligations doctrine, the next section will home in on the positive obligations that specifically relate to freedom of expression and are implicated in para. 137 of the *Dink* judgment.

30. Harris D. J. et al. (2014:23). For a detailed analysis of *Drittwirkung* in the context of the ECHR, see: Clapham A. (1993). For a comparative analysis of the scope of several national bills of rights for legal action against third parties for human rights violations, see: Oliver D. and Fedtke J. (2007).

31. *Ibid.*

32. *Ibid.*

33. *Young, James and Webster v. the United Kingdom*, § 49.

34. *Airey v. Ireland*, § 32.

35. *X and Y v. the Netherlands*, § 23.

36. *VgT Verein gegen Tierfabriken v. Switzerland (No. 1)*, § 46.

A FAVOURABLE ENVIRONMENT FOR PARTICIPATION IN PUBLIC DEBATE BY EVERYONE

At the very heart of the positive obligation set out in para. 137 of the *Dink* judgment is the obligation on states to create a favourable environment for public debate in which everyone can participate. In other words, states are obliged to create an environment that enables inclusive, pluralistic public debate. The concept of an “enabling environment” for freedom of expression and/or the media, developed in different guises in academic literature and policy-making studies,³⁷ can be very useful for exploring the range of (positive) state obligations envisaged by the Court. An enabling environment for freedom of expression typically involves a favourable legal and policy environment and a political, socio-economic and cultural climate that is also conducive to pluralist democracy and pluralist media. This is because, as Monroe Price and Peter Krug have noted, “there is a close interaction between what might be called the legal-institutional and the socio-cultural, the interaction between law and how it is interpreted and implemented, how it is respected and received”.³⁸

A favourable – or enabling – environment for freedom of expression is a prerequisite for a favourable environment for universal participation in public debate. In order to secure the right to freedom of expression, the safety and security of everyone wishing to exercise the right must first be guaranteed. The safety and security of actors in public debate should therefore be seen as prior (but of themselves insufficient) conditions for inclusive and pluralistic public debate. Numerous (positive) state obligations concern the safety and security of those wishing to participate in public debate. They will be considered now, before turning to the (positive) state obligations that concern public debate more specifically.

The outer ramparts of freedom of expression

As already mentioned, Mowbray’s third phase in the Court’s development of its positive obligations doctrine, in/from the 1990s, concerned the identification and elaboration of various positive obligations under Article 2 (right to life), Article 3 (prohibition of torture) and Article 5 (right to liberty and security).³⁹ These positive obligations comprise substantive and procedural dimensions, as will be seen below.

Under Article 2, the state must guarantee the safety and physical integrity of everyone within its jurisdiction and this entails not only the negative obligation to refrain from the intentional and unlawful taking of life, but also the positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction.⁴⁰ This necessarily includes safeguarding the lives of those wishing to participate in public debate. Although its titular focus is on torture, Article 3 obliges states to ensure that

37. For a comprehensive exploration of the concept, see Krug P. and Price M. E. (2002), and more recently and succinctly, Price M. and Krug P. (2007).

38. Price M. and Krug P. (2007:96).

39. For detailed analysis, see: Mowbray A. (2004), Chapters 2-4. See also in this connection, Leach P. (2013:8-11).

40. *Gongadze v. Ukraine*, § 164.

“no one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Under Article 5, the state has an obligation to guarantee the substantive liberty of everyone within its jurisdiction and to that end must ensure that everyone, including journalists and other participants in public debate, are not subjected to arbitrary arrest, unlawful detention or enforced disappearance. By fulfilling these obligations, the state protects the outer ramparts of freedom of expression and thereby creates and secures the necessary space for public debate.

In its judgment in *Gongadze v. Ukraine*, the Court essentialises the nature of the (positive) obligation on states as regards the protection of the right to life, insisting that:

This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends, in appropriate circumstances, to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose lives are at risk from the criminal acts of another individual.⁴¹

This, however, is subject to a number of qualifications, which the Court routinely repeats in relevant case law:

Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party, and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.⁴²

It is important to recall that states’ positive obligations govern all state authorities and are to be fulfilled by the executive, legislative and judicial branches of governments, as well as all other state authorities, including agencies concerned with maintaining public order and national security, and at all levels – federal, national, regional and local. They can have particular implications for different state bodies and officials when dealing with particular situations. Policing operations, including the policing of public demonstrations, are a useful and interesting example from the perspective of public debate. The Court has found in its *Makaratzis v. Greece* judgment that:

Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that, as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force..., and even against avoidable accident.⁴³

41. Ibid.

42. Ibid., § 165; *Kılıç v. Turkey*, §§ 62-63; *Osman v. the United Kingdom*, § 116.

43. *Makaratzis v. Greece*.