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## Christina M. Cerna on the Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights by Alastair Mowbray. Oxford: Hart Publishing, 2004. 239pp.

Christina M. Cerna  
*Inter-American Commission on Human Rights*

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**Abstract**

A review of:

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**Keywords**

Universal Declaration of Human Rights, Civil rights, Political rights

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**The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights by Alastair Mowbray. Oxford: Hart Publishing, 2004. 239pp.**

Since the decision to split the Universal Declaration of Human Rights (UDHR) into two Covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), there has been continued debate on the nature and extent of the rights in these documents. Philosophically, one objection to the full recognition of the rights contained in the ICESCR may stem from the supposed difference between so-called negative and positive rights. Alastair Mowbray's book on the work of the European Court of Human Rights (ECHR) makes a significant contribution to vitiating this argument by carefully analyzing the jurisprudence of the Court regarding the positive obligations of states with respect to civil and political rights.

The classic dichotomy between positive and negative rights suggests that those which are civil and political require few economic resources for implementation while the obligations inherent in the implementation of those which are economic and social require money and affirmative acts. In another sense, negative rights require less rather than more government (state prohibitions on torture arbitrary imprisonment, etc.) while positive rights require extensive state outlays (the right to education and to health requires the state to build and staff schools and hospitals). Mowbray's superb study exposes the artificiality of this dichotomy by tracing the "positive obligations" developed by the case law of the Strasbourg-based European Court of Human Rights over the past thirty years, especially as these rights are codified in the European Convention on Human Rights.

The Strasbourg Court interprets the European Convention as creating affirmative actions that states must implement in order to comply with obligations created by civil and political rights. Most chapters of the book focus on an individual right and the positive obligations that the Court has read into it: Article 2, right to life; article 3, prohibition of torture; article 5 right to liberty and security; article 6, right to a fair trial; article 8, right to respect for private and family life; article 13, right to an effective remedy; and, considered together, articles 9, 10, 11 and 14 (freedom of thought, conscience, and religion; freedom of expression; freedom of assembly and association; and the prohibition of discrimination).

With respect to criminal trials, the Court found that a failure to conduct an effective investigation is considered either a violation of the substantive rights set forth in either article 2 or article 13 (both dealing with "the right to an effective remedy"). This observation is a consistent theme throughout several chapters of the book. Regarding the right to life for example, Mowbray finds that the Court established positive state obligations such as the duty to conduct an effective investigation into killing and to provide protection to persons at immediate risk of death by state agents or even private individual groups. Moreover, the Court has also determined that a violation of the right to life cannot be remedied exclusively by the payment of an award of damages-article 13 requires that an "effective remedy" also entail the prosecution and punishment of those responsible. The evolution of the Court's jurisprudence in this area, moving from the static conventional requirement of providing "just satisfaction" (i.e. money) to the victim to ordering compensation *plus* an effective investigation-prosecution and punishment-reveals the influence of the groundbreaking jurisprudence of the inter-American system on the European Court in the field of remedies. Given the nature of the human rights violations the

inter-American system was required to deal with -disappearances, torture, extrajudicial executions-, as compared with the due process violations that dominate the European system, the payment of compensation without accountability on the part of those responsible for the violations, was not considered sufficient to repair the victim for the damages suffered (the Inter-American Court of Human Rights has developed an extensive jurisprudence in the area of reparations and was innovative in requiring the respondent State, from its earliest jurisprudence, to investigate, prosecute and punish those responsible for violations of the American Convention on Human Rights. *See*, [www.corteidh.or.cr](http://www.corteidh.or.cr)).

As noted above, not all of Mowbray's attention is absorbed with Court decisions regarding due process and fair trial guarantees. In an extensive chapter on the right to private and family life (article 8), Mowbray reviews Court decisions recognizing the existence of positive obligations in a variety of circumstances, from official recognition of the new name and gender of post operative transsexuals to the facilitation of the needs of the lifestyles of the disabled or seriously ill. As regards family life, the Court has issued decisions requiring that states facilitate the separation of married couples when the marriage has broken down. The contours of this right are highlighted by Mowbray's observation that the Court has been unwilling to create such a right where it was excluded by national law or to impose a positive obligation upon states to enable couples to obtain a divorce in a state where divorce did not exist.

By demonstrating the positive obligations associated with so-called negative rights, this study implicitly critiques the failure of certain states to ratify (or recognize) the ICESCR. Mowbray forcefully argues that just like economic, social, and cultural rights, the civil and political rights contained in the ECHR, impose positive obligations on the ratifying State. The larger point is that the existence of positive obligations cannot be seen as a barrier to the implementation of any right. Overall, this book is a useful reference guide for litigators seeking to understand how far the European Court has gone in creating positive obligations connected to specific rights set forth in the Convention. Perhaps most importantly, Mowbray's masterful description of the European Court's jurisprudence provides a nuanced argument of when the Court could or should have gone further, gently prodding the litigator to further explore these possibilities.

*Christina M. Cerna, Inter-American Commission on Human Rights  
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