European Court of Human Rights: Positive obligations in E. and others v. United Kingdom

Bernhard Hofstötter*

European Court of Human Rights—obligations of member states—positive versus negative obligations—child abuse—prohibition of inhuman and degrading treatment in article 3 of the European Convention on Human Rights

In the present case, the European Court of Human Rights was called upon, once again, to decide on the scope and limits of “positive obligations” incumbent on states parties to the European Convention of Human Rights.1 These issues arose in connection with the prohibition of inhuman and degrading treatment (article 3). In the case of E. and others v. United Kingdom,2 the court found the United Kingdom in breach of article 3 because its competent authorities, while aware of acts of child abuse directed against the applicants, did not take action to prevent further abuse from occurring. The discerned “pattern of lack of investigation, communication and co-operation by the relevant authorities” was decisive for the court’s finding.3

* Research fellow and Ph.D. candidate at the University of St. Gallen, Switzerland.


3 Id. ¶ 100.
The applicants, E., H., L., and T., had suffered serious sexual and physical abuse from their mother’s cohabitant, W. H., over a long period of time. Living in harsh social conditions, the family had been under the supervision of the competent social authorities. “An entry on August 1976 noted that the eight children were all happy though overcrowded and that there were no behavioural problems.” On a number of instances thereafter, W. H.’s conduct against the applicants became known to the authorities. E. was found semiconscious at a nearby apartment, having taken an overdose of pills. According to the medical notes, W. H. had hit her, shouted at her, and upset her so much that she ran away with the intent to kill herself. L. also ran away following an incident in which she claimed W. H. had attempted to rape her; she was referred to the social services as an emergency. Criminal proceedings were commenced against W. H. leading to convictions for acts of indecency against E. and L. He was not detained pending sentence and, according to the applicants, returned to live at the applicants’ home. A social inquiry report noted that W. H. did not appear to realize, fully, the serious nature of the charges against him. He was sentenced to two years of probation, with the understanding that he was not permitted to reside at the applicants’ home. However, on visiting the home two or three times unexpectedly the social worker in charge found W. H. “just leaving.” The social worker recorded his suspicion that the mother was still cohabiting with W. H.

In April 1988, T. disclosed to her social worker that she had been subject to sexual abuse involving W. H. in the past. Shortly thereafter, E., L., and T. reported a history of abuse by W. H. to the police. L. stated that their home had been visited frequently by social workers after W. H.’s conviction in 1977. She and the other children had to tell them that W. H. was no longer living with them anymore, while W. H. hid in the house. Petrified of W. H., L. was unable to tell the social worker what was going on at home. According to L., W. H. had sex with her on a couple of occasions after the court case. In 1989, W. H. was again convicted of serious acts of indecency against E., L., and T., but only part of the conviction concerned the period after his 1977 conviction. In the early 1990s, the applicants applied for compensation to the Criminal Injuries Compensation Scheme in respect of the abuse suffered. All of them reported a history of grave sexual and physical abuse from W. H., both before and after his 1977 conviction. E., L., and T. were awarded 25,000 for general damages.

The court had to decide whether “the local authority…was, or ought to have been, aware that the applicants were suffering or at risk of abuse and, if so, whether they took the steps reasonably available to them to protect them from that abuse.” The court’s long-standing case law is unambiguous in requiring the states parties to do more than merely refrain from interfering with the rights enshrined in the Convention. Under some circumstances,
member states must fulfill “positive obligations” in order to prevent wrongdo-
ing by an individual. In this way, the classical function of human rights as a
protective shield against state intrusion is complemented by the state’s role as
a partial guarantor of human rights. This is not an instance of horizontal
effect or *Drittwirkung* where an individual would owe to another individual a
duty to refrain from human rights violations. Rather, the breach is generated
by the fact that the state itself fails to fulfil an obligation under the Convention
by tolerating the occurrence of the prohibited act.\(^6\) This obligation consists of
protecting an individual against interference by another individual, as the
court held, for the first time, in *X and Y v. the Netherlands* with regard to the
right to respect for private and family life (article 8):

> The Court recalls 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. . . . These obligations may involve the adoption of measures
designed to secure respect for private life even in the sphere of the rela-
tions of individuals between themselves.\(^7\)

This expansive reading of the convention is borne out by article 1, according to
which the contracting states “shall secure” to everyone within their jurisdiction
the rights and freedoms of the convention.\(^8\) This article contributes to the full
effectiveness of the rights guaranteed, since for the individuals concerned it
makes little difference whether their rights have been violated by the state or
another private party. Horizontal relationships therefore cannot be placed
outside the convention, “if that law is ever to gain significant effectiveness.”\(^9\)

Despite the recognition, in principle, of “positive obligations,” the court has
been cautious in finding breaches and thereby has paid tribute to the states’
“margin of appreciation.” Its approach is characterized by a concern over
equity in concrete cases, at times to the detriment of predictability and legal
certainty.\(^10\) A scrupulous examination of the relevant facts lies at the heart of
these decisions. The threshold for finding a violation of positive obligations

\(^6\) Theodor Meron, *The Implications of the European Convention on the Development of Public
International Law* 16 (Council of Europe Publishing 2000).


\(^8\) Patricia Eglí, *Drittwirkung von Grundrechten* [The Horizontal Effect of Fundamental Rights]
242–44 (Schulthess 2002).

\(^9\) Meron, supra note 6, at 13.

\(^10\) Cordula Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechts-
konvention* [Positive Obligations of States under the European Convention on Human Rights] 379
(Springer-Verlag 2003).
seems to have been set reasonably high by requiring a pattern of systematic negligence by the relevant authorities.11

In *Osman v. the United Kingdom*,12 the court was confronted with the alleged failure of public authorities to prevent an individual from deliberately killing the applicant’s husband. Holding that the right to life (article 2) may also imply “in certain well defined circumstances a positive obligation on the authorities to take preventive operational measures,”13 the court found no violation of article 2 in that case.14 Nevertheless, it provided an opportunity for the court to articulate further the notion of positive obligations. These obligations must be interpreted in a way that “does not impose an impossible or disproportionate burden on the authorities.”15 Furthermore, “due process and other guarantees which legitimately place restraints” on investigations must be respected.16 Finally, it must be established that the relevant authorities knew or ought to have known of a “real and immediate risk” and “failed to take measures within the scope of their powers” that “might have been expected to avoid that risk.”17

For instance, with regard to the prohibition of inhuman and degrading treatment (article 3), positive obligations were recognized in *A. v. the United Kingdom*.18 In that case, the court held that British law fell short of an effective deterrence against serious breaches of personal integrity, such as heavily beating a child with a cane, which amounted to a violation of article 3. In *Z. and others v. the United Kingdom*,19 the authorities had been aware of serious mistreatment and neglect suffered by four children and failed over four and a half years, despite their statutory duty to protect the children and the means available to them, to take effective steps to bring it to an end. Again the court found a violation of article 3, stressing at the same time the need for balancing the interests involved. It acknowledged that the social services were confronted with “difficult and sensitive decisions,” and the “important countervailing principle of respecting and preserving family life” had to be weighed against the right conferred by article 3.20 This language is reminiscent of Lord

11 Cf. E. judgment, ¶ 100.
12 Osman v. the United Kingdom, 1998-VIII REPORTS OF JUDGMENTS AND DECISIONS 3124 [hereinafter REPORTS].
13 Id. ¶ 115.
14 Id. ¶ 122.
15 Id. ¶ 116.
16 Id.
17 Id.
19 Z. and others v. United Kingdom, 2001-V REPORTS 1.
20 Id. ¶ 74.
Browne-Wilkinson’s leading judgment in the case of X. v. Bedfordshire County Council,21 which deals with the tort law aspects of the Z. and others judgment.22 The official solicitor, acting on behalf of the applicants, had commenced proceedings against the competent local authority claiming damages for negligence and/or breach of statutory duty, which was rejected on appeal by the House of Lords.23 In his judgment, Lord Browne-Wilkinson denied a breach of statutory duty for the purposes of tort law, arguing that “[t]he welfare sector involved is one of peculiar sensitivity, involving very difficult decisions how to strike the balance between protecting the child from immediate feared harm and disrupting the relationship between the child and its parents.”24 For a liability for damages to ensue it would thus require exceptionally clear statutory language showing a parliamentary intention to this extent. As to the tort of negligence, he argued along similar lines: “[s]econd, the task of the local authority and its servants in dealing with children at risk is extraordinarily delicate. Legislation requires the local authority to have regard not only to the physical well-being of the child but also to the advantages of not disrupting the child’s family environment.”25

Lord Browne-Wilkinson found that the local authority did not owe a duty of care to the applicants pursuant to the tort of negligence. Undeniably, the question of positive obligations under the European Convention of Human Rights is an issue of a different order from the notions of “breach of a statutory duty” and “duty of care” under British tort law. And yet, the point made by Lord Browne-Wilkinson is equally relevant in the human rights context. Even though there was no indication of the local authority’s actually considering the principle of respecting and preserving family life in the Z. and others case,26 the court was ready to accept that positive obligations, in the sense of a duty to interfere, were not to be couched in absolute terms. There may be, therefore, instances where the court will have to find—as Lord Browne-Wilson did in the context of tort law—that national authorities did not violate a positive obligation under the Convention, since respect for the integrity of the family has to prevail. The sensitive balance has to be shifted on a case-by-case basis. However, the facts of the present case left no doubt about the failure of the system.

The Inter-American Court of Human Rights, and arguably the United Nations Human Rights Committee, takes a similar stance on the question of states’ obligations beyond their negative duties. As for the latter, the 1981

21 X and Others v. Bedfordshire County Council, [1995] 3 All ER 353 (H.L.) (Eng.).
22 Z. and others judgment, 2001-V REPORTS 1, ¶¶ 119–20.
23 Id. ¶ 42–46.
24 Id. ¶ 45 quoting [1995] 3 All ER at 378.
25 Id. ¶ 46 quoting [1995] All ER at 381.
26 See id.
General Comment 3(13) states that “the obligation under the [International Covenant on Civil and Political Rights\(^\text{27}\)] is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction.”\(^\text{28}\) This interpretation finds support in article 2(1) of the Covenant, which obliges states “to respect and to ensure” the rights protected in it.

The case law of the Inter-American Court of Human Rights is still more straightforward in its recognition of positive obligations, even though the court does not explicitly designate them as such.\(^\text{29}\) In its landmark decision in Velasquez Rodriguez, the Inter-American Court of Human Rights held that “[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”\(^\text{30}\) Article 1(1) of the American Convention on Human Rights readily accommodates this finding by requiring states to “ensure the free and full exercise” of the rights protected in the convention.\(^\text{31}\) In its emphasis on due diligence, the language employed by the Inter-American Court of Human Rights is similar to the law of state responsibility and, in this respect, it differs slightly from the conception of the European Court of Human Rights.

In public international law the recognition of positive obligations on the part of states has had a long history and can be traced back to nineteenth-century judicial pronouncements, such as the Alabama award.\(^\text{32}\) Only recently has the International Law Commission (ILC) adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts\(^\text{33}\) in a second


reading. The ILC’s articulation of article 2 speaks of conduct consisting of an act or an omission that may constitute a wrongful act. In the added commentary, the ILC leaves no doubt that “[c]ases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two.”34 Public international law requires the states to act with due diligence.35 By putting an emphasis on due diligence in Velasquez Rodriguez, the Inter-American Court of Human Rights relied on a well-established and seminal concept in public international law. Even though the European Court of Human Rights does not refer to this concept, its logic underlies the court’s reasoning. In any event, the results yielded by these slightly differing conceptions would appear to be similar.36

In the case at hand, the court found many factors tending to prove the authorities’ omission. W. H. had been charged with a series of sexual offenses indicating a background of chronic bad behavior. The element of physical abuse was disclosed by E. while she was in the hospital. Both E. and L. showed serious levels of distress and disturbance arising from the situation at home. This overall situation had contributed to E. taking an overdose and L. running away. In addition, a social inquiry report prepared by a social worker in 1977 stated that W. H. did not appear to accept the seriousness of the charges against him, nor did the mother of the children. The same report concluded that firm control over the accused was required for a period of time. There was evidence that the mother was still cohabiting with W. H. after his conviction. Moreover, on several occasions W. H. was just leaving the house when a social worker visited unexpectedly. According to an affidavit by the social worker in charge, W. H. was dishonest and likely not to tell the truth when it suited him. Another social inquiry report noted E.’s leaving the house after a scene with W. H.

These elements taken together satisfied the court that “the social services should have been aware that the situation in the family disclosed a history of past sexual and physical abuse from W. H. and that, notwithstanding the probation order, he was continuing to have close contact with the family, including the children.”37 The court went on to declare that the social services should at least have been aware of the potential risk to which the children were exposed. Particularly crucial was the fact that the authorities “were under an obligation to monitor the offender’s conduct in the aftermath of the

34 Id. at 82 (commentary on article 2 of the draft articles).
36 Meron, supra note 6, at 15.
37 E. judgment, ¶ 96.
The general lack of awareness of the issue of child abuse in the 1970s was unsuccessfully pleaded by the defendant, since the relevant authorities had had concrete knowledge about incidences of sexual abuse, which, in addition, had resulted in criminal offenses. The court lists a number of concrete steps at the disposal of the authorities that could and should have been taken in order to discover the exact extent of the problem. It alluded to the failure to investigate the situation at home after E. and L. had been found significantly distressed by it. In addition, the authorities had failed both to investigate fully the possible breach by W. H. of the probation order and to cooperate and exchange information with each other. From this the court concluded that the pattern of the lack of investigation, communication, and cooperation by the relevant authorities was to be regarded as having had a significant influence on the course of events. “Proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least, minimise the risk or the damage suffered.”

The most interesting point about this judgment has to do with causality and, implicitly, the extent of the positive obligations incumbent on the member states. The government of the U.K. had acknowledged shortcomings in its authorities’ handling of the situation in the course of the proceedings. However, it pleaded in its defense that “it had not been shown that matters would have turned out differently” had the relevant authorities cooperated better and monitored the situation more fully. In other words, the U.K. disputed the causal relation between the acknowledged omission and the abuse. This was a new defense in a case on positive obligations, with the inherent potential of undermining the very notion of positive obligations. Should the applicant be required to establish that but for the failure to act on the part of the authorities the ill-treatment would not have happened? Should the required standard of proof be so stringent as to require the applicant to prove that the authorities’ omission was a *conditio sine qua non* for the abuse? Unsurprisingly, the Court did not endorse the U.K.’s argument as a valid defense. In the Court’s words, “[a] failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.”

This is a commendable outcome, since accepting the “causation” defense would have detracted from the effectiveness of human rights protection and would have created a disincentive for national authorities to act at all. In so
holding, the court also takes an implicit position on the extent of the positive obligations incumbent on the member states. The latter are not under an obligation to guarantee a certain result, such as the freedom from inhuman and degrading treatment in the case at hand. By contrast, the states only have to take “reasonably available measures” with “a real prospect of altering the outcome.” This formula further increases the specificity of the test applied in Osman v. United Kingdom, where the court spoke of measures that might have been expected to avoid that risk. Having discharged this obligation without, in fact, having altered or mitigated the harm will not make states responsible, since they have not violated their obligation de moyens. Again the parallel with the law of state responsibility is readily apparent, where states are not held responsible beyond due diligence.

Finally, it should also be noted that the Supreme Court of the United States takes a wholly different approach, one predicated on the state-action doctrine. This is illustrated by DeShaney v. Winnebago County Department of Social Services. The petitioner, having been abused by his father and later beaten so severely that he had suffered permanent brain damage, alleged a violation of his rights under the substantive component of the Fourteenth Amendment’s due process clause. In spite of several complaints regarding the abuse filed with the respondent, the latter had failed to remove the petitioner from his father’s custody. The Supreme Court held that unlike in cases of “special relationships” between the state and an individual, such as imprisonment or institutionalization, “the Clause imposes no duty on the State to provide members of the general public with adequate protective services.” It further pointed out that the language of the due process clause “cannot fairly be read to impose an affirmative obligation on the State.” In cases of horizontal relationships, without any form of state involvement, the level of protection guaranteed by the U.S. judiciary thus lags behind the standards of regional regimes for the protection of human rights.

The present judgment by the European Court has to be commended for further dwelling on the notion of positive obligations in the European system of human rights protection. To rule otherwise would fit uneasily with an enlightened notion of the state, in a European context, if its authorities were entitled to passivity while having, or being under an obligation to have, knowledge of grave acts of child abuse, paired with relevant powers of rectification at their disposal. On the other hand, the concept of positive obligations has its limits and needs to be applied with caution. Nobody would approve of a state’s

45 Id.
48 U.S. CONST. amend. XIV.
49 DeShaney, 489 U.S. at 190.
50 Id. at 190.
intruding into private homes at will. The core function of human rights as a
shield against state interference has to be kept in mind, and this is where the
balancing exercise, referred to in the Osman51 and the Z. and others
judgments,52 must come in. States are not omniscient and certainly should not
be. However, there are instances where state authorities are under a duty to
know and to make use of their powers. The message of cases such as the E.
judgment is clear: it is a call for vigilance addressed to the competent national
authorities. The latter are required to take action and to communicate
effectively with other authorities once they have been confronted with facts
necessitating action.

The case at hand strikes a good balance. In the exercise of their statutory
functions, the authorities had gained selective insights into a history of abuse;
however, a pattern of failing to investigate fully and of not communicating and
cooperating with the relevant authorities stood in the way of uncovering the
exact extent of the problem. The result was a failure to take the remedial
measures available to them. The jurisprudence of the Court on positive obliga-
tions offers a justiciable test for assessing the states’ performance in making
human rights a living truth for those most vulnerable in our societies. The
latter goal can only be achieved by means of a holistic understanding of the
protection of human rights that goes beyond mere shielding the individual
from state interference.

51 Osman, V-III REPORTS 3124, ¶ 116.
52 Z. and others judgment, 2001-V REPORTS 1, ¶ 74.

Japan: The Supreme Court and the separation of church and state
Shigenori Matsui*

Japanese Constitution—separation of church and state—the constitutionality of
attending Daijosai by public officials

1. Introduction

Even though the Japanese Constitution mandates the separation of church
and state, the Japanese Supreme Court has taken a generous attitude toward
governmental involvement with Shinto. In two recent decisions concerning
the attendance by the municipal governors at Daijosai, the special Shinto