

# Workshop Positive Obligations in the Case Law of the European Court of Human Rights

## Ius Commune Conference 2009

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Thursday, 26 November (14.00 - 18.00)

Location: Faculty of Law, Bouillonstraat 1-3

Room: Feestzaal

### Participants

#### Introduction

The intention of the drafters of the European Convention on Human Rights was to guarantee individuals a certain sphere of freedom against the state. Most human rights provisions in the ECHR and its Protocols were accordingly phrased in a negative way. States are prohibited from arbitrarily and disproportionately interfering with individuals' rights. Thirty years ago, however, the European Court of Human Rights already expressed as its view that in addition to such negative obligations the Convention rights could include positive obligations: in certain well-defined circumstances states must take action. By now the Court has recognised a wide variety of positive obligations flowing from all human rights provisions in the Convention. It is the Court's view that such obligations protect the Convention rights more effectively, but commentators have raised questions such as whether the Court is not exceeding the limits of legitimate treaty interpretation.

This Ius Commune workshop brings together experts of various legal disciplines to discuss a number of the key issues concerning the development of positive obligations by the European Court of Human Rights. The workshop is divided in three sessions which will each deal with one particular field of domestic law (private law, criminal law and administrative law respectively) affected by the Court's case law on positive obligations. As each of the three legal disciplines is confronted with its own specific challenges, the focus will be different in the three sessions.

**Chair:** Prof.Dr. A.W. Heringa (professor of Comparative Constitutional and Administrative Law and dean of the Law Faculty, Maastricht University)

14.00 - 14.05 Prof. Dr. A.W. Heringa  
*Welcome*

**Session 1:** Positive obligations and private law

**Background:** A wide variety of positive obligations under the ECHR is aimed at offering citizens protection against private actors. Just like the state may not engage in, for example, discrimination in entering contractual relations or arbitrary expropriation, others too should be prohibited from doing so. To effectively secure the Convention rights states are therefore obliged to take certain active measures to influence private law relationships. This does not only mean that legislation has to comply with certain substantive requirements. The national civil courts too must, when applying civil law in individual cases, prevent the violation of human rights. Thus the question arises if and to what extent the Court can require states to interfere with the personal autonomy of individuals in order to guarantee to others the effective exercise of their Convention rights.

- 14.05 – 14.25 **Presentation:**  
**Dr. O.O. Cherednychenko** (assistant professor of Private Law, VU University Amsterdam)
- 14.25 – 14.35 **Discussant 1**  
**Prof.Dr. J.M. Smits** (professor of European Private Law and Comparative Law, Tilburg University)
- 14.35 – 14.45 **Discussant 2**  
**Dr. A. Woltjer** (assistant professor of Constitutional Law, Utrecht University)
- 14.45 – 15.15 **General Discussion**
- Session 2: Positive obligations and criminal law**
- Background:** The positive obligations which have an impact on national criminal law are aimed at protecting citizens from state and non-state actors. The Court has, *inter alia*, recognised obligations to put in place criminal law provisions to deter certain forms of behaviour, to create and operate law-enforcement machinery for the prevention, suppression and sanctioning of breaches of those provisions and to investigate reasonable claims of human rights violations. The Court thus requires the state, in certain circumstances, to use criminal law to secure Convention rights. Traditionally, however, the use of criminal law has been considered to be a limitation to individual freedom. In that light it may be argued that the Court should rather encourage the contracting states to use other means than criminal law to offer the appropriate level of human rights protection.
- 15.15 – 15.35 **Presentation:**  
**R.G.C. van de Westelaken LL.M.** (junior researcher, Maastricht University)
- 15.35 – 15.45 **Discussant 1**  
**Prof.Dr. P.H.P.H.M.C. van Kempen** (professor of Criminal Law and Criminal Procedure and professor of Human Rights Law, Radboud University Nijmegen)
- 15.45 – 15.55 **Discussant 2**  
**Prof.Dr. A.H. Klip** (professor of Criminal Law, Criminal Procedure and Transnational Criminal Law, Maastricht University)
- 15:55 – 16.25 **General Discussion**
- 16.25 – 16.40 **Coffee break**
- Session 3: Positive obligations and administrative law**
- Background:** Administrative law too is confronted with the Court's case law on positive obligations. The Court has, for example, accepted the existence of obligations under Articles 2, 3 and 8 in cases involving environmental and health concerns. These include, for example, the obligation to adequately regulate the licensing, setting up, operation, security and supervision of dangerous activities. The Court in this context has the difficult task of balancing the interests of the individual and those of the community, including the economic interest. The Court has adopted an especially cautious approach in recognizing positive obligations concerning socio-economic matters. This raises the question what can be legitimately determined by the Court and what must be left for the national legislator to decide. Should the Convention rights, and especially Article 8, not be given a broader interpretation to imply also the obligation for states to provide individuals in exceptional cases with a minimum level of social support, or would this amount to reading new rights into the Convention?
- 16.40 – 17.00 **Presentation:**  
**Prof.Dr. A.R. Mowbray** (professor of Public Law, Nottingham University)

- 17.00 – 17.10 **Discussant 1**  
**Prof.Dr. M.G.W.M. Peeters** (professor of Environmental Policy and Law, in particular Climate Change Issues, Maastricht University)
- 17.10 – 17.20 **Discussant 2**  
**Dr. J. van der Velde** (assistant professor of Constitutional and Administrative Law, Maastricht University)
- 17.20 – 17.50 **General Discussion**
- 17.50 – 18.00 **Conclusion**