



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

## RESEARCH REPORT

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*Positive obligations on member States  
under Article 10 to protect journalists  
and prevent impunity*

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## GENERAL PRINCIPLES ON POSITIVE OBLIGATIONS

- The Court has held that although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be *positive* obligations inherent in an effect respect of the rights concerned. Genuine, effective exercise of certain freedoms does not depend merely on the State's duty *not* to interfere, but may require positive measures of protection even in the sphere of relations between individuals.
- The Court has found that such obligations may arise under *Article 2* (see, for example, *McCann and Others v. the United Kingdom*, § 161, and *Osman v. the United Kingdom*, §§ 115-117) and *Article 3* (see *Assenov and Others v. Bulgaria*, §102), as well as under *Article 8* (see, amongst others, *Gaskin v. the United Kingdom*, §§ 42-49) and *Article 11* (see *Plattform "Ärzte für das Leben" v. Austria*, § 32).
- How does the Court evaluate whether a positive obligation exists?
  - Regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual.
  - The scope of the obligation will vary, having regard to the diversity of situations in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources.
  - The obligation must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, among other authorities, *Rees v. the United Kingdom*, § 37, and *Osman*, cited above, § 116).

## POSITIVE OBLIGATIONS UNDER ARTICLE 10

- A positive obligation may also arise under Article 10. This is because the Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy and that states must ensure that private individuals can effectively exercise the right of communication between themselves.
- In this sense, Article 10 can be invoked before the Court not only in vertical relations but also in horizontal ones (*Drittwirkung*). A court decision in a conflict between private parties is also considered as a measure of the State (see the recent Grand Chamber judgment of *Palomo Sánchez and Others v. Spain* [GC], § 60).
- The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (see, for example, *mutatis mutandis*, *Observer and Guardian v. the United Kingdom*, § 59, and *Informationsverein Lentia and Others v. Austria*, § 38). Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor.
- In deciding whether a positive obligation under Article 10 exists, regard must be had to the kind of expression rights at stake; their capability to contribute to public debates; the nature and scope of restrictions on expression rights; the ability of alternative venues for

expression; and the weight of countervailing rights of others or the public (see *Appleby and Others v. the United Kingdom*, §§ 42-43 and 47-49).

- The Court has arguably conceded that a positive obligation arises for the State to protect the right to freedom of expression by ensuring a reasonable opportunity to exercise a right of reply and an opportunity to contest a newspaper's refusal suing for a right to reply in courts (see *Melnychuk v. Ukraine* (dec.), no. 28743/03, ECHR 2005-IX).
- Moreover, the Court has stressed that States are required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear (see *Dink v. Turkey*, § 137).
- The concept of positive obligation assumes greater importance in relation to any violence or threats of violence directed by private persons against other private persons, such as the press, exercising free speech (see *Özgür Gündem v. Turkey*, §§ 42-43).

## KEY CASE-LAW ON POSITIVE OBLIGATIONS UNDER ARTICLE 10

### *Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000

The applicant was laid off by the Spanish television company (TVE) because of his criticism of its management, which was made during a radio programme. In response to a government argument that TVE was a legal person, the Court found that by virtue of its positive obligation, it was incumbent on the Spanish government to safeguard freedom of expression from threats stemming from private persons, so that the applicant's lawful dismissal constituted an interference with his freedom of expression.

### *Özgür Gündem v. Turkey*, no. 23144/93, §§ 42-43, ECHR 2000-III

The Turkish State was found to be under a positive obligation under Article 10 to take investigative and protective measures where the pro-PKK newspaper and its journalists and staff had been the victims of a campaign of violence and intimidation. The authorities were aware that *Özgür Gündem*, and persons associated with it, had been subject to a series of violent acts and that the applicants feared that they were being targeted deliberately in efforts to prevent the publication and distribution of the newspaper. However, the vast majority of the petitions and requests for protection submitted by the newspaper or its staff remained unanswered.

### *Appleby and Others v. the United Kingdom*, no. 44306/98, ECHR 2003-VI

The applicants, who were campaigners opposed to an application for planning permission, set up stands at the entrance to a privately owned shopping mall, which was originally built by a public corporation. They were prevented by security guards from collecting signatures. Balancing the rights in issue and having regard to the nature and scope of the restriction in this case, the Court did not find that the respondent State failed in any positive obligation to protect the applicants' freedom of expression. The Court rejected a claim that Article 10 imposed a positive obligation to secure a freedom of forum for the exercise of freedom of expression.

*Dink v. Turkey*, nos. 2668/07 and others, § 137, 14 September 2010

Firat Dink, a Turkish journalist of Armenian origin, was publication director and editor-in-chief of *Agos*, a bilingual Turkish-Armenian weekly newspaper published in Istanbul. Between November 2003 and February 2004 Firat Dink published eight articles in *Agos* in which he expressed his views on the identity of Turkish citizens of Armenian origin.

He was prosecuted following a criminal complaint lodged by an extremist group of individuals and convicted under Article 301 for his opinion on the Armenian issue, that is, for denigrating Turkishness. In the eyes of the public, particularly ultranationalist groups, Firat Dink's prosecution and conviction was evidence that he was an individual who insulted all persons of Turkish origin. As a result of this perception or stigma attached to him he was later murdered by an extreme nationalist.

The Court stressed that States were required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear. In a case like the present one, the State must not just refrain from any interference with the individual's freedom of expression, but was also under a "*positive obligation*" to protect his or her right to freedom of expression against attack, including by private individuals. In view of its findings concerning the authorities' failure to protect Firat Dink against the attack by members of an extreme nationalist group and concerning the guilty verdict handed down in the absence of a "*pressing social need*", the Court concluded that Turkey's "*positive obligations*" with regard to Firat Dink's freedom of expression had not been complied with. There had therefore been a violation of Article 10.

*Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and others, § 60, 12 September 2011

The applicants alleged that their dismissal, based on the content of a newsletter, had infringed their rights under Article 10, and that the real reason for their dismissal had been their trade-union activities, in violation of their right to freedom of assembly and association under Article 11. The principal question was whether Spain was required to guarantee respect for the applicants' freedom of expression by annulling their dismissal. The measure complained of by the applicants, namely their dismissal, was not taken by a State authority but by a private company. Following the publication of the trade-union newsletter of March 2002 and the expressions contained therein, the disciplinary measure of dismissal for serious misconduct was taken against the applicants by their employer and confirmed by the domestic courts. Thus the applicants' dismissal was not the result of direct intervention by the national authorities. The responsibility of the authorities would nevertheless be engaged if the facts complained of stemmed from a failure on their part to secure to the applicants the enjoyment of the right enshrined in Article 10 of the Convention. The Grand Chamber found no violation of Article 10, as in the particular circumstances of the case, the measure of dismissal taken against the applicants was not a manifestly disproportionate or excessive sanction capable of requiring the State to afford redress by annulling it or by replacing it with a more lenient measure.

**RELEVANT CASE-LAW EXTRACTS***Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000

38. A cet égard, la Cour rappelle que l'article 10 s'impose non seulement dans les relations entre employeur et employé lorsque celles-ci obéissent au droit public mais peut également s'appliquer lorsque

ces relations relèvent du droit privé (cf., *mutatis mutandis*, l'arrêt *Schmidt et Dahlström c. Suède* du 6 février 1976, série A n° 21, p. 15, § 33). En outre, dans certains cas, l'Etat a l'obligation positive de protéger le droit à la liberté d'expression contre des atteintes provenant même de personnes privées (cf., *mutatis mutandis*, l'arrêt *Young, James et Webster c. Royaume-Uni* du 13 août 1981, série A n° 44, pp. 22-23, § 55). En conséquence, la Cour estime que la mesure litigieuse constituait une ingérence dans l'exercice de son droit à la liberté d'expression protégé par le paragraphe 1 de l'article 10.

Özgür Gündem v. Turkey, no. 23144/93, §§ 42-43, ECHR 2000-III

42. The Court has long held that, although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned. It has found that such obligations may arise under Article 8 (see, amongst others, the *Gaskin v. the United Kingdom* judgment of 7 July 1989, Series A no. 160, pp. 17-20, §§ 42-49) and Article 11 (see the *Plattform "Ärzte für das Leben" v. Austria* judgment of 21 June 1988, Series A no. 139, p. 12, § 32). Obligations to take steps to undertake effective investigations have also been found to accrue in the context of Article 2 (see, for example, the *McCann and Others v. the United Kingdom* judgment of 27 September 1995, Series A no. 324, p. 49, § 161) and Article 3 (see the *Assenov and Others v. Bulgaria* judgment of 28 October 1998, *Reports 1998-VIII*, p. 3290, § 102), while a positive obligation to take steps to protect life may also exist under Article 2 (see the *Osman v. the United Kingdom* judgment of 28 October 1998, *Reports 1998-VIII*, pp. 3159-61, §§ 115-17).

43. The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals (see, *mutatis mutandis*, the *X and Y v. the Netherlands* judgment of 26 March 1985, Series A no. 91, p. 11, § 23). In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, among other authorities, the *Rees v. the United Kingdom* judgment of 17 October 1986, Series A no. 106, p. 15, § 37, and the *Osman v. the United Kingdom* judgment cited above, pp. 3159-60, § 116).

*Appleby and Others v. the United Kingdom*, no. 44306/98, §§ 42-43 and 47-49, ECHR 2003-VI

42. The nature of the Convention right at stake is an important consideration.

43. The Court notes that the applicants wished to draw the attention of their fellow citizens to their opposition to the plans of the local authority to develop a playing field and thus to deprive their children of green areas to play in. This was a topic of public interest and contributed to debate about the exercise of local government powers. However, while freedom of expression is an important right, it is not unlimited. Nor is it the only Convention right at stake. Regard must also be had to the property rights of the owner of the shopping centre under Article 1 of Protocol No. 1.

44. That provision, notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (government offices and ministries, for instance). Where, however, the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of the Convention rights by regulating property rights. A corporate town where the entire municipality is controlled by a private body might be an example (see *Marsh v. Alabama ...*).

...

48. In the present case, the restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of the Galleries. It did not prevent them from obtaining individual permission from businesses within the Galleries (the manager of a hypermarket granted permission for a stand within his store on one occasion) or from distributing their leaflets on the public access paths into the area. It also remained open to them to campaign in the old town centre and to employ alternative means, such as calling door-to-door or seeking exposure in the local press, radio and television. The applicants did not deny that these other methods were available to them. Their argument, essentially, was that the easiest and most effective method of reaching people was to use the Galleries, as shown by the local authority's own information campaign ... The Court does not consider, however, that the applicants can claim that they were, as a result of the refusal of the private company, Postel, effectively prevented from communicating their views to their fellow citizens. Some 3,200 people submitted letters in support. Whether more would have done so if the stand had remained in the Galleries is speculation which is insufficient to support an argument that the applicants were unable otherwise to exercise their freedom of expression in a meaningful manner.

49. Balancing the rights in issue and having regard to the nature and scope of the restriction in this case, the Court does not find that the respondent State failed in any positive obligation to protect the applicants' freedom of expression.

*Dink v. Turkey*, nos. 2668/07 and others, §§ 106-108 and 137-138, 14 September 2010

106. Par ailleurs, la Cour considère que les griefs des requérants, tels qu'ils ont été formulés, ainsi que les circonstances particulières de l'espèce, font entrer en jeu l'obligation positive de l'Etat dans le cadre de l'article 10 de la Convention. Elle rappelle que l'exercice réel et effectif de la liberté d'expression ne dépend pas simplement du devoir de l'Etat de s'abstenir de toute ingérence, mais peut exiger des mesures positives de protection jusque dans les relations des individus entre eux. En effet, dans certains cas, l'Etat a l'obligation positive de protéger le droit à la liberté d'expression contre des atteintes provenant même de personnes privées (*Özgür Gündem c. Turquie*, n° 23144/93, §§ 42-46, CEDH 2000-III, dans lequel la Cour a déclaré que l'Etat avait une obligation positive de prendre des mesures d'enquête et de protection face à la campagne de violence et d'intimidation dont un journal ainsi que ses journalistes et son personnel avaient été victimes ; et *Fuentes Bobo c. Espagne*, n° 39293/98, § 38, 29 février 2000, concernant l'obligation pour l'Etat de protéger la liberté d'expression dans le cadre professionnel).

107. Quant aux circonstances particulières de l'espèce exerçant un effet sur la qualité de victime de Firat Dink, la Cour observe en premier lieu que les poursuites pénales dirigées contre lui ont pour origine une plainte des membres d'un groupe ultranationaliste qui ont affirmé s'être sentis attaqués dans leur identité de « Turcs » par les propos du requérant. Lorsque le parquet a intenté une action pénale contre Firat Dink, le tribunal correctionnel a permis aux membres de ces groupes de se porter parties intervenantes à cette procédure pénale. En deuxième lieu, la Cour constate, comme le font observer les requérants, que le fait que Firat Dink a été déclaré coupable en vertu de l'article 301 du code pénal l'a présenté aux yeux de l'opinion publique, et notamment vis-à-vis des groupes ultranationalistes, comme un individu insultant toutes les personnes d'origine turque. Enfin, la Cour rappelle que les auteurs présumés du meurtre de Firat Dink appartiennent aux milieux ultranationalistes, pour lesquels le sujet est extrêmement sensible, et que les forces de l'ordre, qui avaient été clairement informées de la préparation de cet acte criminel, n'ont pris aucune mesure de nature à l'empêcher.

108. A la lumière de ces explications, la Cour estime que la confirmation de la culpabilité de Firat Dink par la Cour de cassation, prise isolément ou combinée avec l'absence de mesures protégeant celui-ci contre l'attaque des militants ultranationalistes, a constitué une ingérence dans l'exercice de son droit à la liberté d'expression protégé par le paragraphe 1 de l'article 10.

...

137. En réponse aux griefs des autres requérants selon lesquels le verdict de culpabilité aurait désigné Firat Dink comme une cible pour les groupes ultranationalistes, qui l'ont finalement assassiné, la Cour réitère ses considérations concernant les obligations positives de l'Etat en matière de liberté d'expression (paragraphe 106 ci-dessus). Elle estime aussi que les obligations positives en la matière impliquent, entre



autres, que 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.

138. Dans ce contexte, la Cour réitère ses constats concernant les circonstances particulières de l'affaire exerçant un effet sur la qualité de victime du requérant Firat Dink, tels qu'exposées au paragraphe 107 ci-dessus. Elle estime que, dans ces circonstances, le manquement des forces de l'ordre à leur devoir de protéger la vie de Firat Dink contre l'attaque des membres d'un groupe ultranationaliste (paragraphe 75 ci-dessus), ajouté au verdict de culpabilité prononcé par les juridictions pénales en l'absence de tout besoin social impérieux (paragraphe 136 ci-dessus), a aussi entraîné, de la part du Gouvernement, un manquement à ses obligations positives au regard de la liberté d'expression de ce requérant.

*Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, §§ 58-62, 12 September 2011

58. The Court observes that, under Article 1 of the Convention, the Contracting Parties “shall secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention”. As the Court found in the case of *Marckx v. Belgium* (13 June 1979, § 31, Series A no. 31; see also *Young, James and Webster v. the United Kingdom*, 13 August 1981, § 49, Series A no. 44), in addition to the primarily negative undertaking of a State to abstain from interference in the rights guaranteed by the Convention, “there may be positive obligations inherent” in those rights.

59. This is also the case for freedom of expression, of which the genuine and effective exercise does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. In certain cases the State has a positive obligation to protect the right to freedom of expression, even against interference by private persons (see *Fuentes Bobo*, cited above, § 38; *Özgür Gündem v. Turkey*, no. 23144/93, §§ 42-46, ECHR 2000-III; and *Dink*, cited above, § 106).

60. In the present case, the measure complained of by the applicants, namely their dismissal, was not taken by a State authority but by a private company. Following the publication of the trade-union newsletter of March 2002 and the expressions contained therein, the disciplinary measure of dismissal for serious misconduct was taken against the applicants by their employer (see paragraph 14 above) and confirmed by the domestic courts. The applicants' dismissal was not the result of direct intervention by the national authorities. The responsibility of the authorities would nevertheless be engaged if the facts complained of stemmed from a failure on their part to secure to the applicants the enjoyment of the right enshrined in Article 10 of the Convention (see, *mutatis mutandis*, *Gustafsson [v. Sweden]*, § 45).

61. In those circumstances, the Court finds that it is appropriate to examine the present applications in terms of the positive obligations of the respondent State under Article 10, in the light of Article 11. The Court will therefore ascertain whether, in the present case, the Spanish judicial authorities, in dismissing the applicants' claims, adequately secured their right to freedom of expression in the context of labour relations.

62. Whilst the boundary between the State's positive and negative obligations under the Convention does not lend itself to precise definition, the applicable principles are, nonetheless, similar. In both contexts regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State (see *Iltalehti and Karhuvaara [v. Finland]*, § 42).

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