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The development of the right to privacy under the ECHR

A study on the effects of Article 8 on third parties

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# Abbreviations

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<tr>
<th>Abbreviation</th>
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<tr>
<td>CoE</td>
<td>Council of Europe</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>ETS</td>
<td>European Treaty Series</td>
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<td>GC</td>
<td>Grand Chamber</td>
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<td>HRA</td>
<td>Human Rights Act</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>ILJ</td>
<td>International Law Journal</td>
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<td>Q.B</td>
<td>Queen’s Bench</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UKEAT</td>
<td>United Kingdom Employment Appeal Tribunal</td>
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<td>UKHL</td>
<td>United Kingdom House of Lords</td>
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<td>UN</td>
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<td>UNTS</td>
<td>United Nations Treaty Series</td>
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1 Introduction

1.1 Background

When our private e-mails are exposed to strangers, we may be reduced, in the public eye, to nothing more than the most vulgar joke we once told. When our privacy is violated, we run the risk of being judged out of context in a world in which information can easily be confused with knowledge. Privacy has, however, been described as ‘a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings,’ to be useful as a concept.¹ Some of the rights which the right to privacy encompasses are the protection of personal information, physical and moral integrity, and the personal image. The large number of different situations protected under the right to privacy makes it broad and vague. Because of its vagueness, privacy is difficult to define and stands out from other human rights. The lack of a clear definition of privacy has been a subject of study for many legal theorists. It has been stated that ‘few values so fundamental to society as privacy have been left so undefined in social theory.’² With no clear definition, the essence and scope of the right to privacy are left unclear.

The right to privacy has developed as a universal human right. The right to privacy is found in several human rights treaties, including the United Nations Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights (ECHR). In the ECHR, the provision for privacy is found in Article 8. During the last decades, the right to privacy has become more important. Technological developments have led to increasing violations by companies and other individuals. Typical interferences with individuals’ privacy occur when the press acts intrusively, when protests take place outside politicians’ homes or when companies monitor their employees’ use of social media. Many domestic constitutions lack provisions for privacy and some states also lack a legal framework for protecting individuals’ privacy in these cases. Individuals may, therefore, have to rely on the ECHR.

The ECHR does not recognise the concept of *horizontal or third-party applicability* (*drittwirkung*), i.e. the possibility of an individual to bring a claim against another individual directly based on the Convention.³ The ECHR is not binding for individuals, which makes it difficult to use the Convention rights where individuals are responsible for the interference. The Convention does, however, require states to protect individuals against other individuals. Within this relationship, the state is viewed as the primary party responsible for upholding the Convention rights and those individuals who are indirectly held responsible for interferences are regarded as third parties. In the context of the Strasbourg Court and the Convention of Human Rights, a government can be held responsible for failing to prevent, through judicial or law enforcement methods, the violation of a person’s right to privacy by another person or private, non-state actor.⁴ Hence, it may be possible that the ECHR has an indirect effect on third parties (*indirect drittwirkung*).

### 1.2 Purpose and delimitations

The difficulty in formulating what privacy is and why it is important has led to an insufficient regulation and an unmanageable scope. New ways in which privacy is violated have come to light and been recognised by the European Court of Human Rights (ECtHR), and an important aspect of this paper is how the ECHR creates effective privacy protection even when the ground is shifting. The threat against individuals’ privacy comes more and more from private actors and not only from the state. Yet the state is responsible for the protection of privacy and has an obligation to prevent violations of the Convention rights committed by individuals. The provision for privacy in the ECHR may provide an important remedy for individuals whose privacy have been violated, but the Convention is limited in how it may exercise authority over the member states regulations.

The problems touch upon the fundamental question of identifying the content of a Convention right, in this case the right to privacy, and the role of the state to ensure full protection. The purpose of the thesis is, therefore, to clarify what effect Article 8 has

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had for the protection of the right to privacy, especially concerning violations committed by individuals. The study focuses on the relatively neglected area of relations between non-state bodies. The question for this study is how the right to privacy under the ECHR has developed in line with the concept of *indirect drittwirkung* and whether Article 8 has had a visible impact for the protection of individuals’ privacy against other individuals. This involves defining the meaning and scope of the right to privacy and the important and yet complex area of positive obligations of the state to ensure the observance of human rights in the sphere of private relations. Altogether this will lead to a conclusion on what effect Article 8 has in horizontal relations.

Although the right to privacy within Article 8 covers further topics as family rights, the home, and correspondence, these rights are not covered in this analysis. Family life, for instance, has been thoroughly discussed in the literature and therefore this thesis is limited to the notion of private life. Violations of private life can be the work of individuals as well as the state. As the constitutions of the member states of the ECHR do not all protect privacy explicitly, and not even to the same degree, it is of particular interest to see how the Court has coped both with defining and applying such a right. Even though the Court might decide more cases concerning state interferences, the focus here is on the states’ obligations to prevent individuals from violating the right to privacy.

### 1.3 Method and materials

For the aims of this thesis, I have primarily used a legal-dogmatic research method with some elements of comparative and legal analysis to establish the content of the legal rule in Article 8 concerning privacy.\(^5\) In so doing, I have analysed what effect this has on the states’ obligations to offer legal protection. By using this approach, I will be able to discuss the implications of the case-law and create a better understanding of how the Convention law has impacted the member states. The method thus has two parts: describing the legal ground for the protection of privacy and analysing the development of the right to privacy with regard to third parties. In order to analyse the application of the right to privacy between individuals, I have considered the Court’s interpretative

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methods (see section 4.1) and the principles which might be used to limit the Convention’s effect (see chapter 6). The interpretative principles and methods shape the development of the Convention rights and are therefore important to this thesis.

There is a lack of research on the particular topic of the Convention’s effect on third-party relations. The law on this issue is examined by a thorough analysis of case-law, the preparatory works, and doctrine. Cases from the ECtHR is of especial importance. The Court’s judgments are binding for the member states and determine the scope of the Convention rights. It was a challenge to find relevant cases, but the cases which are discussed are chosen on the basis of their importance for the development of the protection of privacy, either as they have widened the scope of Article 8 or clarified the states’ obligations. In addition to cases from the ECtHR, I have read and analysed the preparatory works to the UDHR, ICCPR, and the ECHR. These are used to show how the regional protection in Europe was influenced by the work at the global level. I have also read some cases from the Human Rights Committee (HRC) which illustrate the subsequent case-law to what was intended in the preparatory works.

In order to explain what the right to privacy seeks to protect, different theories and concepts have been used to clarify the definition and meaning of privacy. For this purpose, I have also used early cases from the US Supreme Court which show how privacy was viewed before it was adopted in any international treaty. The study of the Convention’s horizontal effect includes questions of both constitutional law and international law. At the national level, the effect of the Convention rights depends on the country concerned. The purpose of this thesis is, however, not to discuss the constitutional legal orders of the states, but to discuss the issue as it arises before the European Court of Human Rights. The comparative research has been limited to a few cases from the UK, Belgium and France. These countries represent different legal systems and have incorporated the Convention differently. The comparison is therefore illustrative on how the case-law at the Court has influenced the protection for privacy at the national level.

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1.4 Structure
Chapter 2 contains a general introduction to the protection of the right to privacy. This chapter will describe some of the early theories of privacy rights and the codification of the right to privacy. The conventions are discussed in chronological order in order to show how the right to privacy was drafted and why it came to be constructed in such general terms. In chapter 3, the meaning of the right to privacy is analysed. The chapter contains an overview of why the protection of privacy matters and what the concepts underlying the notion of privacy is. The chapter also contains a discussion on how the European Court of Human Rights and the Human rights Committee have defined the right to privacy. This will explain that the right to privacy also covers interferences made by individuals.

In chapter 4, privacy as a human right is further explored in a thorough analysis of the Strasbourg court’s view of privacy in a summary of cases. The chapter includes a discussion on what constitutes an interference with privacy when the state itself is responsible for the violation. Most importantly though is the development of cases where the Court has found a violation when a private actor is responsible for the act.

In the final chapters, the thesis shifts focus to the convention states’ duty to protect individuals’ privacy. Chapter 5 discusses the obligations imposed on the states by the right to privacy. The purpose of this chapter is to discuss the specific aspects of state obligations and what states are required to do, including the obligation to strike a fair balance, legislative requirements, the obligations of the state authorities to take adequate measures, and procedural safeguards. There are limits, however, to the protection of privacy. That is why, in chapter 6, the discussion focuses on the legislative problems in using the Convention to protect the right to privacy. Finally, in chapter 7 the results of this study are summarized with some concluding reflections on the scope of the right to privacy.

1.5 Terminology
This paper makes a distinction between ‘the right to privacy’, ‘privacy’, and ‘private life’. These terms have been defined differently in the ECHR and the ICCPR. ‘The right to privacy’ is used as an umbrella term for all the components covered as private life within Article 8 ECHR. It is often used when describing the general human right, the
integral guarantee protecting privacy. In general, I will refer to privacy as a human right as ‘the right to privacy’. ‘Privacy’ may be used as a single component of the right to privacy or as a term for the general human right. A violation of the right to privacy is in the ICCPR worded as a violation of individuals’ ‘privacy’ and in the ECHR as a violation of one’s ‘private life’. As far as can be observed the ECtHR mostly uses the term ‘private life’ which is why this term will be used when referring specifically to the provision in Article 8. The general human right of privacy consists of several different sub-groups. For instance, it encompasses the right to personal autonomy and the right to be let alone. These categories are all covered by Article 8 of the ECHR and will be referred to as components or concepts in order to distinguish them from the general right.

Article 1 ECHR provides that the states are obliged to ‘secure to everyone within their jurisdiction the rights and freedoms’ in section I of the Convention. Some general notes can be made at this point which is helpful for the reading of the following chapters. Firstly, the word ‘secure’ implies that the Convention imposes obligations on the states. The ECtHR may require legislative changes to bring the domestic law into line with the requirements of the Convention, but also that states must take into account judgments affecting other states. The implications of this are not clear as states may have a similar but not identical law or practice. Secondly, the ‘state’ includes all public authorities, including legislative, administrative and judiciary authorities. Thirdly, following Article 1 and 34 individuals cannot complain that other individuals have breached their Convention rights. The states positive obligations require however that individuals should be protected against others who may threaten their rights and failure to act in such circumstances means that the state has breached the Convention by omission. Fourthly, the words ‘to everyone’ means that the Convention makes no distinction between the citizens and aliens.\(^7\)

2 How the right to privacy became a human right

2.1 Early theories and the status of the right to privacy

The right to privacy as a general guarantee for privacy is a relatively recent concept. For example, the American Constitution did not provide a textual basis for privacy as it is protected today. The Fourth Amendment only protected ‘The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure …’. Although the home was regarded as being a haven from the government, it still was not a place of solitude or individual self-development. An influential article was written in 1890 which set out a more meaningful protection of people’s privacy. The authors of the article, Warren and Brandeis, noted the threats against privacy posed by new technological developments such as instantaneous photographs and focused on how the common law could develop to protect privacy interests. They recognised that individuals’ privacy needed protection against not only state interferences but also against the threats posed by for example newspapers.

At the time, privacy had never been treated as an independent legal right. The nature of the political community was viewed as a collection of citizens and not as private individuals. A general right to privacy, without being attached to a more specific natural or legal right, was regarded as damaging to that sense of citizenship. Words as ‘immorality’ and ‘foolishness’ were used to justify forbidding conduct now considered private. While balancing rights against each other, the judgments were made with

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12 Mindle, supra note 11, p. 578.
13 See the case of Reynolds v. United States, 98 U.S. 145, 1879, which recognised the right of the state to prohibit religiously inspired conduct rather than considering the individual’s private assessment of the importance of the prohibited practice to his emotional well-being.
reference to the conduct’s contribution to the political and intellectual welfare of the state, over the self-development and emotional well-being of the individual. Thus, in early cases, the private sphere was protected only as a consequence of its association with other rights. Since the American constitution did not provide an integral guarantee for the protection of privacy, numerous rights which could have been subsumed under the right to privacy were found only implicitly in cases regarding abortion, free speech, and unreasonable searches. The reason why the right to privacy was left out was not a mere oversight, but a sign of its inconsistency with the understanding of the nature of civil liberties.

In earlier centuries, it was a different society and the norm was that people knew more about each other. The public expectations of privacy were different and therefore less prioritised. In modern societies with greater personal mobility, both physical and intellectual, increasing state control and technological progress in monitoring people’s conduct, privacy is of greater concern. This development means that individuals’ right to privacy needs to be protected in new, unforeseen areas. Society’s new realities have thus shaped what falls within the public and private sphere. The development of philosophical doctrines has also changed how we look at human rights and especially our understanding of privacy rights. As it became more important to protect the individual’s right to define himself, privacy rights were further developed. The philosopher John Stuart Mill’s expression that liberalism manifests itself in the right of the individual to pursue his or her own good in their own way is closely related to the notion of privacy. Individual rights gained more importance and it became less accepted for the state to interfere in people’s lives on the basis of public moral interests.

14 Mindle, supra note 11, p. 582.
19 Doswald-Beck, supra note 18, p. 283.
2.2 Codification of the right to privacy

2.2.1 Drafting of the UDHR and ICCPR

The first international document to include the right to privacy was the Universal Declaration on Human Rights. In an early proposal, a provision was created which contained the protection of privacy. Among privacy was the protection of one’s home, family relations, reputation, property, and correspondence. Several different drafts of the provision of privacy were later made. In some versions, privacy was headed by the umbrella term ‘private life’, with the potential of protecting privacy integrally, and in other versions only as ‘privacy’ which would protect certain aspects of life, such as the privacy of the home, correspondence, and reputation. New and fundamental changes were often made during the drafting process, but explanations for the changes cannot be found. Most likely, the changes were regarded as merely editorial modifications and the drafters did not account for the potential implications of including an integral guarantee for the right to privacy. The final discussions took place at the General Assembly where the delegates agreed that ‘privacy’ should work as an umbrella term:

‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.’

The provision has remained unchanged since it was adopted in 1948 and is found in Article 12 of the UDHR.

The right to privacy is also included in the International Covenant on Civil and Political Rights. A general term for the protection of privacy was proposed late in the drafting process. There were only some discussions on how the term ‘privacy’ should be interpreted. The drafters argued that the Covenant would suffer a serious omission if

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22 Diggelmann & Cleis, supra note 8, p. 445; See also Drafting Commission Report 21 supra note 8.
23 Diggelmann & Cleis, supra note 8, p. 446; See also Drafting Commission Report 21 supra note 8.
24 Diggelmann & Cleis, supra note 8, p. 448.
25 Diggelmann & Cleis, supra note 8, p. 448.
26 Diggelmann & Cleis, supra note 8, p. 447; See also Article 13 Draft Universal Declaration of Human Rights, Report of the Third Committee to the 3rd Session of the General Assembly, 7 December 1948, A/777, p. 4 (emphasis added).
27 Diggelmann & Cleis, supra note 8, p. 450; See also Drafting Committee on an International Bill of Human Rights, 2nd Session, Summary Record of the 29th Meeting, 20 May 1948, E/CN.4/AC.1/SR.29, p. 9.
it failed to include an article on elementary rights such as the right to privacy.\textsuperscript{28} The right to privacy would be protected against both public authorities and private persons, but the use of the term privacy was criticised on the ground that its precise legal implication was not clear. There were, therefore, some discussions on whether privacy should encompass violations committed by individuals as it could require changes to be made in existing rules of private law.\textsuperscript{29} The drafting history on privacy in the ICCPR resembles the codification on Article 12 of the UDHR. There were discussions on whether or not to include privacy, but no clear directions are given on how privacy should be interpreted.\textsuperscript{30} In the end, the wording of Article 17 became almost identical to the UDHR. Article 17 of the ICCPR is worded as follows:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

\subsection*{2.2.2 Drafting of the ECHR}

The drafting of the European Convention on Human Rights started in 1949, soon after the UDHR was adopted. The Convention was mainly influenced by three sources: the UDHR, recommendations by the International Committee of the Movement for European Unity and the Draft ECHR drawn up by the International Judicial Section of said movement.\textsuperscript{31} A provision for privacy in the form of an umbrella term was only provided by the UDHR.\textsuperscript{32} In the Draft ECHR, only family rights and the sanctity of the home was mentioned. The first proposal for a European convention was made by Pierre-Henri Teitgen, the Rapporteur to the Legal Committee.\textsuperscript{33} Teitgen suggested a provision

\begin{enumerate}
\item No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.
\item Everyone has the right to the protection of the law against such interference or attacks.
\end{enumerate}

\begin{thebibliography}{9}
\bibitem{29} Bossuyt, \textit{supra} note 28, p. 341; See also Committee on Human Rights, 9th Session, \textit{supra} note 28.
\bibitem{30} Bossuyt, \textit{supra} note 28, p. 341; See also Committee on Human Rights, 9th Session, \textit{supra} note 28.
\bibitem{32} Diggelmann & Cleis, \textit{supra} note 8, p. 452.
\bibitem{33} Diggelmann & Cleis, \textit{supra} note 8, p. 452.
\end{thebibliography}
on privacy headed by the umbrella term ‘private life’ referring to Article 12 of the UDHR:

‘The Convention … will guarantee … to every person … inviolability of privacy, home, correspondence, and family, in accordance with Article 12 of the United Nations Declaration.’

The provision for privacy went through several changes during the drafting process. At one point there was even a suggestion from the British delegation to eliminate the provision of privacy, possibly because such a position was in line with the British Draft for the ICCPR. Nonetheless, a suggestion was later made on the provision for privacy which was similar to Article 12 of the UDHR. The only difference was that the latter protected individuals from attacks on the honour and reputation as specific aspects of privacy. This omission is mentioned in the preparatory works to the ECHR and it is implied that only a certain part of Article 12 of the UDHR was to be included and applicable. There is no explanation in the preparatory works if ‘private life’ was intended to be a general term, encompassing further, not explicitly mentioned aspects of privacy. The reason why ‘private life’ was used is not explained either. French was an important language in the drafting of the European Convention and it may just be a translation from the French word ‘vie privée’. In the final version, the provision of privacy was worded as follows:

Everyone has the right to respect for his private and family life, his home and his correspondence.

The wording of the provision has since remained unchanged and is found contained in Article 8 of the ECHR.

35 Diggelmann & Cleis, supra note 8, p. 453.
Human rights are typically promoted from state level to the international level and not the other way around. But when the right to privacy was introduced in the UDHR, the international guarantee went beyond most national provisions for privacy. This was unusual as it was only later that the idea emerged to establish mechanisms at the international level in order to strengthen the protection of human rights. Prior to the UDHR, national constitutions only protected the privacy of the home and correspondence. Only a minority of states protected other spheres of privacy, such as honour and the individual’s autonomy. The right to privacy was thus not introduced as an uncontested and well-defined concept, but as a new human right and the provision in Article 12 of the UDHR became influential for other human rights instruments.

The drafting of the UDHR and the ICCPR influenced the protection for privacy at both regional and national level. The drafters of the ECHR often referred to the UDHR and took inspiration from propositions made to the ICCPR. As the provision for privacy was discussed, there was, however, no clear agreement on what the protection for privacy entails. There was no conscious decision to create an integral guarantee protecting the private sphere. Despite the fact that no general term for privacy existed in national constitutions at the time, umbrella terms were introduced as if it was only editorial details. A reasonable explanation for this is that during the drafting process coincidence played a key role. The drafters of these instruments did something new by including an integral guarantee for the protection of privacy, without being aware of the potential implications. Especially within the framework of the ECHR, the use of an umbrella term would open the door for the protection of further aspects of privacy and numerous unforeseen cases concerning the protection of privacy in the member states to the ECHR.

40 Diggelmann & Cleis, supra note 8, p. 452.
41 Tomuschat, supra note 20, p. 10.
42 Diggelmann & Cleis, supra note 8, p. 448.
44 Diggelmann & Cleis, supra note 8, p. 457.
45 Diggelmann & Cleis, supra note 8, p. 457.
2.3 Conclusion

Individuals’ privacy have not always been protected as a human right. The right to privacy was gradually developed and was influenced by individualism and the natural law theory. Yet, few traces of these sources are referenced in the first conventions covering the right to privacy. A study of the travaux préparatoires is disappointing as there is no discussion at all about the meaning of private life. Article 8 of the ECHR was clearly inspired by Article 12 of the UDHR, but the lack of definition indicates the broad and unclear meaning of privacy.

Only two partial guarantees were mentioned in almost all proposals: the right to protection of the home and the protection of one’s correspondence. They both connect to the core ideas of privacy, i.e. shielding the individual from, for instance, unwanted gazes and surveillance. They concern, however, only the part of privacy which protects the individual against state interference. The preparatory works do not explain the full conceptual basis for privacy as it is regarded today. The international provisions for privacy were developed seventy years ago. It was a different society, with a different view on what needed protection and the drafters of the ECHR were focused on protecting against the atrocities committed by authoritarian regimes. The right to privacy as a human right is, however, much broader than what is mentioned in the preparatory works. In the next chapter, the definition and meaning of privacy will be further discussed in order to describe what the right to privacy seeks to protect.
3 The nature and definition of privacy

3.1 Why privacy is protected

The right to privacy is today regarded as a fundamental human right. It is part of several conventions, but its definition and meaning are unclear. Privacy has in earlier theories been described as subordinated to property rights. The view was that one’s right not to be listened to or looked at comes from one’s right to keep possessions away from others.46 Wiretapping was, for example, primarily considered a violation of property rights rather than the intrusion of privacy.47 But this account on privacy misses the point. Privacy is about protecting oneself and not one’s possessions. When surveillance through wiretapping is violating one’s privacy, it is a violation because it may reveal personal information which damages the image of the individual. Respect for these matters is grounded in the liberty, dignity, and autonomy of individuals.

Freedom for the individual is at the core of privacy. At face value, liberty means the absence of interference. It is the freedom from intrusions by the state, especially in one’s own home.48 In addition to this negative sense of liberty, there has emerged a more positive notion of liberty. This concept of liberty is about the individual’s right to be his own master, that one’s life and decisions depend upon oneself and not external forces.49 This means that the right to privacy also cover the right of the individual to do as he pleases in public; wear clothes of his own choosing and express offensive opinions. Individuals must have the possibility of self-definition and self-determination. Without a right to privacy, people would not be secure or comfortable enough to decide their own ends or to pursue some of them.50

Human rights are also meant to protect human dignity. Concerning the right to privacy, this is meant to protect one’s honour, respectability, and status.51 It is easy for others to find personal information which might be harmful. Certain information which

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51 Whitman, supra note 48, p. 1161.
is close to our identities is therefore important that we are able to keep for ourselves. The aim of the right to personal dignity is thus to protect individuals from unwanted public exposure and humiliation. Naomi Campbell’s respectability was, for instance, harmed by the article in *The Mirror* which exposed her drug addiction and provided details about her treatment to such extent that it violated her right to privacy. The meaning of privacy can in this context be seen as a communicative right: a right to selective self-representation which means a right to control how, when, where, and to whom particular aspects of one’s life are communicated.

Personal autonomy is about individuals’ right to make their own decisions and form their own lives. In this regard, autonomy proves to be the most useful ground for privacy. Ranging from cases on abortion to intrusive news articles, courts have stressed that these rights hinge on the personal autonomy. When protecting abortion under the right to privacy, the reason is respect for a woman’s choice whether to end a pregnancy or not. When the right to privacy is given priority over the freedom of the press, the basis is the protection of individuals’ informational autonomy. Personal autonomy is thus the overarching value linking such diverse cases as abortion and prohibiting news articles. Recognising the right to privacy has therefore been necessary due to the growing importance of values such as solitude and freedom of action in the face of increasing intrusions in peoples’ lives.

### 3.2 Concepts of privacy

Finding a clear definition of privacy is not an easy case. It is not only a single human right, but it is also a collective term for a diverse set of rights. Privacy is a sweeping concept, encompassing for instance freedom of thought, control over one’s body,
solitude in one’s home, control over information, freedom from surveillance, and protection of one’s reputation. It is thus difficult to consolidate the notion of privacy into one single conception. The various concepts of privacy are all important and the overlapping ideas contribute to a better understanding of what privacy is. Let us quickly look through them.

Firstly, the right to privacy can be understood as protection of information and individuals’ right to have control over personal information. There are different theories on what type of information the right to privacy should protect. One theory is the concept of secrecy. Under this view, the right to privacy is violated by the public disclosure of previously concealed information. Another theory is the concept of intimacy. Intimacy as a concept relates to having control over one’s intimate relationships or certain aspects of life which individuals may not want to reveal to everyone. It may, therefore, be violated when it is exposed to the public against someone’s wishes. The problem is that when private information is taken out of context, social judgments may be damaging to the individual in a way that threatens his or her autonomy and freedom. Once personal information has become public and becomes known to others, it is impossible to control. It is in this context the protection of informational privacy is so important.

Secondly, the right to privacy concerns accessibility. Privacy has been conceptualised as limited access to the self, which covers the individual’s need for concealment and for being apart from others. In more modern descriptions it is viewed as a limited protection from unwanted access by others, in form of physical access, personal information, or attention. The concept is closely related to the right to be let alone, which was formulated by Warren and Brandeis. The meaning was that people should be able to live their life as they choose, free from invasion by the press, the

59 Solove, supra note 9, p. 1088.
60 The traditional method of conceptualising privacy into different concepts have been criticised by legal theorists. For an extensive elaboration on different approaches to conceptualising privacy, see Solove, supra note 9, pp. 1126–1154.
62 Solove, supra note 9, p. 1105.
63 Solove, supra note 9, p. 1092.
65 Solove, supra note 9, p. 1102.
photographer or to be recorded by others.\textsuperscript{67} Even though this concept does not define to what extent there is a right to be let alone, it is important because it establishes a right to protection of the private sphere against the intrusion from others.\textsuperscript{68}

Thirdly, privacy is a form of protection for personal expressions. A guiding principle both of privacy and human rights in general is about promoting \textit{personhood}. The term refers to the protection of the integrity of the personality.\textsuperscript{69} A common feature in privacy cases is the purpose to protect ‘the right of every individual to the possession and control of his own person’ and being able to make his or her own decisions.\textsuperscript{70} This concept is meant to prevent the state from imposing on individuals a defined identity and restrain state power which threatens the autonomy of individuals.\textsuperscript{71} The aim is thereby to protect the individuality of people, especially by protecting people’s right to express their own identity and make certain significant decisions without interference.

In sum, each of the conceptions of privacy described above elaborates upon certain dimensions of privacy and contains insights of what the right to privacy seeks to protect. On the basis of these principles, the right to privacy has developed. By looking at privacy in specific contextual situations, it becomes visible that the protected private sphere is broad and covers the intrusions made by individuals. The protection of privacy is a protection against disruptions to certain practices such as the invasion of solitude, breach of confidentiality, loss of control over personal facts, searches of one’s person and property, threats to or violations of personal security, destruction of reputation and surveillance.\textsuperscript{72} The matters we consider to be protected by the right to privacy are shaped by culture, history, living conditions and technology.\textsuperscript{73} Consequently, the potential actors that might interfere with the right to privacy are not only the state but also to some extent private actors. In order to protect individuals against interferences of their privacy, the right to privacy should, therefore, provide protection against both state and private actors, even in a public space.

\begin{itemize}
\item \textsuperscript{67} Warren & Brandeis, \textit{supra} note 10, p. 206.
\item \textsuperscript{68} Warren & Brandeis, \textit{supra} note 10, p. 205.
\item \textsuperscript{69} Solove, \textit{supra} note 9, p. 1116.
\item \textsuperscript{70} Solove, \textit{supra} note 9, p. 1117.
\item \textsuperscript{72} Solove, \textit{supra} note 9, p. 1129.
\item \textsuperscript{73} Solove, \textit{supra} note 9, p. 1132.
\end{itemize}
3.3 Privacy under international law

The Convention organs have explained that the right to respect for private life within Article 8 is not susceptible to a precise definition. As described by the Parliamentary Assembly, the right to privacy concerns the right to live one’s own life with a minimum of interference. The European Court of Human Rights has claimed that it would be unwise to make a definition on the right. The reason is that it would be difficult to foresee in which ways the right to privacy might be violated and it would be too restrictive to limit the protection to only some activities. During the last decades, numerous cases have been decided concerning the right to privacy. It is a broad concept which lacks an exhaustive definition. The potential interferences with Article 8 are therefore wide as was illustrated in X v. Iceland:

‘For numerous Anglo-Saxon and French authors, the right to respect for “private life” is the right to privacy, the right to live as far as one wishes, protected from publicity… In the opinion of the commission, however, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfillment of one’s own personality.’

Private life thus appears to have a very wide definition. Private life is according to the Court not limited to the concept of being left alone. Respect for private life also includes the right to establish and develop relationships with other human beings, freedom of action and protection for personal autonomy and physical and moral integrity. The case was an important moment in the interpretation of Article 8 as it opened the door to a whole new way of looking at the extent of the private life guarantee. Consequently, private life within Article 8 seems to cover similar situations as the general right to privacy.

74 See e.g. Nada v. Switzerland [GC], no. 10593/08, ECHR 2012, § 151 (travel ban on people listed to the Federal Taliban Ordinance).
75 Resolution 428, 1970, Declaration on mass communication media and human rights, Doc. 2687.
77 See Pretty v. the United Kingdom, no. 2346/02, ECHR 2002-III, § 61 (assisted suicide); Peck v. the United Kingdom, no. 44647/98, ECHR 2003-I, § 57 (broadcasting of CCTV footage of an attempted suicide).
78 X. v. Iceland, no. 6825/74, Commission decision of 18 May 1976, DR 5, § 87 (regulations prohibiting the keeping of dogs).
79 Harris, D. O’Boyle, M. Bates, E. Buckley, C., supra note 3, p. 526.
On the international level, the Human Rights Committee has expressed the view that in determining the meaning of privacy, limited help can be obtained from European Convention practice.\(^80\) The Court and the Committee have, however, reached similar conclusions on what the right to privacy protects. The notion of privacy within the ICCPR cover similar situations as the ECHR; it ensures protection for personal information, honour, and reputation, and protection against personal and body search.\(^81\) In the case-law of the ICCPR, the sphere of individual autonomy has been described as ‘the field of action that does not touch upon the liberty of others’, where one may withdraw from others, to shape one’s life according to one’s own wishes and expectations.\(^82\) The HRC has held that the notion of privacy refers to the sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone.\(^83\)

Even though the right to privacy protects individuals against third parties, the dilemma of the European Court of Human Rights is whether to interfere in the private sphere of individuals. The workplace and private enterprises are for example regarded as being suffocated and stifled when government enters its domain and there is, therefore, a view of the private sphere as inviolable.\(^84\) In an early case, the Court expressed the view that the objective of Article 8 was essentially that of protecting the individual against arbitrary interference by the public authorities.\(^85\) The reason might be that the origins of Article 8 are situated in the context of a classical liberal conception of a private sphere free from state interference.\(^86\) But if the right to privacy did not also protect individuals in the private sphere which is not directly connected to government, important areas of privacy violations would be forgotten. On this ground, it should not

\(^80\) Coeriel and Aurik v. the Netherlands, 453/91, dissenting opinion by Mr. Kurt Herndl (changing surnames).
\(^81\) HRC, General Comment No. 16, §§ 7–11.
\(^83\) See e.g. Coeriel and Aurik v. the Netherlands, 453/91, § 10.2; Raihman v. Latvia, 1621/07, § 8.2 (compulsory use of Latvian spelling for surnames).
\(^85\) Belgian Linguistic case, (merits), 23 July 1968, Series A no. 6 (regulations on the use of languages in Belgian education).
\(^86\) Clapham (no. 1), supra note 4, p. 218.
be a problem whether a state or a private party violates the right to privacy. It may, however, pose a problem for the implementation of state obligations. States may perceive that its private law and regulations concerning private enterprises are something to be closely guarded over, an area which it alone has sovereignty.\textsuperscript{87}

\section*{3.4 Conclusion}
Without a clear concept of why privacy should be treated as a fundamental human right, it is difficult to describe what it seeks to protect. Even though the preparatory works do not provide the reasons for why the protection of privacy was included, privacy did not become a human right as a mere coincidence. The codification of the right to privacy was the product of social ideas and values. It was formed as a right against state interference and developed over time to foster social acceptance and personal autonomy. The right to privacy is valuable and should be protected because it covers essential aspects of people's daily lives.

The protection of privacy has had a similar development at the regional and international level. Private life within Article 8 has developed in line with the different concepts of privacy. It is a broad human right with no precise definition. Private life covers the right to be let alone, protection of personal information, the right to develop relationships with others, and personal autonomy. The case-law from the Human Rights Committee confirms the inability to reach one single, overarching definition of the meaning of privacy. The conceptual basis for privacy is thus broad and not limited to instances where the state is responsible for the violation. In the next chapter, I will look more closely to what constitutes an interference with private life within Article 8 of the ECHR and how the Court has recognised more aspects of privacy falling under the scope of Article 8.

\textsuperscript{87} Clapham (no. 2), supra note 84, p. 186.
4 The scope of private life under the ECHR

4.1 Interpretative methods shaping the scope of the Convention rights

In the previous chapter, it was established that the concept of the right to privacy entails a protection against not only the state, but also against individuals. The European Court of Human Rights has not given an exhaustive definition of the notion of private life, but its case-law provides insight into the wide range of rights and interests covered. The purpose of the present chapter is to discuss the content of the right to privacy in Article 8. The Court’s generous interpretative methods and the effect of these are important to understand the development of the scope of Article 8 and the state obligations. According to Article 46 ECHR, the judgments of the ECtHR are only binding for the parties to the case. Yet following Article 32, it is generally accepted that the Court’s judgments are intended to develop, refine and explain the meaning of various Convention rights. The judgments have the effect of *res interpretata*, which means they express binding interpretations of the text. This effect has been embraced by the Court as it has used evolutive interpretative principles and stressed the general applicability of these interpretations. The states must heed these interpretations in order to comply with their obligations under the Convention and cannot deviate from the provisions as construed by the Court without potentially violating their obligations under the ECHR.

The Court uses many methods of interpretation to determine the applicability of the Convention rights. Firstly, the Court views the Convention as a living document and often uses evolutive interpretation. The understanding of fundamental rights is continually changing as a result of societal and technological developments and changes in views on fundamental rights. Evolutive interpretation means in this context that the

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89 Gerards (no. 1), supra note 6, p. 23.
90 Gerards and Fleuren, supra note 88, p. 355.
91 Gerards (no. 1), supra note 6, p. 36.
92 Gerards (no. 1), supra note 6, p. 36; See also Bates, E., The Evolution of the European Convention on Human Rights – From its Inception to the Creation of a Permanent Court of Human Rights, 2010, ch. 9.
interpretation of the Convention must be adapted to these developments. Without this approach, it would not be able to provide a pan-European minimum level of protection of fundamental rights. As an example of the Court’s evolutive interpretations, the right to respect for an individual’s privacy is now held to cover not only classic searches in one’s home and telephone tapping but also, for example, the placement of GPS instruments in cars. Secondly, in order to adapt its interpretations to present-day societal and legal views, the Court uses a special interpretative method, namely consensus interpretation. This means that the Court will use a wider interpretation if there is a sufficiently clear consensus of a certain aspect of a right as part of a Convention right. Using this approach, the Court has come to accept that Article 8 of the Convention covers assisted suicide, abortion, a right to procreation and a right to legal recognition of gender transformation.

Thirdly, the ECtHR has also emphasised that the central aim of the Convention is to guarantee fundamental rights to individuals in a practical and effective manner. The Court frequently refers to the general objectives underlying the Convention and has used the principle of effectiveness to determine the content of state obligations. Fourthly, as the Convention uses concepts that are also used in national legislation, the Court has stressed that a European, autonomous definition should usually prevail. The Court is able to derive from the national level of protection and widen the scope of private life. This is important as there would otherwise be a risk that states would try to evade supervision by the Court by giving a narrow definition to terms that determine the Convention’s applicability. The countries which have strict regulations on for example abortion could in the absence of an autonomous interpretation of private life derive from the case-law by not regarding it as part of one’s private life.

93 Gerards (no. 1), supra note 6, p. 36.
94 Üzun v. Germany, no. 35623/05, ECHR 2010 (extracts).
95 Gerards (no. 1), supra note 6, p. 37.
96 Haas v. Switzerland, no. 31322/07, ECHR 2011.
98 S.H. and Others v. Austria, [GC], no. 57813/00, ECHR 2011.
99 Christine Goodwin v. the United Kingdom, [GC], no. 28957/95, ECHR 2002-VI.
100 Gerards (no. 1), supra note 6, p. 38.
101 See Airey v. Ireland, 9 October 1979, Series A no. 32, § 24. See infra, sections 5.2 and 5.6.
102 Gerards (no. 1), supra note 6, p. 39.
103 Gerards (no. 1), supra note 6, p. 40.
4.2 Protected spheres of private life

The jurisprudence of the European Court of Human Rights has proven to be an essential source in establishing the constituent elements of private life. A common description is that ‘the essential object of Article 8 is to protect the individual against arbitrary interferences by public authorities. Yet, the case-law indicates that there are numerous different aspects to this right. Privacy contains several different dimensions and by looking at the context and specific privacy problems we find that the right to privacy is a broad and diverse human right. Given the very wide range of issues which private life encompasses, cases falling under this notion have been grouped into three broad and sometimes overlapping categories. These are firstly a person’s physical, psychological or moral integrity, secondly an individual’s privacy, and thirdly the personal autonomy and identity of people.

The first category within the notion of private life is the physical, psychological or moral integrity of individuals. Under this category, victims of violence have been protected by Article 8. The reason is that violence threatens bodily integrity and therefore the right to a private life. Cases such as domestic violence and even bullying between school children have been included. Private life also encompasses an individual’s right to choose medical treatment and the Court has held that assisted suicide is an element of private life as well as the right to reproductive choice. In line with the Court’s dynamic interpretation, the right to respect for the individual’s choices about one’s body has blossomed into the right to choose the circumstances of becoming a parent, to choose to become a genetic parent, and in access to IVF.

To protect individuals’ well-being, the Court has also included environmental issues, such as pollution and high noise levels, to the right to privacy.

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104 See e.g. P. and S. v. Poland, no. 57375/08, 30 October 2012, § 94 (abortion).
105 CoE, Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence, 2018, p. 18 (‘Case-law guide’).
107 Durdević v. Croatia, no. 52442/09, ECHR 2011 (extracts).
108 Pretty v. the United Kingdom, no. 2346/02, ECHR 2002-III.
110 Evans v. UK, [GC], no. 6339/05, ECHR 2007-I.
111 Dickson v. the United Kingdom [GC], no. 44362/04, ECHR 2007-V.
112 S.H. and Others v. Austria, [GC], no. 57813/00, ECHR 2011.
The second category of private life as protected by Article 8 is privacy. In this context, it is understood as the traditional aspect of the right to private life; people’s interests in not being exposed to unwanted attention from the state or third parties. Even though Article 8 does not explicitly mention honour and reputation, as Article 12 of the UDHR does, it does fall within the scope of private life. It has been interpreted that the protection of one’s honour and reputation was deliberately left out, but as it strikes at the essence of the right to privacy it cannot be left outside its scope. The Court has stated that a person’s image constitutes one of the most important attributes of a person’s personality. It reveals the individual’s unique characteristics and distinguishes him from others. Private life, therefore, provides a right to one’s image and photographs, which concerns the publishing of photos, images, and articles. When these publications attain a certain level of seriousness which may cause prejudice to the personal enjoyment of the right to privacy, Article 8 may also be used to protect a person’s reputation. There are also numerous restrictions concerning police surveillance, registrations in police databases, tracking of individual movements, and surveillance of communications.

The third category concerns the protection of personal autonomy and identity. This includes a right to personal development and a right to establish relationships with other human beings. As this concept also includes relationships of a professional and business nature, restrictions to work or dismissals from office based solely on factors relating to an individual’s private life may, therefore, constitute an interference with Article 8. To protect personal autonomy, the Court has established that disclosure of information about personal religious and philosophical convictions may implicate Article 8, as such convictions concern some of the most intimate aspects of private life.

114 Burbergs, M., ‘How the right to respect for private and family life, home and correspondence became the nursery in which new rights are born’, in Shaping Right in the ECHR, Brems, E. and Gerards, J (eds.), 2014, pp. 315–329. p. 321. See further the case of Young, James and Webster v. the United Kingdom, 13 August 1981. The Court was of the view that the substance of a right is important and downplayed the significance of the omission made in the drafting of Article 8.
115 Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, ECHR 2012, § 97.
117 Axel Springer AG v. Germany, [GC], no. 39954/08, 7 February 2012, § 83.
120 Oleksandr v. Ukraine, no. 21722/11, ECHR 2013.
The Court has also established that personal choices as to an individual’s desired appearance fall within the notion of private life, as it relates to the expression of his or her personality. This includes choosing one’s haircut, wearing a beard, and to wear religious clothing such as a veil. There are also a lot of different subsets of rights which form the personal identity protected under the right to privacy. The Court has held that elements such as gender identification, ethnic identity, name, and sexual orientation and sexual life are important to the personal sphere protected by Article 8.

4.3 Third-party interferences

The use of evolutive and autonomous interpretations of the ECHR has made it possible to expand the protection of the Convention rights. A proposal during the drafting of the Convention to limit the scope of Article 8 to only governmental interference was rejected and the Convention was thus not meant to exclude the protection of human rights from private interference. The Court has, however, been reluctant to apply the Convention rights in situations between individuals. It has been stated that the right to privacy may be limited when ‘the individual himself brings his private life into contact with public life or into close connection with other protected interests’. Hence, the protection of the personal sphere has in these situations been more limited. Nevertheless, the Court has developed a rich case-law also involving third parties. In the present chapter, I will highlight these cases under the subheadings of privacy at home, in public, on the internet, and at the workplace.

121 Folgerø and Others v. Norway [GC], no. 15472/02, ECHR 2007-III, § 98.
122 Popa v. Romania (dec.), no. 4233/09, 18 June 2013, §§ 32–33.
123 Tığ v. Turkey (dec.), no. 8165/03, 24 May 2005.
128 Dudgeon v. the United Kingdom, 22 October 1981, Series A no. 45, § 41.
130 Brüggemann and Scheuten v. Germany, no. 6959/75, Commission decision of 19 May 1976, DR 5. § 100 (abortion).
4.3.1 Privacy at home

The traditional view of privacy was to protect the individual against state interferences at his or her home. It was a guarantee against unwanted home visits, searches, and seizures.131 Most of these cases fall within the notion of home within Article 8, but the right to private life may also be relevant. For example, in noise pollutions cases, the Court has found the business activity of private companies being a threat to individuals’ right to privacy. In one case, the failure of Spain to regulate the noise levels of a nightclub near the applicant’s home in Valencia was in breach of Article 8.132

In the context of individuals’ home, however, most cases have concerned criminal acts committed by other individuals in the home. Filming someone without their consent may interfere with their right to privacy. For example, in a case where the victim was filmed naked in her home by her stepfather, the Court made clear that this was a case which was covered by the protection in Article 8.133 The reason is that filming someone without their consent may violate their personal integrity. The scope of protection is especially wide for children. Having to witness domestic violence in their home may violate their right to privacy.134 The Court held in a case that the psychological effect for children by repeatedly witnessing their father’s violence against their mother in the family home amounted to an interference with their right to respect for their home and private life.135 While Articles 2 and 3 are often engaged in cases concerning violence, Article 8 has also been applied in cases where individuals are subject to violence at home.136 As noted above in section 4.2, violence threatens bodily integrity and therefore the right to privacy. Under this sub-right to the right to privacy, the states have far-reaching obligations to provide protection and prevent acts of violence by private individuals.137

131 Case-law guide, supra note 105, p. 62. See this document for further examples on violations of the home.
133 Söderman v. Sweden [GC], no. 5786/08, ECHR 2013, § 117. See infra, section 5.4.2.
134 Eremia v. the Republic of Moldova, no. 3564/11, 28 May 2013.
135 Eremia v. the Republic of Moldova, no. 3564/11, 28 May 2013, § 74.
137 See infra, chapter 5.
4.3.2  Privacy in public

The right to privacy is not limited to the home of the individual. Whether in public or in private, individuals’ privacy is now protected by the Convention. The Court’s case-law mainly presupposes the individual’s right to control the use of their image, including the right to refuse publications thereof. Photographs at a private clinic by a professional photographer without the parents’ prior consent and the negatives retained was, for instance, held to violate Article 8 and their right to privacy.\footnote{Reklos and Davourlis v. Greece, no. 1234/05, 15 January 2009, §§ 40 and 43.}

The protection of individual reputation and honour has been especially relevant in third-party relations where newspapers are responsible for the interference. In the leading case of\footnote{Von Hannover v. Germany (no. 1) ECtHR, 24 June 2004, appl. No. 59320/00. See infra, section 5.3.1} von Hannover v. Germany, it was held that everyone has a legitimate expectation that his or her private life will be protected.\footnote{Von Hannover v. Germany (no. 1) ECtHR, 24 June 2004, appl. No. 59320/00, § 50.} This particular case concerned princess Caroline of Monaco who had been pictured in daily life activities, such as engaging in sport, walking outside and leaving restaurants. As a result of this case, the Court has established that there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life.\footnote{Whitman, supra note 48, p. 1161.}

Protection against publication of personal information is a form of informational self-determination.\footnote{Gurgenidze v. Georgia, App. No. 71678/01, 2006, § 56.} Accordingly, newspapers are restricted to not publish personal information which reveals damaging details about an individual’s private life. In Gurgenidze v. Georgia, Mr. Gurgenidze was accused in a number of newspaper articles of stealing a famous author’s manuscript. Since it concerned unverified charges and the publication was held to not meet any public interests, the publication was contrary to Article 8.\footnote{Petrina v. Romania, no. 78060/01, 14 October 2008.} Another example is Petrina v. Romania, where a man in a television show and in a newspaper article was accused of having cooperated with the security service Securitate during the communist regime.\footnote{Despite the allegations being false; the domestic courts dismissed his libel case. The Court held that the allegations overstepped the boundaries of acceptability and found a violation of Article 8.}
4.3.3 Privacy on the internet

The internet is a new area in which violations of Article 8 have been found. Concerning the protection of personal information, the Court has accepted that the availability of the internet has led to new fundamental rights issues being covered by Article 8. For example, the long-term availability of personal data and difficulties related to not being able to fully remove personal information from the internet or databases are now covered.\footnote{Khelili v. Switzerland, App. No. 16188/07, 2011.} Individuals have a right of protection for personal information and data published on the internet, especially when, by means of search engines, it may be accessed and retrieved by third parties and used for profiling purposes.\footnote{M.L. and W.W. v. Germany, nos. 60798/10 and 65599/10, 28 June 2018, § 91 and 97.} It is unclear if the collection of personal data by, for instance, social media companies, falls within the scope of Article 8. Collection of personal data has when public authorities were involved been found to violate the right to privacy, even though no information was disclosed to third parties.\footnote{Copland v. the United Kingdom, no. 62617/00, ECHR 2007-I, § 43.} The collection of personal information may be even greater by private companies, but no case has so far concerned the collection of personal data by companies such as Facebook and it is unclear what the Court’s view is, leaving it to the member states to decide how to confront this issue.

The Court has, however, decided some cases on the subject of defamatory remarks made on social media or other internet blogs threatening the reputation of individuals. In the context of the internet, the Court has emphasised that the test of the level of seriousness is important. Even if millions of internet users post comments every day which may be regarded as offensive, the majority of them are likely to be too trivial in character or the publication too limited for them to cause any significant damage to another person’s reputation.\footnote{Tamiz v. the United Kingdom, (dec.), no. 3877/14, 19 September 2017, §§ 80–81.} In a case concerning offensive online posts, the Court held that even though the comments which had been made on a blog were undoubtedly offensive, in large part they were little more than ‘vulgar abuse’ of a kind which was common in communication on many internet portals.\footnote{Tamiz v. the United Kingdom, (dec.), no. 3877/14, 19 September 2017, §§ 80–81.} The Court ruled on the scope of the right to privacy safeguarded by Article 8 in relation to the freedom of expression as
secured by Article 10. It found that the state concerned had a wide margin of appreciation and emphasised the important role that service providers, such as Google, has to facilitate access to information.\textsuperscript{149}

A similar situation was found in the case of \textit{Egill Einarsson v. Iceland}.\textsuperscript{150} The case concerned a politician in Iceland who had been the subject of an offensive comment on Instagram in which he had been called a ‘rapist’ alongside a photograph. The Court held that a comment of this kind was capable of constituting interference with the applicant’s private life in so far as it had attained a certain level of seriousness.\textsuperscript{151} Article 8 was interpreted to mean that even where the comments had prompted a heated debate on account of his behaviour, public figures should not have to tolerate being publicly accused of violent criminal acts without such statements being supported by facts.

\textbf{4.3.4 Privacy at the workplace}

The right to privacy has been particularly restricted at the workplace. The reason is that the employee with his individual rights submits himself to the organisational or jurisdictional control of the employer.\textsuperscript{152} The protection for privacy in professional or business activities include restrictions to access to a profession, dismissals from office, and workplace monitoring. Most of the cases regarding restriction to professions and dismissals from office have concerned the exercise of public authorities. For example, when a person could not register with the Bar Association as a result of an old criminal conviction,\textsuperscript{153} or when a person was transferred from his job because of his religious beliefs.\textsuperscript{154}

In relation to third parties, however, the Court has recently required stronger protection when companies surveil the private communications of their employees. Previously in cases concerning workplace monitoring, individuals’ right to privacy have

\textsuperscript{149} Tamiz v. the United Kingdom, (dec.), no. 3877/14, 19 September 2017, § 90; See \textit{infra}, section 5.4.2 on the state’s positive obligations in K.U. v. Finland, no. 2872/02, ECHR 2008.

\textsuperscript{150} Egill Einarsson v. Iceland, no. 24703/15, 7 November 2017.

\textsuperscript{151} Egill Einarsson v. Iceland, no. 24703/15, 7 November 2017, § 52.


\textsuperscript{153} Jankauskas v. Lithuania (no. 2), no. 50446/09, 27 June 2017, § 56.

\textsuperscript{154} Sodan v. Turkey, no. 18650/05, 2 February 2016, §§ 57–60.
been dependent on their reasonable expectation of privacy. In for example the case of *Halford v. the United Kingdom*, Article 8 was applied because the lack of warning meant that the employees had a reasonable expectation of privacy.\(^{155}\) In the recent case of *Barbulescu v. Romania*, the Court has improved the protection of privacy at work.\(^{156}\) Mr. Barbulescu was employed as a sales engineer and was required to create a Yahoo messenger account for work purposes. Personal use was prohibited, but monitoring was not mentioned. He was later confronted by the company which claimed his internet usage was significantly higher than his colleagues. When he denied any personal use, his employer provided him with a 45-page transcript of his messages including personal and intimate matters. He was dismissed from office afterward for breaching the company’s rules on the personal use of computers.

In the Romanian Court of Appeal, Mr. Barbulescu’s claim for unfair dismissal was considered within Article 8 and was balanced against the employer’s right to monitor. The domestic court found that it had been necessary for the employer to access the content of the messages to prove the personal use, which was a legitimate aim of supervising staff performance and ensuring the smooth running of the company. At the Grand Chamber of the ECtHR, the Court stated that the existence of a reasonable expectation of privacy ‘is a significant but not necessarily conclusive factor’ when determining whether Article 8 was applicable.\(^{157}\) They held that Article 8 was applicable as the communications came within the concepts of private life and the Court found a violation of his right to privacy.\(^{158}\)

As the court stated that a reasonable expectation of privacy is not always necessary for Article 8 to be engaged, domestic courts might be prompted to include more cases concerning workplace monitoring. In, for instance, the British case of *Atkinson v. Community Gateway Association*, the national court diverges from the ECtHR regarding the scope of privacy at work.\(^{159}\) In *Atkinson*, an employee was dismissed for personal use of his work email account. The court held that the employee must have been aware

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\(^{155}\) *Halford v. the United Kingdom*, 25 June 1997, Reports of Judgments and Decisions 1997-III, § 45

\(^{156}\) *Barbulescu v. Romania*, [GC], no. 61496/08, ECHR 2017 (extracts).

\(^{157}\) *Barbulescu v. Romania*, [GC], no. 61496/08, ECHR 2017 (extracts), § 73.

\(^{158}\) See *infra*, section 5.3.

of the company policy that personal use was forbidden and that communications would be monitored. The court based its decision on the notion that the employee could not have a reasonable expectation of privacy and also claimed that there had not been any judgment that suggests that Article 8 might be breached even where there is no reasonable expectation of privacy.\textsuperscript{160}

After Barbulescu, the situation in Atkinson may be recognised as raising Article 8 issues since they no longer can rely solely on the reasonable expectation test. However, it is not clear what additional factors are relevant to the reasonable expectation test. It is possible that the Court found Article 8 to be applicable because of the intimate personal messages and because the case was related to correspondence which may have a different scope of its protection of private correspondence.\textsuperscript{161} The reason is unclear though and by failing to clarify the factors which lead to Article 8 being engaged where there is no reasonable expectation of privacy, the case leaves the scope of the right uncertain. Nonetheless, the indication that Article 8 can be applied where there is no reasonable expectation of privacy is welcome. The reason is that it will prevent employers from blocking applications of the right. One problem with the reasonable expectation test is that people living in societies where intrusive technologies are prevalent, or surveillance is widespread, are likely to have lower reasonable expectations of privacy, thus narrowing the scope of protection provided by Article 8.\textsuperscript{162} Applying a purely empirical reasonable expectation test might lead to a weaker level of protection in those countries where it is most needed. Widespread surveillance should not be a reason against finding a violation of Article 8. The fact that someone is used to having a reduced level of privacy in some situations should not prevent the Court from increasing their protection. Otherwise, an employer could be able to shape an employee’s expectations of privacy and thereby preventing the application of Article 8.\textsuperscript{163} Rather the Court needs to ask whether an individual should be entitled to expect that his privacy would be respected in the circumstances.

\textsuperscript{160} Atkinson v. Community Gateway Association, UKEAT/0457/12/BA, 2014.
\textsuperscript{162} Atkinson, supra note 161, p. 696.
\textsuperscript{163} Atkinson, supra note 161, p. 693.
4.4 Conclusion

The scope of Article 8 is thus broad and encompasses multiple sub-rights and interests. The interests that are protected by Article 8 are wide, covering almost all aspects of peoples’ lives. The evolutive and dynamic interpretation has made it possible to continuously expand the scope of privacy and include further aspects of privacy which was not even imagined in the drafting process. The most important effect of the Court’s development of the right to privacy is that previously neglected areas are now included within the scope of Article 8. Individuals are now entitled to protection in their home, in public, on the internet, and at their workplace. Common cases concerning third parties are violence and other criminal acts between individuals, dismissals from office on grounds based solely on issues regarding an individual’s private life, environmental problems coming from companies, defamations made by individuals and when the press acts intrusively.

On the one hand, the Court’s approach has made it difficult to define categorically what constitutes private life and the states may object to such far-reaching judgments. On the other hand, the Convention is a living document and the concepts are dynamic insofar as their meaning is capable of evolving as new ways of violations are found. The exact parameters of the right to privacy are difficult to determine: new issues will continue to arise in the light of changing circumstances and evolving social attitudes. It is therefore favourable to have a flexible and generous interpretation of the right to privacy which allows the case-law to develop in line with social and technological developments. As more situations fall within the sphere of personal life, it will simultaneously have an effect on the state obligations. In the next chapter, I will analyse the state obligations imposed under the right to privacy and what effect the ECHR has had on the national legal systems of the convention states.
5 State obligations imposed by the right to privacy

5.1 State responsibility and private actors

The right to privacy is according to the summary of the case-law set out in chapter 4 applicable in a great number of situations. The various rights in Article 8 do not only protect against state-interference, but they also require the state to offer legal protection against other individuals. To understand the extent of the duty imposed on the states we need to understand the horizontality of the ECHR. Under the ECHR, rights are conceived as claims of individuals vis-à-vis the state, and therefore the rights are strictly speaking only generating legal duties on the state. At the European Court of Human Rights, individuals can only lodge complaints against the state for failing to protect their Convention rights, it is not possible to invoke the provisions of the Convention in legal disputes between private individuals. At the national level, the ECHR does not impose upon the contracting states the obligation to make the Convention part of domestic law. Whether the ECHR has third-party effect (drittwirkung), depends on the member states’ constitutional systems. Hence, the horizontal effect of the Convention may differ among the states and the differences between the constitutional systems have important consequences for the position of the ECHR in the national legal orders.

Firstly, there are countries such as Belgium, France, and the Netherlands, where the Convention rights have a direct horizontal effect and can be applied by individuals in national cases against other individuals. By giving the Convention rights direct effect, applicants can rely specifically on Article 8 and the scope of the applicant’s right to privacy stem directly from the scope of the Convention right. The jurisdiction of the domestic courts is not subject to the same conditions as the European Court of Human Rights which benefits people because they do not have to apply to the ECtHR to

165 Gerards (no. 1), supra note 6, p. 24.
166 Gerards and Fleuren, supra note 88, p. 343.
determine a case based on their Convention rights. In Belgium, for instance, violations of Article 8 have been raised in a case relating to a journalist’s right to freedom of expression and individuals’ right to privacy, and in a case concerning a private contract with the purpose of secretly photographing individuals.

Secondly, there are national legal systems where the provisions of the Convention are not directly applicable. In states, such as the United Kingdom and Sweden, the ECHR only has an indirect horizontal effect requiring the state to develop its law in light of the Convention. Even though applicants in these countries cannot rely upon Article 8 itself, the ECHR is relevant for situations where only private parties are involved. Those states are also obliged according to Article 1 to secure the rights set forth in the ECHR. The Convention creates indirect obligations for individuals as it may oblige the state legislature or the national courts to protect individuals from one another. Hence, regardless of the Convention’s position in the member states, all the Convention rights, even if only indirectly, take effect in horizontal relationships.

5.2 Negative and positive obligations

The provision in Article 8 is worded as a ‘right to respect for private life’. Traditionally, using the term ‘respect’ implies a negative obligation of non-interference while the terms ‘protect’ and ‘fulfill’ concerns positive obligations. But since the case of Marckx v. Belgium, the Court has inferred from the term ‘respect’ a positive obligation to protect in addition to the duty of non-interference. The meaning of the provision is not clear and the Court has recognised that it is not clear-cut, especially where the positive obligations implicit in that concept are concerned. Whereas the negative obligations restrict the state from interfering with individual’s rights, the positive

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171 Gerards and Fleuren, supra note 88, p. 343.
173 Lavrysen, supra note 164, p. 72.
175 See e.g. B. v. France, 25 March 1992, § 44, Series A no. 232-C.
obligations require the states to ‘take action’. In these cases, it may be hard to establish the necessity and the required scope of state action.

The Court considers whether the importance of the interest at stake requires the imposition of the positive obligation sought by the applicant. Relevant factors for deciding the content of the states’ positive obligations are whether fundamental values or essential aspects of private life are in issue, the impact on an applicant of a discordance between the social reality and the law, and the coherence of the administration and legal practices within the domestic system. Additionally, the Court considers the impact of the obligation on the state as the alleged obligation might be too narrow and precise or broad and indeterminate.

Where the court has developed implied positive obligations, a common justification has been to ensure that the relevant rights are practical and effective in their exercise. This type of obligation thus comes from the principle of effective protection and Article 1 which requires states to secure the Convention rights to everyone within their jurisdiction. This means that the states are obliged to protect the right of the individual from both public authorities and other individuals. The states’ obligations to take preventive or protective action to safeguard the Convention rights is of great importance. It has led to the recognition of positive obligations in the relationships between individuals and thereby influenced the balancing of human rights, the protection by the law and increased the procedural safeguards.

5.3 The obligation to strike a fair balance

In most cases, the Court does not impose an obligation to introduce any specific form of protection against violations of Article 8. It is up to the contracting states to choose how they want to protect the Convention rights. When balancing privacy rights under

177 Hämäläinen v. Finland [GC], no. 37359/09, ECHR 2014, § 66 (transgender operations).
178 Hämäläinen v. Finland [GC], no. 37359/09, ECHR 2014, § 66.
180 Mowbray, supra note 179, p. 4.
181 X and Y v. the Netherlands, 26 March 1985, Series A no. 91, § 24.
Article 8 with other rights, the state is though called upon to guarantee both rights and if the protection of one lead to an interference with the other, to choose adequate means to make this interference proportionate to the aim pursued. The Court’s view is that where the domestic legal system does attempt to strike a balance on a specific issue, it must ensure respect for Article 8. The states’ choice over the ways and means of meeting their positive obligation limits the Court’s function ‘in reviewing whether or not the particular solution adopted can be regarded as striking a fair balance’. \(^{183}\) Regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole.\(^{184}\)

The Court may also provide specific directives on how the balancing between rights should be made. In the case of Barbulescu, the Court introduced clear requirements for how domestic legal systems should protect the right to private life in the context of workplace monitoring.\(^{185}\) These include both substantive elements, such as the type of notification before workplace monitoring that is generally needed, and procedural safeguards such as the relevant factors to consider when striking the balance.\(^{186}\) The case does not impose an obligation to introduce any specific form of protection against workplace monitoring, but where the domestic legal system attempts to strike a balance on this issue it must ensure respect for Article 8 in line with the Court’s judgment. This approach to positive obligations means that the case of Barbulescu has potentially far-reaching implications for domestic law. The case imposes positive obligations on the state to introduce protections against disproportionate workplace monitoring and sets out the principles that states must adhere to when striking the balance in this area. Any area of law which balances the employee’s right to privacy and an employer’s interest in monitoring must do so in accordance with the principles set out in this case.\(^{187}\)

\(^{182}\) Fernández Martínez v. Spain [GC], no. 56030/07, ECHR 2014 (extracts), § 123. In this case a Spanish priest claimed he lost his job because of his views on Catholic celibacy. The ECtHR considered that the issue was balancing the Spanish state’s positive obligation to protect his private life against the Catholic Church’s decision to refuse renewal of his contract.

\(^{183}\) Hatton v UK, [GC], no. 36022/97, ECHR 2003-VIII, § 123 (expansion of an airport).

\(^{184}\) Roche v. the United Kingdom [GC], no. 32555/96, ECHR 2005-X, §157 (test of exposure of military service personnel to nerve gas).

\(^{185}\) Barbulescu v. Romania, [GC], no. 61496/08, ECHR 2017 (extracts), §§ 121-122.

\(^{186}\) Atkinson, supra note 161, p. 696.

\(^{187}\) Atkinson, supra note 161, p. 694.
5.3.1 Balancing the right to privacy and the freedom of the press

In a lot of cases, the Court has decided whether a fair balance has been struck between freedom of expression in Article 10 and the right to privacy in Article 8. The case of Von Hannover v. Germany is one of the most important cases concerning individuals’ right to privacy and the freedom of the press. Princess von Hannover had complained about photographs taken of her in various everyday life situations, such as at the market, on horseback, cycling, in a restaurant and tripping over an object. In arguing in favour of privacy, the Court observed that the activities engaged in were of a ‘purely private nature’. The articles contained only facts about private details and not facts ‘capable of contributing to a debate in a democratic society’. Furthermore, the Court held that the Princess did not hold an official function in a state which may require stronger protection for the press. The Court, therefore, found that Germany had a duty to clarify its legislation with regard to the distinction it draws between ‘figures of contemporary society par excellence’ whose private life is to be protected only in their private sphere, and relatively public figures who are entitled to broader protection.

The far-reaching judgment of the Von Hannover-case poses a question for the relationship between the Court and the contracting states. Usually, it is not the Court’s role to decide how the states’ control the press. Especially when there is no common approach among the states, the Court habitually grants a margin of appreciation. The aim of this judgment has been seen as to harmonise the privacy laws in the states. As the German Constitutional Court also uses value-based categories and only arrives at a different conclusion, this approach by the ECtHR has been criticised as an attempt at judicial activism on the part of the ECtHR. The protection of public figures may vary in society depending on the social climate in each state, but as a result of this case, the Court has set the standards for privacy against the freedom of the press.

188 Von Hannover v. Germany (no. 1), ECtHR, 24 June 2004, appl. No. 59320/00.
189 Von Hannover v. Germany (no. 1), ECtHR, 24 June 2004, appl. No. 59320/00, § 61.
190 Von Hannover v. Germany (no. 1), ECtHR, 24 June 2004, appl. No. 59320/00, § 63.
191 Von Hannover v. Germany (no. 1), ECtHR, 24 June 2004, appl. No. 59320/00, § 72.
193 Ziegler (no. 2), supra note 192, p. 201.
194 Ziegler (no. 2), supra note 192, p. 201.
5.3.2 The British response to the development of privacy rights

The development of the right to privacy has had a significant impact in the member states, especially at the level of balancing between rights. Prior to the implementation of the ECHR, Britain did not recognise a right to privacy in line with the European Convention on Human Rights. The strict legislation only protected people’s privacy when there had been a breach of confidentiality, a demonstrated damage in economic terms or evidence of trespassing by paparazzi’s.\(^{195}\) Bills were proposed to create a general right to privacy, but due to Parliament’s fear of inhibiting rights and freedoms of the press and the public’s right to information they never managed to create such a right.\(^{196}\) The only way for individuals to protect their privacy was through the European Convention itself, by applying to the ECHR to have his or her case heard.

The right to privacy was not actually recognised until the adoption of the ECHR by the enactment of the Human Rights Act (HRA) 1998. In the famous British case Douglas v. Hello! the court applies the method prescribed by the Human Rights Act 1998.\(^{197}\) This act requires that English courts must take into account Strasbourg decisions.\(^{198}\) In the Douglas-case the court states that ‘the time has come to recognise that the values enshrined in Articles 8 and 10 ECHR are now part of the cause of action’.\(^{199}\) The legal landscape for the press has thereby changed. In the decision of the House of Lords in Campbell v. MGN, the influence of the ECHR was apparent as the British court reiterated the reasoning of the ECtHR.\(^{200}\) The case concerned publications of personal information about super-model Naomi Campbell’s drug addiction which was found to violate her right to privacy. The House of Lords differentiated between receiving general information that was in the public interest, for example, Ms. Campbells lies about her addiction, and details about her treatment.\(^{201}\)

\(^{198}\) Section 2 of the Human Rights Act, 1998.
The case shows that domestic courts follow the decisions of the ECtHR. Domestic courts are obliged to not act incompatibly with the requirements of the Convention. This means that, in giving effect to the common law, courts should seek to apply and develop the law in a way which is compliant with the Convention rights.\textsuperscript{202} The most significant development in this field is the modification of the common law breach of confidence doctrine into a remedy capable of protecting against disclosure of private information by the press. After the case of \textit{Campbell v. MGN}, the breach of confidence remedy has been renamed as the tort of ‘misuse of private information’ which is used to cover the protections afforded by Article 8.\textsuperscript{203} Thus, the domestic common law now provides far greater protection for personal privacy. Even if Britain has maintained a strong protection for the freedom of the press, the incorporation of the ECHR has been greatly influential. Without the Human Rights Act incorporating the Convention rights, Britain would not even recognise a right to privacy at all.\textsuperscript{204} Even though the ECHR only has indirect horizontal effect in the UK, this shows that Article 8 of the ECHR has influenced the development of the law in cases involving only private parties.\textsuperscript{205} Hence, a violation in an individual case, such as the German \textit{Von Hannover case}, may lead to a general jurisprudence on what the right to privacy requires.

\section*{5.4 Protection by the law}

The states are also in some circumstances under the obligation to provide protection by the law. This positive obligation imposes a duty on states to develop their legal framework and provide adequate legal provisions criminalising the conduct which threatens another’s Convention rights.\textsuperscript{206} Domestic legislation is necessary for individuals to have a legal remedy for the infringement of their privacy. Further aspects of privacy may need to be protected in the domestic law systems and existing legislation might have to be changed to avoid violating Article 8. The main purpose of this section

\begin{footnotesize}
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\item \textsuperscript{203} Masterman, supra note 202, p. 316.
\item \textsuperscript{204} Deringer, supra note 195, p. 210.
\item \textsuperscript{205} Masterman, supra note 202, p. 315.
\item \textsuperscript{206} Xenos, supra note 129, p. 70.
\end{itemize}
\end{footnotesize}
is to establish how the legislative requirements have affected the responsibilities of third parties, but in order to give a full scope of the states’ positive obligations, this section will begin with a description of the states’ own responsibilities.

5.4.1 Regulations between the individual and the state

Positive obligations may be vertical in nature, in the sense that they directly regulate the relations between the individual and the state. States may have to change their laws in order to not restrict individual’s enjoyment of their right to privacy and this has had a significant impact in a range of cases. The obligation to protect imposes on the member states a duty to introduce regulations compelling both private and public hospitals to adopt appropriate measures for the physical integrity of their patients, whose consent, based on a full understanding and knowledge of the consequences of an operation should be obtained before any medical intervention is performed.207 Some states may still have inadequate protection for abortion rights, but as the Court has included reproductive choice as part of the right to privacy, states are not permitted to ban abortion and they are required to have a legal framework which provides for an abortion.208 Another example where the Court has required regulation concerns the parental status and the right to discover one’s origins. It is not compulsory for states to DNA test alleged fathers, but the legal system must provide alternative means to determine paternity claims.209 Following the case-law of family names, laws which oblige women to adopt their husband’s surname is no longer compatible with the ECHR.210 The margin of appreciation has thus been eliminated where national regulations are based on gender discrimination.

5.4.2 Regulations between individuals

While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is within the states’ margin of appreciation, effective deterrence might require efficient law provisions. In assessing the legislation,

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207 Codarcea v. Romania, no. 31675/04, 2 June 2009.
208 Tysiac v. Poland, no. 5410/03, ECHR 2007-I.
the issue is whether the state had in place an adequate legal framework in compliance with its positive obligations according to article 8 EHCR.\textsuperscript{211} Concerning grave acts, where fundamental values and essential aspects of private life are at stake, the Court has required legislation. Most of these cases have concerned violence between individuals. Children and other vulnerable individuals are, in particular, entitled to effective protection.\textsuperscript{212}

The state is required to be aware of potential violations of the ECHR and to develop a legal framework which covers intrusions on people’s privacy. An illustrative case on this matter is the case of \textit{Söderman v. Sweden}.\textsuperscript{213} The Swedish legal system, which at the time did not prohibit filming without someone’s consent, had not protected the applicant against the violation of her personal integrity. Because of the absence of clear statutory provisions criminalising the act of covertly filming a naked child, Sweden had violated Article 8. After this decision, Sweden had to introduce legislation to prohibit filming without consent.\textsuperscript{214}

New technologies provide new opportunities for individuals to violate the right to privacy. This is especially relevant for violations on the internet and the importance of keeping the legislation up to date with potential violations was also the issue in the case of \textit{K.U. v. Finland}. This case concerned the posting by an anonymous person of the picture and contact details of a 12-year-old boy on an internet dating site in 1999, which exposed the boy to the interest of pedophiles.\textsuperscript{215} A police investigation was started, but it was unsuccessful as the service provider refused to divulge the necessary information to identify the person who was responsible for the advertisement. The company considered itself legally bound by the principle of confidentiality of telecommunications, and Finish law did not require service providers to divulge such information. The Court held that the widespread problem of child sexual abuse on the internet was well known. Finland was found to have violated Article 8 by not having put in place a system to protect child victims from being exposed on the internet.\textsuperscript{216}

\begin{itemize}
\item \textsuperscript{211} Lavrysen, \textit{supra} note 164, p. 85.
\item \textsuperscript{212} See e.g. X and Y v. the Netherlands, 26 March 1985, Series A no. 91, §§ 23–24.
\item \textsuperscript{213} Söderman v. Sweden [GC], no. 5786/08, ECHR 2013.
\item \textsuperscript{214} Söderman v. Sweden [GC], no. 5786/08, ECHR 2013, § 117.
\item \textsuperscript{215} K.U. v. Finland, no. 2872/02, ECHR 2008, §§ 8–9.
\item \textsuperscript{216} K.U. v. Finland, no. 2872/02, ECHR 2008, § 48.
\end{itemize}
It is thus the task of the contracting state to adequately tackle new threats to the right to privacy which may arise. It is, however, difficult to hold social media companies responsible for violations of privacy committed on their platforms and the case of *K.U. v. Finland* is one of few judgments at the ECtHR dealing with violations on the internet. The important message of the judgment in *K.U. v. Finland* is that, while the internet is different from traditional media, this should not prevent the application of the established positive obligation case-law to this context. The Court noted that it is especially important in the case of conflicting rights for the states to establish a legal framework that balances these rights. Courts may not be the best fora to deal with conflicting rights. Hence, a lack of such legal framework may lead to the finding of a violation of the ECHR. If the state, however, does establish such a legal framework, then it will only risk violating the right to privacy if it is manifestly disregarded.

When the Court examines the domestic legislation, it is usually fairly undetailed with respect to the content that should be given to the required legal provisions. There are, however, certain exceptional cases in which the Court did provide detailed guidance as to what legislative changes were required. In the case of *M.C. v. Bulgaria*, the Court specified what should be the focus of any member state’s definition of the criminal offence of rape. The case concerned a 14-year old girl who was the victim of date rape by two men. As no use of force was established beyond reasonable doubt, the prosecutor decided not to start criminal proceedings. The Court held that Article 8 requires the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.

### 5.5 Protective measures

The states’ positive obligations do not only require the state to lay down sanctions for individuals infringing the Convention or issue legal rules, but it may also consist of practical measures. Positive obligations may require specific changes in the exercise

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218 Lavrysen, *supra* note 164, p. 95.
219 Lavrysen, *supra* note 164, p. 98.
220 *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII.
of a public authority. In the case of *Gaskin v. the United Kingdom*, the Court required Britain to set up an independent body tasked with deciding requests on confidential personal information.\(^{223}\) Even without an interference by a public authority the state can violate Article 8 by tolerating an existing situation or by not providing sufficient legal protection. The state can be held to account for omissions, despite that the specific violation which has shown that the legal protection was insufficient has been committed by a private subject, whose actions the state is not responsible for. For instance, in *Vilnes and Others v. Norway*, the Norwegian authorities had not ensured that the companies observed full transparency and provided the divers with sufficient information about the risks with diving, which the Court found as a violation of Article 8.\(^ {224}\)

Authorities are thus obliged to effectively prevent violations committed by third parties. The measures applied by the states to protect individuals against acts of violence must be effective. This includes reasonable steps to prevent ill-treatment and protect those who are in dangerous situations. For example, in *Bevacqua and S. v. Bulgaria*, the state failed the applicant by not responding when they had knowledge of her husband’s violent behaviour.\(^ {225}\) The police had neither provided her with protection when she reported being battered at home nor had the prosecutors examined the case properly. The authorities’ failure to impose sanctions or otherwise enforce the applicant’s husband to refrain from unlawful acts amounted to a refusal to provide the immediate assistance the applicant needed.\(^ {226}\) Similarly, in the case of *Kalucza v. Hungary*, Hungary was held to violate Article 8 by having dismissed the applicant’s request for a restraining order.\(^ {227}\) These findings are critical as the authorities’ view in some of these cases have been that no assistance was due as the dispute concerned a ‘private matter’.\(^ {228}\) The states can no longer treat domestic violence as merely a private issue and have to provide adequate protection. Article 8 can thus provide an additional remedy alongside Article 3 for those who have suffered from violence.

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\(^{223}\) *Gaskin v. the United Kingdom*, 7 July 1989, Series A no. 160, § 49.

\(^{224}\) *Vilnes and Others v. Norway*, nos. 52806/09 and 22703/10, 5 December 2013, § 244.

\(^{225}\) *Bevacqua and S. v. Bulgaria*, no. 71127/01, 12 June 2008.


\(^{227}\) *Kalucza v. Hungary*, no. 57693/10, 24 April 2012, § 65.

\(^{228}\) *Bevacqua and S. v. Bulgaria*, no. 71127/01, 12 June 2008, § 83.
5.6 Procedural safeguards

Procedural duties have a central place within the category of positive obligations. Although Articles 6 and 13 of the ECHR are mainly concerned with procedural rights, the Court has found that procedural systems are important to ensure the protection of individuals’ privacy. Individuals must be able to challenge also the private parties whose activities involve threats to their right to privacy. Having a legal framework providing a remedy is important, but it is also important that they are supplemented by effective procedural mechanisms.

In assessing the criminal justice system, the Court has required a more effective investigation and prosecution of an alleged crime. One of the first cases concerning procedural safeguards within the right to privacy was the case of Airey v. Ireland. In this case, the right to privacy was directly interfered with, not by the state of Ireland but by Mr. Airey. He was accused of having frequently threatened his wife, Mrs. Airey, with violence. She complained, under Article 8, that the state had failed to ensure her an accessible legal procedure which would determine her rights. Because of the prohibitive cost of legal representation, she could not obtain a judicial separation, there being no legal aid available for such proceedings.

The states’ positive obligation to ensure effective injunctions following criminal acts and to provide practical support for the victims of this abuse of the right to privacy has in subsequent case-law been confirmed. The issue of having adequate law-enforcement procedures was raised in the case of X and Y v. the Netherlands, which is one of the most important cases on the application of Article 8 to the acts of private individuals. In this case, a mentally handicapped woman was a victim of sexual crime. According to the law in the Netherlands, the prosecution could only be held after indication by the plaintiff. But the woman was due to her condition not able to do so. The Netherlands thus violated Article 8 by not providing means for her prosecution. In these cases of rape or other forms of bodily harm, the states’ positive obligation is to regulate and

229 Xenos, supra note 129, p. 27.
231 Airey v. Ireland, 9 October 1979, Series A no. 32.
232 X and Y v. the Netherlands, 26 March 1985, Series A no. 91.
233 X and Y v. the Netherlands, 26 March 1985, Series A no. 91, § 27.
prescribe sanctions of an appropriate deterring effect which requires law-enforcement procedures in order to ensure compliance of law. Positive action in terms of enacting criminal law provisions is thus required of states to ensure that Convention rights are effectively safeguarded. The principle of effectiveness is thereby linked to the development of positive obligations.

The negative effects of procedural inefficiencies were further illuminated in the case of _E.S and Others v. Slovakia._ In March 2001, the applicant, E.S, had left her husband, S, and filed for divorce which was granted in May 2002. She was also granted custody of their three children. In April 2001 she filed a criminal complaint against her husband claiming that he had ill-treated her and their children and sexually abused one of their daughters. S. was two years later convicted of ill-treatment, violence, and sexual abuse and sentenced to four years’ imprisonment. During this time, E.S had requested an interim measure ordering her husband to move out of the council flat where they were both joint tenants. Due to domestic legislation, the court lacked the power to restrict her husband’s right to use the property and she had to wait before the divorce was finalised to be able to terminate their joint tenancy. She was merely ordered to apply for an order requiring her husband to refrain from inappropriate behaviour. The Constitutional Court held that there had been no violation of E.S right as she had not applied for such an order. Following the introduction of new legislation, she made further applications and two orders were granted which prevented her ex-husband from entering the flat and awarding her exclusive tenancy.

The procedural inadequacy had negative implications for the applicant who in the meantime, had had to move away from their home, family, and friends, and two of their children had had to change school. The ECtHR found that the orders that were eventually granted would not have provided the applicants with adequate protection. Most importantly, E.S. had not been in a position to apply to sever the tenancy until the divorce had been finalised in May 2002, more than a year after the allegations were made against the husband. The family had needed immediate protection and there had

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234 Xenos, _supra_ note 129, p. 23.
been no effective remedy open to E.S to ensure protection before the divorce.\textsuperscript{237} By attaching the right to privacy to the personal and physical integrity, these situations are protected under Article 8 and the widening of the scope of positive obligations works to ensure the efficiency and availability of important remedies.

Regarding the right to compensation for damages, the Court has been relatively cautious. This is for good reason though. Making a legal duty out of Article 8 is not easy. The guiding principle in tort law is that the person who committed the wrong is obliged to put the victim as far as possible in the position in which he would have been if no wrong would have occurred.\textsuperscript{238} In cases of privacy, the nature of the violation means that the situation cannot be restored. Publications of personal information, for example, cannot be reversed. The state has an obligation to make available a procedure capable of providing them some compensation for damage.\textsuperscript{239} Nonetheless, Article 8 does not necessarily require monetary compensation to the victim if other redress mechanisms are put in place. In a case concerning the publication of two children of a former goalkeeper with the German national football team, no award of damages was made against the publisher for breaching an injunction not to publish the photographs.\textsuperscript{240}

### 5.7 Conclusion

The provision of respect for one’s private life requires both negative and positive obligations. Even though there is no legal obligation to incorporate the substantive provisions of the Convention into domestic law, the Convention law sets out a list of international obligations owed by states to individuals within their domestic jurisdiction. The state is required to make a fair balance between competing rights, provide a legal framework which criminalises potential violations of an individual’s privacy, improve their procedural systems to prosecute violations efficiently, and adopt practical measures to limit and prevent violations from individuals.

\textsuperscript{237} E.S. and Others v. Slovakia, no. 8227/04, 15 September 2009, §§ 39–43.
\textsuperscript{239} See e.g. Vasileva v. Bulgaria, no. 23796/10, 17 March 2016.
\textsuperscript{240} Kahn v. Germany, no. 16313/10, 17 March 2016, § 75.
The development of positive obligations under Article 8 has made it possible to provide effective protection for the right to privacy between individuals. Most of the cases where the Court has imposed specific positive obligations on the states have concerned the criminal law system. The application of Convention rights when the domestic law has not been able to adequately protect individuals have been important. On these grounds, the ECHR has had a great influence on the domestic legal systems. While individuals’ rights are strengthened, the obligations of third parties have changed as the states have been required to amend the domestic legislation. Both the state and affected third parties may react to these far-reaching judgments and object to the legal development. There are therefore limits to the extent to which the ECHR can be used to change the legislation and procedural systems of the member states. In the next chapter, the limits for the protection of privacy are discussed and why the states’ additional protection is important.
6 Limits for the protection of privacy

6.1 Justifications for state interferences

Private life within Article 8 of the ECHR is a broad concept. In principle, whenever a state sets up a rule for the behaviour of the individual within this sphere, it interferes with the respect for private life. The scope of the right to privacy may, however, be limited. In the case of a negative obligation, the rights guaranteed under Article 8 can according to certain conditions in paragraph 2 be justifiably restricted by the state:

‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

The provision in Article 8 paragraph 2 contains three conditions for restricting the right to privacy. The first condition is a legality test of whether the interference was conducted in accordance with the law. For example, in the context of surveillance, the law must be sufficiently clear in order to give citizens an adequate indication of the conditions and circumstances in which the authorities may use secret surveillance and collection of data.\textsuperscript{241} The second condition concerns the legitimate aims which may justify restricting privacy. One example of how the state has been allowed to restrict the right to privacy is the case of S.A.S v. France. The Court found that a ban on full-face veils in public spaces served a legitimate aim considering the respondent state’s argument that concealing the face makes it impossible to identify persons and has a negative effect for social interaction and is a public safety issue.\textsuperscript{242} Thirdly, there is a proportionality test. In determining whether the interference is necessary for a democratic society, the Court will consider the importance of the public interest at stake and whether the reasons were relevant, sufficient and proportionate to the legitimate aims pursued.\textsuperscript{243}

\textsuperscript{241} Shimovolos v. Russia, no. 30194/09, 21 June 2011, § 68.
\textsuperscript{242} S.A.S. v. France [GC], no. 43835/11, ECHR 2014 (extracts), § 122.
6.2 Delimitations on the scope of positive obligations

In the case of positive obligations, the assessment of the states’ responsibilities is more complex and may be more limited. What distinguishes positive obligations from negative is that it leads the Court to concern itself primarily with justifications for abstention by the domestic authorities. The justifications contained in Article 8.2, such as domestic legality, is only one of many aspects which the Court considers. The scope of the positive obligations is decided on various factors: the importance of the public interest at stake and the right at issue, the states’ margin of appreciation, the practice of the state parties with regard to the question at issue, and the rights of third parties. In this context, the Court is constantly veering between boldness and restraint.

The states cannot guarantee that a Convention right is not affected since a positive obligation is primarily an obligation as to measures to be taken and not as to results to be achieved. When determining the scope of positive obligations, the ECtHR has considered the position of the state and whether the alleged obligation is narrow and defined or broad and indeterminate. A decision condemning a state’s failure to act bears more consequences than one condemning the state for its interference. Violations of negative obligations merely lead to a duty to repeal the legislation in breach with the Convention, while a decision rendered against a state for breach of a positive obligation might impose a duty to act. Consequently, the Court has to consider the states’ possibilities to ensure effective protection and cannot develop obligations which are too burdensome on the states.

The scope of the states’ obligations is also determined by the seriousness of the human rights threat involved. The legal framework which the state is required to develop must be proportionate to the severity of the threat to human rights: more serious

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244 Akandji-Kombe, supra note 176, p. 19.
245 Akandji-Kombe, supra note 176, p. 19.
246 Akandji-Kombe, supra note 176, p. 20.
247 Plattform, ‘Ärzte für das Leben’ v. Austria, ECtHR, 21 June 1988, appl. no. 101226/82, § 34 (protection of demonstrations).
248 A., B. and C., v. Ireland, [GC], no. 25579/05, ECHR 2010, § 248 (abortion); See supra, section 5.2.
threats require more serious safeguards.\textsuperscript{250} If a threat is not considered to be serious enough, there may not be a need for legislative changes. This was illustrated by the case of Köpke \textit{v. Germany}.\textsuperscript{251} The applicant, who worked at a supermarket, was dismissed by her employer on the suspicion of theft. The Labor Court allowed as evidence a covert video surveillance tape which the employer had obtained via a detective agency. The surveillance video was found appropriate under the circumstances such as suspicions of theft. The Court held that it was sufficient that the domestic courts had considered the surveillance as a considerable intrusion into the employee’s privacy and thereby found no need for the legislator to reconcile such conflicting interests.\textsuperscript{252}

### 6.3 Balancing rights and interests

The requirement to protect the rights of third parties limits the scope of the protection of privacy. The idea is not that all human rights should in all cases be defended. When there is a counterweight which can be balanced against a human right, the scope of the Convention right might be restricted in the specific case. Strengthening the rights and freedoms of one party is often made at the expense of the freedom and autonomy of another person.\textsuperscript{253} If one has to respect the privacy of one person, another person cannot take photos as he like. There are thus delimitations made when an individual’s right to privacy comes in contact with other interests or rights. Where only private life, in general, is concerned, the Convention seems to afford a strong protection.

All Convention rights have a fundamental value and the protection in Article 10 of the freedom of expression might limit the protection of privacy under Article 8. Thus, it cannot be said that Article 8 has priority over freedom of expression which is covered by Article 10 ECHR.\textsuperscript{254} When balancing the right to reputation under Article 8 and freedom of expression under Article 10 the European Court of Human Rights considers the following key factors: contribution to a debate of general interest, how well known the person concerned is, prior conduct of the person involved and whether he has

\textsuperscript{250} Lavrysen, \textit{supra} note 164, p. 96.
\textsuperscript{251} Köpke \textit{v. Germany}, ECTHR (inadm.) 5 October 2010, No. 420/07.
\textsuperscript{252} Köpke \textit{v. Germany}, ECTHR (inadm.) 5 October 2010, No. 420/07, p. 12.
previously discussed his private life with the press, how the information was gathered and the factual basis, and the consequences of publication.\textsuperscript{255}

While Britain has gone from not even recognising a right to privacy to using Article 8 to limit the freedom of the press, the implementation of the ECHR has caused France to afford more protection to the freedom of expression.\textsuperscript{256} The right to privacy has rested in France on far-reaching principles. For instance, it is irrelevant which medium is used to portray a person’s image and consent must be clearly expressed for the taking, reproduction, and use of one’s image.\textsuperscript{257} When articles were touted as Marlene Dietrich unpublished memoirs in a weekly magazine, France-Dimanche, the Paris Court of Appeal held that no one may publish one’s private recollections without consent from the individual concerned.\textsuperscript{258} Although some of the articles about Dietrich’s life were true, the French court found that it violated her right to privacy because she had not authorised the publication. It is only recently, through the weight of decisions by the ECHR that the French law has adopted a more balanced approach. There has been an increase in the use of the ECHR for those seeking to protect their freedom of expression. The European Convention’s protection for free speech is broader than the stringent regulation for the press in France.\textsuperscript{259} Individuals who have felt that the French courts have allowed an interference with their freedom of expression that did not meet the requirements according to Article 10 ECHR can take their claim to the ECHR. This has had effects on French domestic law and in recent cases, the French Court of Cassation has recognised the limits Article 10 may put on protecting privacy interests.\textsuperscript{260}

\begin{thebibliography}{99}
\bibitem{255} Axel Springer AG v. Germany [GC], no. 39954/08, 7 February 2012, § 97–100.
\bibitem{256} Deringer, \textit{supra} note 195, p. 192.
\bibitem{259} Deringer, \textit{supra} note 195, p. 207.
\bibitem{260} Deringer, \textit{supra} note 195, pp. 207-208; See Judgment of Jan. 31, 1989, Cass. Civ. Ire, LEXIS Pourvoi No. 87-15.139 [The affair of The Bones of Dionysis]. In this case the court held that an injunction banning a novel that allegedly harmed the reputation of certain individuals was an unjustified restriction under Article 10. The court relied on the European jurisprudence concerning Article 10 and changed the way French courts balance the right to privacy and freedom of expression.
\end{thebibliography}
6.4 Subsidiarity of the Court

To understand why the European Court of Human Rights does not have the power to regulate every aspect which might need protection, especially between individuals, it is important to be aware of the limitations of the Convention system. It is primarily the task of the national authorities to secure the rights under the Convention. The Court has a subsidiary role: The principle of subsidiarity means that the national authorities should offer primary protection. The Court’s own role is first and foremost one of supervision and the separation of powers is an important reason why the Court sometimes is reluctant to find a violation of a Convention right.

The Convention only applies in cases against public authorities. Having only the ECHR to rely on might therefore not be enough. The Court only assesses complaints when national authorities may have failed to comply with their obligations under the ECHR. An individual’s actions are not alone enough to lead to a finding against the state. It is necessary for the conduct of the private individual to be seen as originating in a failure on the part of the state itself or as tolerated by it. The state is thus only responsible for violations committed by individuals when there has been a failure in the legal order, such as inadequate intervention, a lack of measures or legislation. This requires an examination on whether the state had a positive obligation to prevent and whether it was necessary in the specific case. Having a remedy in a national court is more effective and convenient than recourse to an international procedure at the ECtHR.

Without domestic law protection, individuals are forced to use international treaties, such as the ECHR, as the last resort. If a state has not made the provisions in the Convention directly applicable in proceedings before national courts, individuals cannot enforce these rights against individuals and the national courts may not review the acts and omissions of public authorities against the ECHR. Incorporation of the ECHR into national law is therefore desirable. The efficiency of the implementation is dependent on several factors, such as the details of incorporation, the approach taken by

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261 Gerards (no. 1), supra note 6, p. 17.
264 Lemmens, supra note 262, p. 23.
the judiciary, the status of the Convention and whether it can be pleaded directly by individuals before the courts. Only self-executing provisions can be relied on in legal relationships between citizens and state authorities or in legal relationships between private parties. Consequently, if the provision for privacy in Article 8 has not been given domestic status, the effects of the ECHR is more limited. At the international level, the right to privacy is only exercisable against the state, and at the domestic level, individuals cannot take their case to the broader law of the ECHR. Even though all states must take the case-law of the ECHR into account, they may fail to apply them correctly and individuals are therefore dependent on the states’ additional protection.

6.5 Margin of appreciation

The question which remains is how far the positive duties go. As mentioned in section 6.4, the Court acknowledges that the national authorities have the primary responsibility to safeguard Convention rights. As long as they respect the limits set by the ECHR and the case-law of the Court, i.e. the minimum required protection, they have great freedom to make their own choices and decide which restrictions are necessary and to determine the steps to be taken to ensure compliance with the Convention. This is illustrated by the states’ margin of appreciation. In general terms, it means that the state is allowed a certain measure of discretion, subject to European supervision when it takes legislative, administrative or judicial action in the area of a Convention right. The margin of appreciation is most commonly applied when determining whether or not a fair balance has been struck between competing Convention rights or against the public interest. Consequently, the Court generally does not consider there to be a single right answer as to how to strike a fair balance and the choice of measures is up to the states.

As illustrated in section 5.3, it will merely examine the way the states have struck the

265 Harris, D. O’Boyle, M. Bates, E. Buckley, C, supra note 3, p. 27.
266 Gerards and Fleuren, supra note 84, p. 345.
268 Gerards (no. 1), supra note 6, p. 19.
balance. As a result, the states may in specific cases differ from each other concerning the weight to be given to the right to privacy in relation to other Convention rights.

The margin of appreciation is based on the premise that the Court’s power should be more limited and afford the states a certain degree of freedom to decide how to protect the Convention rights. This principle of subsidiarity underlines the margin of appreciation and is important as the Court’s extensive interpretations may be criticised for overreaching. In practice, this doctrine functions as a yardstick for the level of scrutiny of the member states’ protection of the Convention rights. The margin of appreciation may be wide or narrow. If the margin is wide, the Court applies light scrutiny, whereas if the margin is narrow, it applies strict scrutiny. The width of the margin of appreciation is determined by three broad factors: the common ground factor, the better-placed argument and the nature of the affected right or interest.

The first factor implies that where there is no consensus among the convention states, as to whether a certain interest is worthy of protection or on how to protect it, the margin will be wider. When most contracting states lack regulation on a specific issue, the Court is reluctant to decide how the legislation should develop. This is especially relevant in politically sensitive issues, such as end of life issues, IVF treatments, and surrogate motherhood. It is important though that the Court does not only rely on what member states do, for certain traditional views may not be consistent with human rights. If the ECtHR would not be able to go further than the protection in the most restrictive state, the Court would not be able to find a violation in morally sensitive cases such as abortion. Moreover, the Court would not have been able to develop the law on third parties given the great variation in privacy laws in Europe. Given the diversity of practices followed in the member states, the positive obligations vary nonetheless considerably from case to case.

271 Gerards (no. 1), supra note 6, p. 29.
272 Lavrysen, supra note 164, p. 125.
274 E.g. Dickson v. the United Kingdom [GC], no. 44362/04, ECHR 2007-V, § 78.
275 Haas v. the Netherlands, no. 36983/97, ECHR 2004-I, § 51.
276 Evans v. the United Kingdom [GC], no. 6339/05, ECHR 2007-I.
277 Paradiso and Campanelli v. Italy [GC], no. 25358/12, 24 January 2017, §§ 165 and 215.
278 Akandji-Kombe, supra note 176, p. 36.
The second factor concerns the presumption that the states are in some cases better placed than the Court and therefore should be left with a wide margin of appreciation.\textsuperscript{279} This factor is of special relevance with respect to cases involving the rights of third parties. The fact is that in those cases, the Court must balance the rights of the applicant and those of other persons. Most of the time, the Court will merely decide whether the state has struck a fair balance between the interests involved.\textsuperscript{280} It is not up to the Court to decide which right should triumph in the specific case. Provided that the state considers all interests and rights it may protect one right at the expense of privacy. It is only in exceptional cases where the Court goes as far as to indicate positive measures.\textsuperscript{281}

The third factor concerns the importance of the affected right. The margin will be narrow if the essence or the core of one of the Convention rights is affected. The Court has, for example, considered that the margin must be narrow when a particularly important facet of an individual’s sexuality or identity is at stake.\textsuperscript{282} It is in the interest of the Court to create a more common protection among the Convention states, but if the core of the right to privacy is not threatened the Court might leave a wider margin for the states to decide the level of protection.\textsuperscript{283}

\textbf{6.6 Conclusion}

The right to privacy is important to protect, but there are a number of restrictions and difficulties in providing individuals with adequate protection. Concerning negative obligations, the interference may be justified if it is in accordance with the provision in Article 8 paragraph 2. Concerning positive obligations, the situation is much more complex. Firstly, the protection against violations committed by individuals is limited by the construction of the Convention system. The extent to which the Court can develop positive obligations is limited by the subsidiary role of the Court. The Court’s

\textsuperscript{279} Gerards (no. 2), \textit{supra} note 273, p. 110.
\textsuperscript{280} Akandji-Kombe, \textit{supra} note 176, p. 36.
\textsuperscript{281} Akandji-Kombe, \textit{supra} note 176, p. 36; See \textit{supra}, sections 5.4 and 5.6.
\textsuperscript{282} See e.g. Dudgeon v. the United Kingdom, § 52 (legislation criminalising sexual acts between homosexuals).
\textsuperscript{283} Hatton v UK, [GC], no. 36022/97, ECHR 2003-VIII, § 103. In this case both economic well-being and the protection of the right and freedom of others were found to be the legitimate aim of large government projects, such as the expansion of an airport.
role is primarily one of supervision and cannot, therefore, stretch the rights and obligations under the Convention to the extent that new norms are created.\footnote{See Gerards (no. 1), supra note 6, p. 18.}

Secondly, the discharge of positive obligations requires an assessment of specific national circumstances. The Court needs to consider the importance of the right, the principle of effectiveness and the possibility for the state to act in order to protect the specific right. The margin of appreciation is especially important in this context. The width of the margin is determined by the consensus argument, the better placed argument, and the nature of the affected right or interest. Especially concerning the relationship between individuals, states are allowed a wide margin of appreciation to strike a fair balance between the competing rights and interests. There are always important values on both sides of this relationship. The Court cannot dictate how the balance should be made, it can only ensure that the domestic law and courts provide a fair balance which considers all interests involved.
7 Concluding remarks

The jurisprudence of the ECHR does not disclose a direct horizontal effect and it is up to the states to choose whether to grant direct effect to the Convention. The influence on private parties has nonetheless been established by the development of positive obligations, which gives the provisions in the ECHR at least indirect horizontal effect. What this means in individual cases is not clear and the purpose of this thesis was to analyse how the right to privacy in Article 8 provides protection against third parties. As some of the states’ constitutions do not contain explicit protections for the right to privacy, at least not to the same degree as it is construed by the ECHR, the Convention can provide additional protection. To what extent, then, has Article 8 of the ECHR influenced the protection for the right to privacy in horizontal relations?

Providing statements of human rights values and the content of specific rights is an important feature of the European Court of Human Rights and is necessary when the states neglect certain areas in need for protection. When the states do not recognise certain aspects of privacy, individuals face a weaker protection. The preparatory works are silent on the issue of what the right to privacy seeks to protect. As a result, the provision for privacy is vague, leaving to the courts to define the scope and definition. To prevent states from violating important aspects of this right, it is therefore important that the Court makes the case for why privacy matters. Individuals should be free from intrusion by both the state and third parties. In legal theory, the right to privacy includes the protection for one’s right to be let alone, being able to withdraw to a space of retreat, and the freedom of action and communication which is vital for the development of individual personalities. In this sense, the protection of privacy is about protecting individual freedom. Without a protected personal sphere, we might self-censure in the face of stifling pressure of social conformity which threatens the human individuality.

Private life is according to the Court a broad human right and the scope of protection has been extended to cover almost every aspect of a person’s life. The development has taken a tree-like form. From the right to privacy, the Court has interpreted a right to physical and moral integrity, a right to protection for one’s image and reputation, personal autonomy and identity, information and a right to personal development. Within these branches, there is a very wide range of issues. The Court has, by attaching
issues to sub-rights which in turn are linked to the right to privacy, expanded the
definition of privacy and increased the social value of privacy. Despite the Court’s view
that the essential object of Article 8 is to protect individuals from state interferences,
several cases have concerned the states’ responsibilities to protect the individual from
the acts of third parties. Violent crimes, noise pollution from private companies,
defamatory comments on the internet, filming without individuals’ consent, the
publishing of photos and damaging articles, and workplace monitoring are all covered
by Article 8. The importance of this development is that the Court determines what
constitutes an interference with an individual’s privacy and has widened the protection
of the personal sphere. The more difficult question is whether the Court has the
authority to lead this development and whether the states have a positive obligation to
protect.

Conflicts between private parties are now common within the application of
Article 8, concerning, for instance, the relationship between newspapers and individuals
or employers and employees. In these cases, the question arises as to whether the
domestic law is in conformity with the Convention requirements for protection of
human rights and whether the courts have failed to interpret and apply the law in
conformity with the articles of the Convention. The Convention influences the legal
settlement of private conflicts by the positive obligations which works to improve the
protection by legislative, administrative and judicial authorities. In this context, the
Court has made use of its ‘dynamic’ approach to interpretation of the Convention in the
light of changed social values and the idea that there may be positive obligations upon
states, requiring them, to respect the right for privacy in more areas such as on the
internet, in public and at the workplace.

There may be protections available under private law or criminal law which will
cover most situations in which the states have positive obligations to protect individuals
from other individuals. But an important function of the Court is that it can reveal the
blind-spots in the states. Consequently, the Court’s case-law on the right to privacy has
resulted in a legal change for the protection of privacy at the national level and has, in
so doing, assisted indirectly in increasing the responsibilities for third parties. In Britain,

285 See Klein, supra note 267, p. 208.
it has led to the right to privacy being finally recognised, especially when dealing with situations where individuals seeking to protect themselves from the press. In Sweden, the legislation of unauthorised photography had to be amended to protect individuals against other individuals intrusive filming.\textsuperscript{286} and Finland had to change their laws in order to make social media companies cooperate in a criminal investigation.\textsuperscript{287} This illustrates that the Court has been prepared to interpret Article 8 by emphasising the evolutive and dynamic principles enshrined therein. By doing so, they will set the legal standard for the protection of privacy in Europe. Britain and France came from different ends of the spectrum regarding privacy rights, showing that the influence of the Convention leads in the end to a relatively similar level of protection. By balancing different Convention rights and deciding cases from different law systems, the Court’s judgments lead to a strong protection in all the contracting states.

There are limits though to the extent the Convention may be used to increase the protection for individuals’ privacy. The ECHR merely has an indirect horizontal effect. Even though the states’ positive obligations place a duty on them to prevent violations committed by individuals, it is difficult to use the Convention in third-party relations. The enforcement of positive obligations is made only after a violation of a Convention right occurs and requires that individuals are able to take their case to the European Court of Human Rights, which is greatly restricted, costly and difficult. After the Court has decided in a particular case, the judgment may lead to a general rule which will prevent similar violations in other states, but the principle of subsidiarity means that the states must act themselves to create a comprehensive legal framework. The states are better placed to develop the domestic law according to their own legal system. When violations are committed by individuals, several important interests and rights are involved, and in those cases, the state has a margin of appreciation to decide how to legislate. The scope of positive obligations in the relationship between individuals is therefore reasonably limited.

This relationship poses important questions of the legitimacy for the Court’s intervention and the scope of Convention rights which limits the Court’s ability to enforce these rights within the private sphere. The intention of the ECHR was not to

\textsuperscript{286} See Söderman v. Sweden [GC], no. 5786/08, ECHR 2013.  
\textsuperscript{287} See K.U. v. Finland, no. 2872/02, ECHR 2008.
create a European constitution. Rather, the purpose was to provide additional protection and promote human rights in Europe. The member states have objected to judicial activism on part of the Court which indicates the restraints on the Court to develop and create new legal rules.\textsuperscript{288} It is more suitable for the states themselves to decide in cases of central political concern. It may be argued that it is against such threats to human rights the Convention was originally designed, but the Court’s role is more to supervise and make judgments on the protection of fundamental human rights.

A direct horizontal effect for the Convention would give the Court more power and has several benefits. It guarantees an effective remedy when individual rights are violated and provides a remedy against national judicial decisions that fail to protect a Convention right. Furthermore, direct horizontal effect makes it possible to exercise one’s rights against both the state and private actors, thus ensuring a development of the human rights at the domestic level. When it concerns Convention rights, however, we must consider the value of state sovereignty and respect the member states rights to form their own constitutional systems and decide in what way they believe is best to implement the ECHR. The method of indirect effect ensures, for instance in the UK, a development in line with the common law.\textsuperscript{289} The common law has a much broader ambit, which requires attention to be paid to values and interests not listed in the Convention. In this regard, indirect horizontality provides better flexibility for the states to protect their own legal system which is important for the legitimacy of the Court and the Convention.

To answer the question of the Convention’s effect on third parties regarding the right to privacy, we must distinguish between the scope of the right to privacy and the reach of indirect horizontal effect. The scope of privacy is wide and continues to develop as violations are made in new ways and in new forms. The indirect horizontal effect of the Convention is, however, limited to the extent the Court is able to develop positive obligations for the states. The responsibility to protect the Convention rights is thereby shared between the ECtHR and the member states. The Court’s role in strengthening the protection for human rights, and in particular the right to privacy, is to continue to supervise the implementation of the Convention and develop the scope of the provision.

\textsuperscript{288} Ziegler (no. 2), \textit{supra} note 192, p. 201.
\textsuperscript{289} Young, \textit{supra} note 167, p. 48.
of privacy and the state obligations. The states’ responsibilities are to develop the legal framework to cover new violations and make it easier to challenge those who violate individuals’ privacy. By doing this, the protection of privacy will hopefully continue to be strengthened despite the limits of the Convention system.
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