The Positive Obligations of the State under the European Convention of Human Rights

Dimitris Xenos
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The system of the European Convention of Human Rights imposes positive obligations on the state to guarantee human rights in circumstances where state agents do not directly interfere. In addition to the traditional/liberal negative obligation of non-interference, the state must actively protect the human rights of individuals residing within its jurisdiction. The liability of the state in terms of positive obligations induces a free-standing imperative of human rights that changes fundamentally the perception of the role of the state and the participatory ability of the individual, who can now assert their human rights in all circumstances in which they are relevant. In that regard, positive obligations herald the most advanced review of the state’s business ever attempted in international law.

The book undertakes a comprehensive study of positive obligations: from establishing the legitimacy of positive obligations within the system of the Convention to their practical implementation at the national level. Analysing in-depth legal principles that pervade the whole system of the Convention, a coherent methodological framework of critical stages and parameters is provided to determine the content of positive obligations in a consistent, predictable and realistic manner.

This study of the Convention explains and critically analyses the state’s positive obligations, as imposed by the European Court of Human Rights, and sets out original proposals for their future development. The book will be of interest to those who study, research or practice public law, civil rights and liberties or international/European human rights law.

Dimitris Xenos is a Research Fellow at the European Public Law Organisation, Athens. He also acts as a legal consultant on issues of human rights law.
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Dimitris Xenos
For Athena and her mother
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Universal Declaration of Human Rights (adopted 12 December 1948) UN Doc A/180 (1948) .................................................. 8, 16
To what extent should the state be responsible for protecting those under its jurisdiction from violations of their human rights by private parties, and from possible breaches arising from circumstances which, although it may not itself have created, it may nevertheless be said to have an obligation to remedy? This sophisticated, erudite and detailed study considers the legitimacy and limits of such ‘positive obligations’ in the context of the European Convention on Human Rights. Seeking to find a comprehensive methodological framework, it focuses on the technical expertise required of the European Court of Human Rights, and the most appropriate form of judicial reasoning, given both the goals and objectives of the Convention and the responsibilities and capacities of state parties.

While the study of positive obligations under the Convention has interested other commentators, Dr Xenos’s contribution is particularly stimulating, thorough, thought-provoking, nuanced, and conscious of both theoretical and practical dimensions. As he fully acknowledges, the potentially open-ended scope of positive obligations creates both problems and opportunities. A key question is whether principled limits can be found or if it is simply a matter of pragmatic balancing, subject to elastic national margins of appreciation. Over the past thirty years or so the Court has, for the most part in the complainants brought to its attention, addressed the issue simply by conducting a series of ad hoc balancing exercises with other competing interests loosely derived from the limitation clauses attached to specific Convention provisions. Dr Xenos powerfully and convincingly argues that this has resulted in a jurisprudence without adequate theoretical foundations which undermines the potential impact of positive obligations. As he says: ‘positive obligations are often used as a buzzword for every measure of compliance with human rights standards, a fact that leads gradually to their dilution.’

According to Dr Xenos, with respect to active third-party violations, the state’s core positive obligation is to provide adequate legal and administrative systems that offer both minimum preventive protection and adequate remedies in cases of violation. But, inevitably, these will vary according to context and will also be subject to national margins of appreciation.
reflecting the state’s many other responsibilities. As Dr Xenos maintains, procedural safeguards, the participation of complainants in the implementation and enforcement of positive obligations at the domestic level, and effective processes of investigation, are of particular importance. In his excellent and highly original chapter on vulnerable individuals, Dr Xenos argues that the key issues for the Court here are whether it can coherently justify its intervention and whether recognising a particular positive obligation will impose a disproportionate burden on public resources.

Dr Xenos’s study makes a major contribution, not only to the debate about positive obligations, but also to our understanding of the relationship between civil and political rights, on the one hand, and social and economic rights on the other, and to how the European Convention on Human Rights can and ought to be interpreted. It should, therefore be required reading for students, scholars and policy-makers interested in these fields.

Steven Greer
Professor of Human Rights
University of Bristol
Human rights are not simply safeguards against state interference but must be enjoyed in a wide range of circumstances. The system of the European Convention of Human Rights guarantees this by imposing positive obligations on the contracting state to actively protect human rights. As a consequence, a profound and permanent change has been brought about in the understanding and assertion of human rights.

A great number of activities that may be addressed in other legal areas (e.g. of national, supranational or international law systems) can engage the responsibility of the state under the Convention when protection of human rights has not been guaranteed. In some recent analyses, the coexistence or interaction of various legal systems is placed within a complex combination of international law and political intergovernmental arrangements that also prescribe a form of transnational governance characterised by an abstract polycentric model.

The Convention, however, is an independent and autonomous legal authority that creates and guarantees individual human rights under international law. It does not compromise when the protection of human rights is at stake. It does not answer to subjective proposals and convenient politico-legal rhetoric, but deals with real complaints by real victims of human rights violations. Accordingly, what we are mostly interested in with this study is the voice of the ordinary individual, and most importantly, the very possibility of the expression of that voice that has been made possible by the application and development of positive obligations within the system of the Convention.

In the department of law, we make things possible with legal rules. Because the art of a lawyer is law, our job here is to show how positive obligations work or can work in legally binding terms. We deal with legal questions and propose legal answers that aim to prove a manageable application of positive obligations. A methodological framework is provided to determine a realistic and tangible content of positive obligations.

The current study is an updated and slightly revised version of my doctoral thesis that was completed under the supervision of Holly Cullen and Roger Masterman at Durham University. I am indebted to both for their
professionalism, the dialectics and the care that they have shown all these years with their constructive comments. I thank also the examiners, Kevin Boyle and Gavin Phillipson, for their useful suggestions.

I wish to thank the judge and former president of the Inter-American Court of Human Rights, Antonio Augusto Cançado Trindade, for useful discussion on various occasions in the European Court’s library and after the end of some seminars in Strasbourg, and for his general advice: ‘concentrate on the [legal] science’ which I have taken seriously. I owe great gratitude to Steven Greer and Spyridon Flogaitis for valuable advice and discussion. Special thanks to Maria for intellectual conversations and, in particular, on the importance of taking risks.

In this work, Chapter 3 is based on the article entitled ‘The human rights of the vulnerable’, which was published in the *International Journal of Human Rights*, Vol. 13 (4) in 2009 (copyright Taylor & Francis). For some of the cases discussed in the main text and footnotes, their official English translation had not been available in HUDOC’s database (the Court’s case-law electronic portal) when the final manuscript was submitted. Translations of primary and secondary sources not in English are my own, unless otherwise noted.

D.X.

January 2011
Abbreviations

AJIL  American Journal of International Law
Camb Q  Cambridge Quarterly of Healthcare Ethics
Healthc Ethics
CrimLR  Criminal Law Review
ΔηA  Δικαιώματα του Ανθρώπου
EEEurop  Ελληνική Επιθεώρηση Ευρωπαϊκού Δικαίου
ECLR  European Constitutional Law Review
EHRLR  European Human Rights Law Review
EJIL  European Journal of International Law
ELJ  European Law Journal
ELR  European Law Review
ER  European Review
ERPL  European Review of Public Law
HRLJ  Human Rights Law Journal
HRLR  Human Rights Law Review
HRR  Human Rights Review
GLJ  German Law Journal
ICLQ  International and Comparative Law Quarterly
I-CON  International Journal of Constitutional Law
IFLJ  International Family Law Journal
IJHR  International Journal of Human Rights
IIJ  Industrial Law Journal
JCP  Juris Classeur Periodique, La Semaine Juridique
JLS  Journal of Law and Society
LLR  Liverpool Law Review
MJ  Maastricht Journal of European and Comparative Law
MLR  Modern Law Review
NILR  Netherlands International Law Review
NQHR  Netherlands Quarterly of Human Rights
N-SAIL  Non-State Actors and International Law
OJLS  Oxford Journal of Legal Studies
RDI  Rivista di Diritto Internazionale
RGDIP  Revue Générale de Droit International Public
"Abbreviations"

\[\begin{align*}
\text{RHDI} & \quad \text{Revue Hellénique de Droit International} \\
\text{RIDC} & \quad \text{Revue Internationale de Droit Comparé} \\
\text{RIDU} & \quad \text{Rivista Internazionale dei Diritti dell’Uomo} \\
\text{RLR} & \quad \text{Ritsumeikan Law Review} \\
\text{RTDH} & \quad \text{Revue Trimestrielle des Droits de l’Homme} \\
\text{STL} & \quad \text{Scots Law Times} \\
\text{ΤοΣ} & \quad \text{Το Σύνταγμα} \\
\text{ΧρΙΔ} & \quad \text{Χρονικά Ιδιωτικού Δικαίου} \\
\text{YbkEL} & \quad \text{Yearbook of European Law} \\
\text{YLJ} & \quad \text{Yale Law Journal}
\end{align*}\]
There really is no such thing as art, there are only artists.

Ernst Gombrich
1 The working base

1.1 What’s right and what’s wrong with positive obligations

The discourse of the protection of human rights sixty-one years after the signing of the European Convention of Human Rights (hereinafter, the Convention)¹ is now placed within a normalised era of European history in which the state acts as their principal protector and guarantor. These are the times in which human rights are increasingly advertised in political manifestos and their established status is reflected in university study packages and job opportunities both linked to the growing supermarket of governmental, intergovernmental, international or non-governmental human rights organisations.² In this mainstream climate, the obvious and fundamental functions of the state, and by extension, of law, are re-discussed, rediscovered and restated in order to secure a normal starting point. As Phedon Vegleris recalled in the early 1970s:

[i]t is also undeniable that the protection of the individual from attacks on his liberties by other private individuals constitutes one of the normal functions of the law, particularly civil and criminal law, and an essential task of the executive and judicial authorities. And it is a historical fact that this function of the law was in operation and had reached a certain degree of stability even before the rights of the individual vis-à-vis the State were proclaimed, or means...

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² Some tensions are currently observed with the franchising of non-governmental organisations. See, e.g., Moscow Branch of the Salvation Army v. Russia [2006] no. 72881/01; Church of Scientology Moscow v. Russia [2007] no. 18147/02. A. Giddens, ‘Foreword’, in M. Glasius et al. (eds), Global Civil Society (Oxford: Oxford University Press, 2002), p. iii: ‘NGOs are no more elected than big corporations are, and substituting orthodox democratic politics with a world run by NGOs is therefore problematic.’
of defence against agents acting on behalf of the State were instituted.\(^3\)

Viewed from the neutral and normal point of a genuine democracy, human rights violations by the state are the exception rather than the rule, and therefore the time has come to reverse the perspective from which the human rights discourse is made, namely the classical liberal view of the state’s non-interference (negative obligation).\(^4\)

In response to a new generation of human rights claims pushed forward by a new generation of Europeans, who have been brought up free from the complexes of the past, the Convention has passed to its complete phase under which entitlement to human rights means entitlement to enjoy human rights and not merely an entitlement to their non-violation by state agents. States are perceived as having ‘inherent’ positive obligations to protect and guarantee human rights within their territory. The Convention imposes positive obligations on the state to actively protect the human rights of individuals against acts of interference from other private parties. To the extent that it is the state which has the sovereign power and ability to regulate all activities operating within its jurisdiction, its indirect responsibility can reasonably be raised when human rights are violated by private parties.

Departing from the point that it is ‘a historical fact’ that the active protection of individuals from acts of interference of other individuals constitutes one of the normal and classic functions defining the state,\(^5\) the subject matter of positive obligations appears basic at a first glance. There are, however, important questions on important details. Moving from general to specific issues, it is asked whether protection exists in the particular context of private interactions or whether protection is effective through regulation and procedural safeguards. Of importance, also, is the question of when human rights protection is provided and on whom the initiative of protection depends. If protection in a given context has been provided by the state, it pays to see the background/history of how

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4 G. Malinverni, ‘Les Fonctions des Droits Fondamentaux dans la Jurisprudence de la Commission et la Cour Européennes des Droits de l’Homme’, in W. Haller et al. (eds), Im Dienst an der Gemeinschaft (Basel: Helbing & Lichtenhahn, 1989), pp. 539–560, p. 539: ‘In recent years, this concept appears to be insufficient, because of its purely negative character. Indeed, it does not allow fundamental rights to assume the function that is expected of them in a modern society. Therefore, to the traditional concept a constitutive concept of liberties is contrasted.’, (translation).

5 P. Vegleris, in A.H. Robertson (ed.), Privacy and Human Rights.
The working base

The protection of human rights was pressed by social forces and how long it took to acquire its current legal status.

By contrast, the uniqueness of positive obligations is that the active protection of human rights is demanded right now or should have already been provided for by the state’s mechanism in circumstances in which there are known human rights issues. More importantly, the initiator of this demand is not the elected member of the Parliament, but the ordinary individual. In this account, positive obligations impose real constitutional priorities on the state’s business in the form of the active protection of human rights. Other means of asserting protection of human rights, such as street-level pressure, collective actions, campaigns of civil society groups, lobbying work and modern institutionalised monitoring systems, remain usual and helpful avenues. But the emergence of the ordinary individual, the atomic unit, as the initiator of the constitutional claim (in legally binding terms) of the protection of human rights in contexts in which private individuals interact, has no precedent in the political history of humankind.

To illustrate this point, we can look at those cases from the jurisprudence of European Court of Human Rights (hereinafter, the Court) in which states have been found in breach of their positive obligation to regulate and effectively implement health and safety standards for industrial activities, whose operation violated the human rights of some individuals. The message, therefore, is that an industrial activity (set up by private or public funds) must operate under health and safety standards. This issue, however, is basic, for the debate and campaign for safety standards in industrial sites is not new. Rather, the novelty of the message of positive obligations is the one single individual who is able to pursue their grievance within the system of the Convention and oblige a whole state, this most powerful and structured organisation, to prioritise its work and guarantee the protection of human rights in the various contexts in which private individuals interact.

Positive obligations exist because the binding system of the Convention exists. Therefore, the participatory ability of the ordinary individual to initiate the constitutional claim exists only because of the Convention. The current study covers the state of law on positive obligations, as has developed in the system of the European Convention of Human Rights. Previous major studies on positive obligations have covered the jurisprudence until the year of 2002, but there have been many and important developments since that time. A number of these developments concern positive obligations in circumstances where various individuals claim assistance from the state because they cannot enjoy human rights due to their own circumstances of personal vulnerability (physical and

psychological condition). This is an important and considerable extension of the scope of positive obligations, and that of the Convention, which can only be explained by the fact that the ordinary individual has become increasingly aware of their participatory ability to initiate the constitutional claim of human rights protection at the supranational level of the Convention. As, generally speaking, the protection of human rights is not only restricted to acts of interference, positive obligations are now debated and asserted across the board.

However, the problem with positive obligations is that their scope appears open-ended. As the study of the case-law will show, the Court does not set general conceptual limitations for its intervention to review the manner by which human rights standards are safeguarded in private interactions, other than those linked to the conceptual scope of the Convention rights which are often described and interpreted in equally broad terms. In principle, positive obligations can be claimed everywhere, a fact that creates problems as well as opportunities. Where positive obligations concern direct assistance to vulnerable individuals (i.e. an act of interference from a given source is absent), limitations are considered in relation to the state’s margin of appreciation, whose evaluation is not always clear. The list of problems with positive obligations is long, if one takes a close look at how they have developed in the jurisprudence. Often, problems do not exist separately but come as a result of a previous problem that arises in relation to a legal test or principle. In this regard, our study has to give due weight to the most important and preliminary questions. Problems may also arise from lack of focus on what is really at stake.

The underlying interests of this study lie in the wider effects of positive obligations, whose application in the system of the Convention produces two consecutive results. In particular:

1. Positive obligations secure the participatory position of the ordinary individual to initiate the constitutional question of the active protection of human rights in all areas in which they are relevant (i.e. beyond direct interference by state actors), thereby changing fundamentally the structure of democratic governance.

And, as a consequence of the first result:

2. They expand the intensity of review of the states’ system at lengths not previously imagined or attempted by any national or international law institution, through the empowerment of their nationals who are now able, for the first time, to be personally engaged in a continuous vigilance and re-discussion of the standards of human rights protection.

It should be noted, however, that the open discussion on positive obligations is not made over the above-stated results. European judges are
renowned for their low profile and cautiousness with states’ sensitivities about the ever-decreasing national sovereignty that unavoidably results from the interaction of national legal systems with European human rights law. It is to their credit that they have always managed to sense carefully the international climate and the changing social dynamics in various corners of Europe before moving to modify steadily and progressively the intensity of their review on the states’ legal system. There are numerous statements by the Court on the state’s margin of appreciation and on the optional choice of the domestic incorporation of the Convention but, in reality, what is actually observed is a considerable expansion of positive obligations and numerous rulings against the states that we present and discuss in the following chapters.

The whole debate on positive obligations over the last thirty years is being held in the neutral technical language of European human rights law. If the scope of positive obligations has to be curtailed or expanded, it has to be made in technical terms, because their wider effects are not openly stated so that there can be any meaningful elaboration or challenge. It is important, however, for the reader of this study to appreciate the significance of the issue with which we deal here from an early stage.

The current study of positive obligations concentrates on the technical points of law, save for a brief discussion of the object and purpose of the Convention in a sub-section of this introductory chapter. We have set two principal aims: first, to explain the content of positive obligations in accordance with their potential to extend and further improve the protection of human rights in a wide range of circumstances in which the state does not directly interfere; second, to transpose the content of positive obligations at the domestic level through procedural safeguards and institutional access for the participation of the ordinary individual so as to guarantee the implementation of protection and the continuous debate of human rights.

The principal condition for achieving these aims regards the practical realisation of positive obligations. The content of positive obligations has to be sought over a scope of human rights protection that can realistically be handled at both national and supranational level so as to emerge as a pan-European minimum standard. Accordingly, the challenge is that the open-ended scope of positive obligations, as has ambitiously been set by the Convention, has to be brought under a manageable level and be secured by a coherent methodological framework to provide certainty and predictability in the planning of the application and development of positive obligations.

All aims and challenges discussed above are addressed in the rest of the chapters, whose overview is detailed in the following section that sets out the route-map for the rest of study.
1.2 Overview of chapters

The current study is interested in the real and practical results of positive obligations that can be achieved or reasonably expected by the articulation of a doctrine in technical terms. The system of the Convention produces such results and, therefore, our exclusive area of study is its jurisprudence that is related or connected to the development of positive obligations.

Before moving to address the aims and challenges of this study in the following chapters, various essential starting points have to be secured as a working base in the introductory chapter. It has to be noted that there has been a substantial body of jurisprudence on positive obligations in the last thirty years without a connection being made to any theoretical base. Of course, the Court responds to individual petitions and senses the changes in civil society dynamics across its jurisdiction so as to develop accordingly the state’s positive obligations.

There are, however, two reasons why we need some theoretical input: first, because in the volumes of European human rights law literature, positive obligations are at times ignored and scholarly commentary still debates the legitimacy of their subject matter or the conceptual limits of the Court’s intervention in private relationships; we need to include discussion of the object and purpose of the Convention, the influential scholarly contributions preceding the first application of positive obligations in the late 1970s, an analysis of the early case-law on positive obligations, and the current national and international debate on the protection of human rights in private interactions. Second, a theoretical discussion provides useful background knowledge that can help explain the ever-increasing expansion of positive obligations in the Court’s jurisprudence.

However, in view of the fact that the jurisprudence on positive obligations has continuously progressed for the last thirty years through an internal development of various technical principles, rather than the subjectivity of theory, the theoretical discussion in this study cannot move beyond its introduction. It should also be noted that when there is a theoretical debate on the conceptual limits of positive obligations, it is the practical issue of the reasonable management and control of positive obligations (i.e. the technical legal issue) that prompts and ultimately justifies a given theoretical position.

There are additional basic issues of context and subject matter that determine crucial perspectives and conceptual parameters about the scope and structure of the Convention rights, which have to be secured early in the study, as they affect considerably the technical discussion in the following chapters.

This chapter also provides an analysis of the Court’s internal debate on the manner and intensity of its review of the state’s legal system that aim to improve the quality of the European judges’ decisions and the management
of the ever-growing caseload. From this ongoing debate, various trends and shifts in focus have emerged that reflect the current evaluation of the capabilities, objectives and function of the Court which guide the discussion of positive obligations in subsequent chapters.

Having covered the essential starting points for the study of positive obligations, we arrange the plan of chapters to cover the substantive content of positive obligations in Chapters 2 and 3, before moving, in Chapter 4, to discuss the procedural framework that guarantees the implementation of positive obligations at the domestic level.

Chapter 2 covers the application and development of positive obligations in the system of the Convention. Positive obligations are determined through a coherent framework that accords due weight to contextual differences. With reference to the Court’s internal debate, the chapter relies on current case-law developments to assert the distinctiveness of positive obligations which establishes their potential and guides accordingly the determination of their content. The critical condition, against which the state’s international liability can be engaged when human rights are violated by non-state actors, is identified and placed at the centre of the proposed framework. Since the question of international liability arises first, the content of positive obligations, at whichever stage and level is examined, is determined in conformity with the conditions engaging the state’s liability under the Convention.

The more detailed discussion of positive obligations is sub-divided according to the nature and structure of the Convention rights and the practical limitations of the cost of human rights protection. Critical conditions and parameters that affect the judicial examination are addressed in order of their respective importance. The length of this chapter exceeds that of any other chapter due to the large number of critical details that all have to be identified and be known before determining positive obligations in the wide range of circumstances in which human rights can be threatened in private interactions.

Chapter 3 continues the discussion on the substantive content of positive obligations that extends to the protection of vulnerable individuals who cannot enjoy human rights due to their own personal (physical and/or mental) condition. Before a content of positive obligations can be described, limits of legitimacy and practicality of protection are identified. The chapter recognises (the possibility of) positive obligations through well-defined limits, given that protection of human rights is claimed in the very wide range of circumstances in which the causal element of a prior interference from a private or public actor is absent. Limits that relate to the scope of the Convention rights have already been introduced and discussed in the preceding chapters, as they concern basic and preliminary questions of the content of positive obligations whose application transcends context. Their discussion in this chapter is particularly valuable for the whole thesis of this study that aims to establish a manageable scope of
positive obligations through a methodological framework of critical principles and parameters and procedural guarantees. In that regard, the content of positive obligations is not only examined as a personal form of protection but as the very framework through which any given content of protection can be asserted and finally emerge.

Chapter 4 completes the study by addressing the question of the domestic implementation of the substantive content of positive obligations that is covered in the previous chapters. It discusses procedural rights and legal principles by which the Court reviews procedural safeguards and structures that are crucial for the enforcement of positive obligations in the state’s legal order. The analysis of the procedural framework extends to the procedural aspects of the substantive content of positive obligations (as is discussed in previous chapters) which target both the private parties that directly violate human rights and the public officials who discharge the state’s positive obligations in relation to the acts of the former. Procedural safeguards are marked as access points for the participation of the ordinary individual in the implementation and enforcement of the substantive content of positive obligations at the domestic level. The underlying aim is to manage positive obligations at the European level through an intensified review of the domestic procedural infrastructure in the critical stages (and sub-stages) of the decision-making process of public administration.

1.3 Basic issues of context and subject matter

1.3.1 The distinctiveness of human rights

Stating the most basic point, the protective role of the state is examined over ‘human rights’. The trademark term ‘human rights’ that is recognisable universally was launched with the Universal Declaration of Human Rights by the General Assembly of the United Nations in 1948. Closely connected to human rights are the so-called fundamental freedoms (e.g. freedom of expression), which have both an individual and collective/political dimension. Being mutually inclusive, human rights and fundamental freedoms form one interconnected whole, with the term ‘human rights’ encompassing fundamental freedoms. Also, under the strict liberal understanding, the rights of individuals are freedoms from acts of interference and, therefore, human rights can be seen as synonymous to fundamental freedoms. However, the use of the term ‘rights’ instead of

'freedoms’ has a great significance, in that the ‘rights’ term connotes a natural law imperative that induces an open-ended negotiation of the relationship between the state and the individual citizen, as well as the full and continuous arrangement of constitutional balances of rights and freedoms between the citizens themselves. This position is further influenced by the concurring existence of international law that aims at the rights of everyone in order to prescribe universal values, rather than to simply preserve the state of citizens and their individual interests, for which purpose human rights had originally developed and accordingly declared. In this connection, human rights gradually emerge, in addition or otherwise, as a special and distinguishable category of rights that revolve around intrinsic elements of one’s personhood to define indispensable anthropocentric values of universal standing.

Other alternative or concurring terminology exists, such as ‘fundamental rights’ which is more expansive and does not automatically reveal the exact nature of the rights referred to. Examples from the wording used in national constitutions include: Droits de l’Homme et du Citoyen (the Rights of Man and of the Citizen); Grundrechte/Grondrechten (Basic Rights); Human Rights Act; Ατομικά και Κοινωνικά Δικαιώματα (Individual and Social Rights); Diritti e Doveri dei Cittadini (Rights and Duties of Citizens); Drepturile, Libertățile și Și Îndatoririle Fundamentale (Fundamental Rights, Liberties, and Duties); Temel Haklar ve Ödevler/Direitos e Deveres Fundamentales/De los Derechos y Derebes Fundamentales (Fundamental Rights and Duties);Основни Права и Задължения на Гражданите (Fundamental Rights and Duties of Citizens).

However, it is not the label given to a category or set of rights that is important, but rather their nature and exact content. For the purposes of the current study, which is exclusively made on the European Convention of Human Rights, human rights include fundamental freedoms that apply to every individual (citizens and non-citizens, including those from non-member states) within its territorial jurisdiction. The content of human rights and fundamental freedoms that are covered in this study are those of Section I that lists the so-called substantive rights of the Convention. Further rights of concurring or supplementary nature have been added to its text, such as the proprietary right under Article 1 of Protocol 1. However, despite being undeniably important, this right

8 See, e.g., Article 30: ‘Protection in the event of unjustified dismissal’, Charter of Fundamental Rights of the European Union (Official Journal of the European Communities, C 364/1; C 303/1).

can be compromised relatively easily by way of monetary compensation due to the wide discretion accorded to the state to pursue general socio-economic policies.\textsuperscript{10} Thus, different evaluative standards require separate studies.

\textbf{1.3.2 International responsibility and the general scope of human rights protection}

The general scope of human rights protection, against which the international liability of the contracting state is arranged, is indicated in the title of the Convention and its first provision (Article 1). Both the title and the first Article are worded in broad terms allowing the Court to self-assert its autonomy\textsuperscript{11} and interpret the Convention as a ‘living instrument’.\textsuperscript{12}

\textbf{1.3.2.1 Article 1}

The first Article is cited immediately before Section I and sets out the terms of the state’s international responsibility as follows:

\begin{quote}

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention./Les Hautes Parties contractantes reconnaissent à toute personne relevant de leur juridiction les droits et libertés définis au titre I de la présente Convention.
\end{quote}

Although both the English and the French text are official, it is widely accepted that it is the English version of ‘shall secure’ rather than the lighter wording of ‘reconnaissent’ (‘recognise’) that expresses the real scope and potential of the Convention.\textsuperscript{13} The Court had the opportunity in an early case to clarify that


\textsuperscript{11} \textit{Al-Saadoon & Mufdhi v. the United Kingdom} [2010] no. 61498/08, para. 128: ‘a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.’

\textsuperscript{12} \textit{Ty rer v. the United Kingdom} [1978] no. 5856/72, para. 31; \textit{Pretty v. the United Kingdom} [2002] no. 2346/02, para. 54.

Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a “collective enforcement”… By substituting the words “shall secure” for the words “undertake to secure” in the text of Article 1 (art. 1), the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States…. The Convention does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms it embodies; as is shown by Article 14 (art. 14) and the English text of Article 1 (art. 1) (“shall secure”), the Convention also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels.14

1.3.2.2 Title

The title of the Convention reads as ‘Convention for the Protection of Human Rights and Fundamental Freedoms’/‘Convention de Sauvegarde des Droits de l’Homme et des Libertés Fondamentales’. From this, one can discern the general nature of the Convention provisions, as well as the general purpose, namely their ‘protection’ (‘sauvegarde’).

The title of the Convention is also conveniently referred to as the ‘European Convention of Human Rights’ (‘La Convention Européenne des Droits de l’Homme’), with fundamental freedoms being implied in these short titles. It should be noted that, unlike the French short title that remains unchanged wherever and whenever is used, the English version is also encountered as ‘the European Convention on Human Rights’. The difference between a Convention ‘of’ human rights, as opposed to a Convention ‘on’ human rights is nothing but fundamental. The former recognises its preponderant status close to the one and only document, while the latter version suggests a Convention on something among other things. In addition, as Pieter Drost has explained:

A clear distinction must be made between treaties of human rights and treaties on human rights. The first category creates individual rights; the second creates merely governmental obligations. If the international legal order has the essential function to afford protection against the state, and to guarantee the individual assistance by the state, it is necessary to create individual human rights under international law.15


1.3.3 The nature and structure of the Convention rights: the centrality of private life/personality as a core value

Section I of the Convention contains the substantive rights against which the state’s international liability arises. The nature and structure of these rights can first be seen by a literal reading of their respective provisions, i.e. Article 2: the right to life; Article 3: prohibition of torture and inhuman or degrading treatment, etc. At a basic level, the Convention is studied on an Article-by-Article basis, as reflected in the applicants’ claims and Court’s decisions. There are, however, broader issues of human rights protection in the wider context to which the applicant’s circumstances often relate which accordingly require a broader approach. To this aim, it is important to note that the Convention is not simply a collection of various human rights interests but constitutes an integrated whole. As the Court constantly reiterates, ‘[t]he Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions.”

In this respect, due attention has to be paid to the first component of Article 8 that guarantees respect for ‘private life’, a term whose broadness accounts by far for the most positive obligations claims. The concept of private life has long been connected to the development of one’s ‘personality’ (or ‘personal development’), an interpretation that satisfactorily encapsulates the ultimate core of a person’s existence. It has been made clear since the early jurisprudence of the former European Commission of Human Rights (hereinafter, the Commission) that

17 L. Wildhaber, ‘The European Court of Human Rights in Action’ (2004) 21 RLR 83–92, p. 84: ‘In a dynamic instrument, Article 8 has proved to be the most elastic provision.’
18 This approach has been influenced by the German constitutional provision of Article 2 of the Basic Rights (Grundrechte) of 1949: ‘Everybody has the right to the free development of his personality, as long as he does not violate the rights of others and does not contravene the constitutional order or moral laws.’ For analysis of earlier case-law, see P. Duffy, ‘The Protection of Privacy, Family Life and Other Rights Under Article 8 of the European Convention on Human Rights’ (1982) 2 YbEL 191–238, pp. 191, 194, 224; L. Loucaides, Essays on the Developing Law of Human Rights (Dordrecht: Martinus Nijhoff, 1995), chapter 4: ‘Personality and Privacy under the European Convention on Human Rights’, pp. 83–107.
19 Pretty v. the United Kingdom [2002] no. 2346/02, para. 61; Van Kuck v. Germany [2003] no. 35968/97, para. 69; Campagnano v. Italy [2006] no. 77955/01, para. 53; Evans v. the United Kingdom [2007] no. 6393/05, para. 71; Farcas v. Romania (dec.) [2010] no. 32596/04, para. 68 (available in French only); Ozpinar v. Turkey [2010] no. 20999/04, para. 45 (available in French only).
20 Under the provisions of Protocol 11, the European Commission and the European Court on Human Rights joined together in a single body, the European Court of Human Rights, in 1999.
For numerous anglo-saxon and French authors the right to respect “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 here. It comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one’s own personality.21

Under this clarification, the scope of Article 8 targets the necessary conditions that allow the individual to develop their personality, or, put in negative terms (perhaps more accurately), those critical conditions without which the personality of an individual cannot develop. Such conditions have been recognised in Article 8 case-law as including the ‘physical and psychological integrity’ of a person and the possibility to ‘develop relationships with other human beings’. To the extent that these specific interests are vital to the development of one’s personality, they are valued in their own right, something that is also confirmed by the fact that in some judgments direct reference to the more general and unifying core value of personality is often omitted.22

The generous interpretation of ‘private life’ as the development of one’s personality (or personal development) not only succeeds in specifying an otherwise open-ended term but also, more importantly, interconnects all human rights around a central concept through which the long-professed holistic reading of the Convention provisions can be achieved. As Commissioner Loukis Loucaides (as he was then) has noted in analysing earlier Article 8 jurisprudence:

[t]he personalised inclination of the system [of the Convention] is indicated by the particular human rights which are expressly recognised and protected and which constitute aspects of personality of the

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21 X. v. Iceland (dec.) [1976] no. 6825/74, p. 87, as quoted by Loucaides, Essays, p. 87, who also explains that ‘from the first years of application of the Convention [its organs] have felt the need to protect the right to privacy on the basis of the requirements of personality.’, citing an admissibility decision of 1969, no. 2929/66, pp. 99–100, see also pp. 86–87 and footnote 11. For earlier case-law, see Bruggeman and Scheuten v. Germany (dec.) [1976] no. 6959/75, para. 57; McFeeley and Others v. the United Kingdom (dec.) [1980] no. 8317/78. See also Taliadorou and Stylianou v. Cyprus (dec.) [2008] nos 39627/05, 39631/05, paras 52–54; Reklos and Davourlis v. Greece [2009] no. 1234/05, paras 39, 40; Bigaeva v. Greece [2009] no. 26713/05, para. 23.

22 See, e.g., Niemietz v. Germany [1992] no. 13710/88, para. 28; Costello-Roberts v. the United Kingdom [1993] no. 13134/87. In Botta v. Italy [1998] no. 21439/93, para. 32, it has been explained that ‘[p]rivate life, in the Court’s view, includes a person’s physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings’ (cited case omitted).
individual in a democratic and pluralistic society (the right to respect for private and family life, home and correspondence, freedom of thought, of expression and of association, the right to education, the right to marry, etc.).

In that connection, the holistic reading of the Convention concerns in essence a central protected interest (i.e. personality) around which various degrees of severity and contextual applications are specified in the remaining rights whose exact scope is fixed in the Court’s jurisprudence.

Where contextual applications are concerned, such as the right to marry, preference is given to the *lex specialis* (Article 12) due to the degree of specificity entailed in the express provision. A link to the central protected interest of one’s private life/personality, through a reference or a parallel examination of the *lex generalis* (Article 8), will always be useful for a better appreciation of the interconnection and holistic reading of the Convention provisions.

### 1.3.4 The object and purpose of the Convention

It is important at this early stage of the study to acquire an understanding of the political significance of positive obligations that places the question of their legitimacy and far-reaching scope within the object and purpose of the Convention.

The European Convention of Human Rights is first and foremost a peace project. It was founded as a regional international institution following the setting up of the United Nations and the Universal Declaration of Human Rights in the aftermath of the Second World War (WWII), an event that is remembered as the most catastrophic war in human history for the unprecedented number of casualties and the sickness and perversity of the atrocities committed. Within the geo-
political area of the Council of Europe, differences between member states on human rights issues can peacefully be adjudicated by the Convention’s institution.\textsuperscript{27} The standing of the Convention as an international adjudicator has boldly been affirmed in cases concerning the preservation and actual enjoyment of property (including physical access) of individuals who have forcibly been displaced following a military operation.\textsuperscript{28}

However, the Convention’s plan to advance the objective of peace goes beyond the international adjudication of human rights issues between the contracting states. As is clear from the preamble of the treaty, peace is the categorical and ultimate objective that has to be achieved through the intermediate objectives of democracy, human rights (and fundamental freedoms) and the rule of law. All these objectives are indispensable in guaranteeing a solid institutionalised framework at the domestic level capable of inducing a civilised and advanced political culture. In other words, the Convention aims at the foundations of peace by creating a European culture that has a sweeping effect on whole generations of people, rather than serving as a mere adjudicator of human rights complaints after peace has been broken. Every single complaint brought by an individual residing within one of the contracting states is an opportunity to advance and continuously maintain the political culture of democracy, human rights and the rule of law. Every victory won at the individual level is a victory towards an advanced civilised culture and, by extension, a victory towards peace.

The realisation of the core intermediate objectives of the Convention presupposes an additional intermediate objective, which is the Convention itself. This fundamental assertion is highlighted as follows:

\textsuperscript{27} Since it was set up in 1959, the Court has delivered judgments in three inter-state cases: Ireland v. the United Kingdom [1978] no. 5310/71; Denmark v. Turkey [2000] no. 34382/97; Cyprus v. Turkey [2001] no. 25781/94. At the time of the application of Georgia v. Russia, lodged with the Registry on 26 March 2007, a further 17 inter-state applications were dealt with by the former European Commission of Human Rights. See, further, S. Greer, The European Convention on Human Rights: Achievements, Problems and Prospects (Cambridge: Cambridge University Press, 2006), ‘Inter-state complaints’, p. 25.

\textsuperscript{28} Loizidou v. Turkey [1995] no. 15318/89; Demades v. Turkey [2003] no. 16219/90; Xenides-Arestis v. Turkey [2005] no. 46347/99; Epiphaniou and Others v. Turkey [2009] no. 19900/92; Dokic v. Bosnia and Herzegovina [2010] no. 6518/04. The dissenting opinion of the French judge Pettiti in the Loizidou case has to be cited if only to show different visions about the role of the Court in international affairs and peace: ‘The movement of displaced persons from one zone to another, an exodus which affected both communities, was the consequence of international events for which responsibility cannot be ascribed on the basis of the facts of the Loizidou case but has to be sought in the sphere of international relations’.
The Convention has first to establish a supranational system that sets itself over and above national sovereignty. It produces European human rights law that creates and guarantees individual human rights under international law. In such a system there are three fundamental characteristics:

1. The decisions of the European Court of Human Rights are \textit{binding}.\footnote{\textit{Loucaides}, Essays, p. 4: ‘The provisions of the European Convention in contrast with those of the Universal Declaration, are legally binding and may be enforced through the judicial organs of the Convention.’} The Court is able to order an award of just satisfaction under Article 41 and ask for action on the part of the respondent state where there is a continuing effect of human rights violation in the applicant’s circumstances.\footnote{\textit{Fadeyeva v. Russia} [2005] no. 55723/00.} The Committee of Ministers supervises the state’s compliance and intensifies its monitoring over repetitive cases concerning similar human rights complaints against the same state.\footnote{Resolution \textit{Res}(2004)3 of the Committee of Ministers on a judgment revealing an underlying systemic problem (adopted on 12 May 2004). See also \textit{Broniowski v. Poland} [2004] no. 31443/96; \textit{Lukenda v. Slovenia} [2005] no. 23032/02; \textit{Cocchiarella v. Italy} [2006] no. 64866/01; \textit{Rumpf v. Germany} [2010] no. 46344/06; \textit{Vassilios Athanasiou and Others v. Greece} [2010] no. 50973/08. Cf. \textit{Wolkenberg and Others v. Poland} (dec.) [2007] no. 50003/99.}

2. The state shall secure the Convention rights to ‘\textit{everyone}', as expressly stated in Article 1 or implied and stated in paragraph 1 of other Articles (‘\textit{everyone} has the right to . . .’, or ‘\textit{no one} shall be . .’).\footnote{\textit{Austria v. Italy} (dec.) [1961] no. 788/60.}

3. \textit{Individual Petition} to the European Court is secured under Article 34 (ex Art. 25), which has become obligatory since 1987.\footnote{Before 1987, individual petition was available to those states that had opted for it, e.g. the United Kingdom in the 1960s, France and Turkey in the 1980s.} This right is complemented by corresponding rights of access to a human right
claim under both admissibility criteria (Article 35.1) and procedural obligations for a domestic remedy (Article 13).  

These three fundamental characteristics are closely interdependent and have a combining effect that comes down to one reality (the current living experience) that the Convention exists as an independent and autonomous legal authority that responds to the human rights claims of the ordinary individual. Therefore, the agenda for the development of European human rights law and, by extension, any advances needed in the current human rights standards, are informed and pursued directly by the ordinary individual. It is within this context that the additional objective of ‘greater unity’ between member states, as is also mentioned in the Convention’s preamble, can best be appreciated. Unity is the result of the combining effort of European individuals who through their own initiative and persistence advance European human rights law. Any given case that is pursued at the European level can have an effect on three levels: (1) the applicant’s circumstances, (2) the respondent state’s legal system and (3) that of other member states falling short of the European standards (as they are exposed to similar complaints before the Court). Accordingly, the interrelation of the intermediate objectives that have to be secured in priority in order to safeguard the final objective of peace can be described as follows:

34 W. Friedmann, The Changing Structure of International Law (London: Stevens & Sons, 1964), p. 244: ‘this Convention signifies a revolutionary advance in the legal position of the individual. The right of an individual to bring complaints, culminating in the compulsory jurisdiction by a supra-national court, against violations of his rights by the state of his own nationality, is a derogation from the principle of absolute state sovereignty with regard to nationals’. K. Boyle and H. Hannum, ‘Individual Applications under the European Convention on Human Rights and the Concept of Administrative Practice: the Donnelly Case’ (1974) 68 AJIL 440–453, p. 440: ‘The most distinctive feature of the European Convention on Human Rights is the optional procedure under [ex] Article 25’. P. Drost, The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples, Book I: Humanicide (Leyden: A.W. Sijthoff, 1959), p. 82: ‘Human rights and fundamental freedoms, whether they are ordained in national constitutions or proclaimed in international conventions, in so far as they relate to norms of action and forms of organization of the state and do not confer rights and remedies to the private person at law, belong to the province of politics and economics more than to the department of law. [§] Constitutions and treaties often are not much more than empty words and printed paper. Words are usually plentiful and paper always patient.’

35 Χ. Ροζάκης (Ch. Rozakis) (former vice-president of the Court), Η Προστασία των Ανθρωπίνων Δικαιωμάτων σε μία Μεταβαλλόμενη Ευρώπη (Athens: Αντ. Ν. Σάκκουλα, 1994). L. Wildhaber (former president of the Court), ‘A Constitutional Future for the European Court of Human Rights?’ (2002) 23(5–7) HRLJ 161–165, p. 162: ‘the mechanism of individual applications is to be seen as the means by which defects in national protection of human rights are detected with a view to correcting them and thus raising the general standard of protection of human rights.’
It should be noted that in no period in the history of humankind the ordinary individual could exercise such a direct and personal pressure through a normal institutional framework to influence important constitutional issues at both national and international levels. The emergence of the ordinary individual as an active international player in the shaping of the political culture is an overwhelming and unprecedented experience. It is this experience that explains the advanced and very advanced kind of human rights claims that are brought before the Court on the state’s positive obligations. In that connection, positive obligations reflect the Court’s response to social forces, as expressed in individual petitions, in redirecting the Convention as a ‘living instrument’ accordingly.36

In turn, positive obligations acquire their own significance within the Convention’s interconnected aims, whose structure begins and ends with the participation of the individual and the preservation of peace, respectively. As positive obligations concern the active protection of human rights in circumstances in which the state does not directly interfere, the participatory ability of the ordinary individual now extends to all areas in

which human rights can be relevant, thereby signalling the most advanced review of the state’s business ever attempted in international law. Therefore, when the legitimacy or the conceptual limits of positive obligations are discussed, it is important to have in mind the opportunities for the ordinary individual and, by extension, for international peace that have resulted from the development and application of positive obligations within the system of the Convention.

1.4 The doctrinal justification of positive obligations

1.4.1 Early studies

In this sub-section we give a brief account of important writings that influenced the application of positive obligations in the Court’s jurisprudence in the late 1970s. The argumentation developed prior to that period exhibits the origins of the debate and help us understand that the core base of the current, more expanded scope of positive obligations has been and still remains the active protection of human rights from acts of interference of private parties. This is also an opportunity to pay homage to the scholarly debate of the 1960s and 1970s that took place at both national and international levels and which cannot possibly be exhausted here. For our purposes, we need only to present key points of justification of positive obligations from the ground already covered in previous commentary, and move on.

Some of the most important writings tackling the issue of human rights violations by private parties are contained in a book of individual articles entitled Privacy and Human Rights. In his contribution, “‘Twenty Years’ Experience of the Convention and Future Prospects’, Phedon Vegleris has pointed out:

The only qualitative difference between private infringements of this kind [on human rights] and those which may be perpetrated by public authorities is that the private individual, unless he manages to establish a de facto government, can never legally remove or impair any of these rights or freedoms, either generally or individually.\(^37\)

This explanation affirms the basic point that when human rights are violated by non-state actors, these rights have still a binding effect, and hence they are legally actionable. Therefore, it is the responsibility of the state to regulate private conduct and duly enforce the regulated

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\(^37\) P. Vegleris, in A.H. Robertson (ed.), Privacy and Human Rights, p. 382.
standards. In this regard, the sovereign state becomes accountable for acts of interference of private parties.\textsuperscript{38}

It is worth noting that some of these contributions were written by self-exiled scholars in a Europe characterised by communist regimes in the East and dictatorships in the South. In spite of that bleak political climate, the protection of human rights against private actors was dynamically campaigned for.

Beyond general justifications, it is pertinent to establish that the Convention has the necessary internal resources to channel legitimately, as well as effectively, the responsibility of the state within its supranational system. In the same book of articles, Jan De Meyer has argued that the protection of human rights from private interference should be organised by holding the state indirectly responsible. In particular, he wrote that

without the text of the Convention having to be amended or a new protocol drafted, violation by private individuals of the rights protected by the Convention can be sanctioned indirectly, under the existing text, by the organs responsible for ensuring that the Convention is respected by the contracting States, if the responsibility of such a State is involved. Such a case could arise if a State had failed in its duty to provide due protection and, in particular, had failed to take the necessary steps to prevent or punish the offence or ensure effective redress for the victim, for where the State’s responsibility is involved in this way it follows that it is the State itself which has infringed the rights protected.\textsuperscript{39}

De Meyer based his position on the express wording of the Convention rights and the background information of the drafting history. In particular, he explained that the state’s indirect responsibility for human rights violations by private parties is deducted from the express wording of the following provisions:

\textsuperscript{38} M.-A. Eissen, ‘La Convention Européenne des Droits de l’Homme et les Obligations de l’Individu: une Mise à Jour’, in \textit{Amicorum Discipulorumque Liber René Cassin III: Protection des Droits de l’Homme dans les Rapports Entre Personnes Privées} (Paris: Pédone, 1971), pp. 151–162, p. 156: ‘How does a private individual encroach on the rights of another if the state does not authorise the individual’s acts in the name of a private interest, which is both legitimate and sufficiently important?’ (translation). G. Malinverni, in W. Haller et al. (eds), \textit{Im Dienst an der Gemeinschaft}, p. 559: ‘the Strasbourg organs have deducted from the Convention the obligation of the member states to make sure that the rights and liberties of the Convention cannot be prejudiced in any circumstance, irrespective of whether the interference, which can be attributed to the State, originates from the State itself or a private individual or even from a state agent, which authorises or tolerates that act … If a violation of a fundamental right is caused by an act of a private individual, it is not him who should be responsible, but the State.’, (translation).

- Article 1: To secure the Convention rights to everyone.
- Article 13: To guarantee an effective remedy notwithstanding that the violation has been committed by persons acting in an official capacity.\(^{40}\)
- Article 17: To prohibit abuse of the Convention rights by any state, group or person engaged in any activity.\(^{41}\)
- The terms ‘Everyone has the right’ in Articles 1, 2, 5, 6, 8, 9, 10, 11, 13 or ‘no one shall’ in Articles 3, 4.\(^{42}\)

Any of these provisions, taken alone or in combination, suffices to establish positive obligations as inherent into the system of the Convention.

In addition, De Meyer cites the drafting history of Article 8 from the 
\textit{travaux préparatoires} to remind that a proposal to include ‘the right to freedom from governmental interference’ in the first paragraph of Article 8 was removed by the drafting Conference.\(^{45}\) Although the drafting papers do not influence the interpretation of the Convention, which has long

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\(^{40}\) See also P. Mertens, \textit{Le Droit de Recours Effectif devant les Instances Nationales en cas de Violation d’un Droit de l’Homme} (Brussels: Editions de l’Université de Bruxelles, 1973), p. 110, who pointed out that ‘[t]he status of the actor of the violation is indifferent.’ (Ch. III, sec. III: ‘L’article 13 de la Convention de sauvegarde et la responsabilité de la puissance publique’), and for analysis of earlier case-law, see pp. 111–141. Mertens quotes Henri Rolin at pp. 105–106: ‘It appears that from the moment that the states are under an obligation to ensure the protection of individuals against any violation, including those emanating from a state agent, this protection means to prevent or sanction violations committed by parties other than State officials or agents, namely, by private individuals. It follows, therefore, that as far as they are concerned, there is also an obligation [for the State]. The State that ratifies the Convention links also its nationals, namely all individuals who reside in its territory’ (translation), from the book of articles entitled \textit{La Protection Internationale des Droits de l’Homme dans la Cadre Européen} (Dalloz, 1961), p. 410.


\(^{42}\) De Meyer, ibid., p. 260: ‘The Council of Europe Consultative Assembly has since been moving unmistakably towards a progressive interpretation of Article 8; this is revealed especially clearly in its resolution of 23 January 1970, where it states explicitly that the “right to privacy afforded by Article 8 of the Convention … should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media”, see also pp. 162 and 275.

\(^{43}\) Ibid., p. 264. For discussion of earlier case-law, see G. Malinverni, in W. Haller \textit{et al.} (eds), \textit{Im Dienst an der Gemeinschaft}, p. 555.
been treated by its Court as a ‘living instrument’,\footnote{See case-law cited in note 12.} they show nevertheless that even in those very early years the Convention was not meant to exclude protection of human rights from private interference.

The influence of these writings on the application of positive obligations in the Court’s jurisprudence can be seen in the connection between the above-mentioned book of articles submitted for an international conference in Brussels, the first case on positive obligations against Belgium (i.e. \textit{Marckx v. Belgium}) and the express reference to one of the articles from that book by the lawyer representing Paula Marckx in the homonymous case.\footnote{In \textit{Marckx v. Belgium} (dec.) [1975] no. 6833/74, the applicant cites (at p. 130) the article of Torkel Opsahl, ‘The Convention and the Right to Respect for Family Life Particularly as Regards the Unity of the Family and the Protection of the Rights of Parents and Guardians in the Education of Children’, in A.H. Robertson (ed.), \textit{Privacy and Human Rights} (Reports and Communications Presented at the Third International Colloquy about the European Convention on Human Rights, Organised by the Belgian Universities and the Council of Europe, with the support of the Belgian Government: Brussels, 30 September–3 October 1970), (Manchester: Manchester University Press, 1973), pp. 255–275.} It should also be noted that learned scholars and lawyers are often nominated by the states as judges or for other influential posts in the Convention’s institution (e.g. Jan De Meyer, Torkel Opsahl, Marc-André Eissen). This final note adds nothing to the internal legitimacy of positive obligations but highlights the trading and streamline of thoughts and the human factor involved in the development of institutions.\footnote{With reference to the previous note, see also the argument of Commissioner Torkel Opsahl before the Court in \textit{Airey v. Ireland} [1979] no. 6289/73, p. 22: ‘I do not think that this Court would accept any description of the European Convention as one containing essentially “negative” rights or endorse the out-dated \textit{laissez-faire} concept of human rights which would find anything in order so long as there was no interference by a public authority in the particular situation.’, Cour/Misc.(79)19 (the Court’s verbatim record).}

\section*{1.4.2 The first positive obligations cases}

The application of positive obligations in the Court’s jurisprudence begins with the judgments in the cases of \textit{Marckx} and \textit{Airey} in 1979. In both these cases, the Court’s ruling should be considered quite ahead of its time, even by current standards, in that the issue of protection of human rights against acts of interference from private actors was either not relevant (as in \textit{Marckx}) or did not concern the general question of the state’s indirect responsibility as such (as in \textit{Airey}).

However, as already noted, in spite of the current expanded scope of positive obligations, their core base has been and still is the active protection of human rights from acts of interference of private parties, whose causal relation to the violation complained of requires an effective response from the state (see detailed discussion in the following chapters).
These issues would become more apparent in subsequent case-law, such as *X and Y* of 1985 in which positive obligations were examined in relation to a violation of a human right that was caused by a private individual.\(^{47}\)

For the purposes of the current study, the case of *X and Y* needs to be discussed first to preserve the order by which the understanding of positive obligations has developed since the beginning of the scholarly debate, making more accessible in that way the core principles and justifications of the state’s positive obligations. It is only then that the judgments of *Marckx* and *Airey* should be introduced to stress the expanded scope of positive obligations that we elaborate in more details in the following chapters.

### 1.4.2.1 X and Y

The case of *X and Y* concerned the rape of the second applicant (the incident occurred on the day after Miss Y’s sixteenth birthday) who could not initiate criminal law proceedings against the perpetrator due to her being mentally handicapped. The applicants complained that the state did not make available a criminal law remedy against rape in the circumstances of the victim. It was admitted by the government that rape attracted generally a punishment in criminal law which could not apply in her case due to the applicable procedural requirements. However, it argued that an alternative remedy was available in civil law, although if this had been a serious argument, a preliminary objection on the non-exhaustion of domestic remedies would have already been made.

When a private party violates a human right of another individual, the liability of the state is sought over its failure to protect the victim in the given circumstances. In the cases of rape or other forms of bodily harm, the basic content of protection and, by extension, of positive obligations is to regulate the commission of offences against the person and prescribe sanctions of an appropriate deterring effect that must be backed up by law-enforcement procedures in order to ensure due compliance of law. In *X and Y*, the fact that criminal law sanctions were not enforceable or applicable in the applicant’s circumstances meant in practice that no prior regulation existed in criminal law. Only civil law remedies were available, for which enforcement proceedings could be initiated. The state was found in violation of its positive obligations on the ground that the protection offered (i.e. civil law remedy) could not guarantee the appropriate deterring effect in relation to the human rights interest concerned (i.e. respect for private life under Article 8) and the higher degrees of severity therein (i.e. ‘where fundamental values and essential aspects of private life are at stake’).\(^{48}\)

\(^{47}\) *X and Y v. the Netherlands* (1985) no. 8978/80.

\(^{48}\) Ibid., para. 27.
The case of X and Y constitutes what can conveniently be called the classic positive obligation case that arises when the state is rendered ‘indirectly’ responsible for its failure to actively protect an individual, either at all or adequately (as in that case) from acts of interference of another private actor.

1.4.2.2 Marckx

The Court applied, for the first time, positive obligations as ‘inherent’ in the effective protection of human rights in the case of Marckx. The main complaint under Article 8 concerned the lack of appropriate administrative measures that would establish a legal bond between an unmarried mother and her child from the mere fact of birth. Positive obligations were justified by simply pointing to the first paragraph of the Convention right that was engaged in the applicant’s circumstances. There was no need to seek additional justifications or the combined effect of various Convention Articles.

The Court’s reasoning in that case closed conclusively the issue of legitimacy of positive obligations in the legal order of the Convention or, more accurately, that legitimacy was never questioned, given that positive obligations were recognised as ‘inherent’ in the provisions of paragraph 1 of the substantive rights of the Convention.

In order to illustrate this point further, the focus of the Court’s approach has to be highlighted. The main defence in the government’s submission was that the current domestic law favours the traditional family on grounds relating to morals and public order (as the legitimate aims of interference under the second paragraph of Article 8). In addressing this argument, the Court did not rule on the legitimacy and justifiability of these aims but concentrated on the question that protection of the right to respect for family life applies to ‘everyone’, including an unmarried mother. The main issue was of how an ‘illegitimate family’ had been protected by the state and not whether an interference could be justified. In particular, the Court reasoned:

[the object of Article 8] does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective “respect” for family life…. As envisaged by Article 8 (art. 8), respect for family life implies in particular, in the Court’s view, the existence in domestic law of legal safeguards that render possible as from the moment of birth

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50 See also Marckx v. Belgium (dec.) [1975] no. 6833/74.
the child’s integration in his family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 (art. 8–1) without there being any call to examine it under paragraph 2 (art. 8–2).\footnote{Ibid.}

It is clear from this passage that since the state has ‘inherent’ positive obligations to actively protect the human rights of an individual, a core content of protection has to be guaranteed by virtue of paragraph 1 of the Convention right. The judgment in \textit{Marckx} makes clear that the state is under a positive obligation to assist the integration of a child into a family environment, including the offspring of non-marital women. If the measures taken by the state’s administration do not comply with this obligation, they fall foul of the Convention without being necessary to examine any defences on a justifiable interference under the legitimate aims of paragraph 2.\footnote{Duffy, ‘The Case of Klass and Others: Secret Surveillance of Communications and the European Convention on Human Rights’, p. 200; C. Forder, ‘Legal Protection under Article 8 ECHR: \textit{Marckx} and Beyond’ (1990) 37(2) \textit{NILR} 162–181, p. 179.}

Having said that, it should also be noted that the state had expressly invoked paragraph 2 of Article 8 to support its position, as can be seen in the text of the Commission’s admissibility decision. In principle, the legitimate aims listed in paragraph 2 can never be excluded from the judicial examination when they are relied upon in a state’s defence. The state is entitled to argue its case and the Court should respond as to whether the arguments presented can or cannot be accepted. Of course, it can be argued that it was obvious that no legitimate aims of interference could be engaged in that case. In law, however, nothing is obvious until stated. If the obvious has been explained in previous jurisprudence, then express reference to these authorities should be made.\footnote{Previous cases arising from the same context had been rejected or had reached an opposite outcome, \textit{Marckx v. Belgium} [1979] no. 6833/74, para. 58: ‘As recently as 22 December 1967, the Commission rejected under Article 27 (2) (art. 27–2) – and rejected de plano (Rule 45 (3) (a) of its then Rules of Procedure) – another application (No. 2775/67) which challenged Articles 757 and 908 of the Belgian Civil Code; the Commission does not seem to have been confronted with the issue again until 1974 (application no. 6833/74 of Paula and Alexandra Marckx).’}

The key explanation of the Court’s approach in \textit{Marckx} is not that legitimate limitations cannot be justified, but that they are not relevant. The irrelevance of paragraph 2 aims is seen from the fact that there is simply no issue of prior interference over which a limitation to a human right could be justified under one of the legitimate aims listed in that paragraph. In that respect, the main question before the Court concerned the positive obligation to actively facilitate the integration of a family. The state was found in violation of Article 8 due to the inefficient manner of
the applicable procedure, which was so cumbersome that it was leaving the applicant’s child motherless for certain days.

The Court’s reasoning, as quoted in the passage above, has confirmed that the protection of human rights has a universal application that cuts across the board. The fact that the freestanding imperative of human rights (i.e. not conditioned to a prior act of interference) can be discerned in the very first case in which positive obligations were imposed by the Court is of tremendous importance.

The universal imperative of human rights protection does not, however, mean that universal legal principles and justifications apply in all circumstances. Clearly, when positive obligations are examined in relation to acts of interference by a private party, the existence of a causal link between the act complained of and the ensuing human rights violation creates a stronger imperative to react upon a given event. In contrast, where acts of interference are absent, the protection of human rights proceeds upon different justifications and, therefore, different evaluative principles should apply. As a preliminary point, which is explored fully in the following chapters, the only possibility to restrict protection in *Marckx* under paragraph 1 of the Convention rights would be to show that a Convention right had not been engaged in the applicant’s circumstances or that the cost of protection would be disproportionate, and hence impractical. Neither of these parameters applies in circumstances such as those of *Marckx* and, therefore, a core positive obligation is imposed.

1.4.2.3 *Airey*

The case of *Airey* arose from a wife’s decision to separate from her abusive husband.\(^{55}\) In this context of relationships between private individuals, the positive obligations of the state concern regulations that prescribe appropriate sanctions in the event of physical violence. If violence occurs within a marital relationship, then the possibility of separation should easily be accessible to the victim (see discussion above, pp. 12–14, on the right to develop one’s personality under the provisions of Article 8). The general question of whether such a situation raises the indirect responsibility of the state in the form of positive obligations was not discussed as such in the Court’s judgment, because it had been presupposed by both the applicant and the respondent state.

Indeed, the main issue before the Court was whether legal separation was practically available to the applicant. As discussed in *X and Y* above, the corollary of an effective regulatory framework is to guarantee enforcement and remedial procedures in order to implement in practice the regulatory standards of law. In *Airey*, legal separation had been regulated and existed as such in the domestic legal order but was not practically accessible to the

\(^{55}\) *Airey v. Ireland* [1979] no. 6289/73.
applicant due to the high financial cost of litigation. Consequently, the state was found in violation of its positive obligation under Article 8 on the grounds that the regulated measure was not effective in the applicant’s circumstances. This case is further discussed in Chapter 4, which is devoted to the procedural aspect of positive obligations.

The favourable judgments of Marckx and Airey complete each other in covering both the substantive (in Marckx) and procedural (in Airey) content of positive obligations that are indispensable for the effective protection of human rights. Indeed, seizing the opportunity, as presented by the facts of these cases, the Court, in two judgments in the year of 1979, moved expeditiously to lay down the general framework and scope of positive obligations. The judgments of Marckx and Airey are not only the beginning of the application of positive obligations in the jurisprudence but reveal also their more expanded and sophisticated content that only the recent case-law has started to explore.

1.4.3 Subsequent studies

A major study that has exclusively been made on the state’s positive obligations under the Convention is the doctoral thesis Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention (2003) by Cordula Dröge. The author presents a ‘normative’ categorisation of positive obligations within which the study, understanding and development of positive obligations can be undertaken through a more ‘holistic’ human rights theory as liberales, soziales und multidimensionales Grundrechtsverständnis (liberal, social and multidimensional understanding of fundamental rights). The division of these categories breaks down to a ‘horizontal’ and ‘social’ dimension within which the case-law of the Court can fit. The former concerns the protection of human rights between private parties, while the latter encompasses what does not fall within the former category and ‘comprise not only the so-called economic and social rights, but also rights to legislative action, for example to enact the laws necessary for the enjoyment of right in a given national system’.

Another major study is the work of Alastair Mowbray, The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights (2004) in which important cases are identified and categorised on an Article-by-Article basis. Because of its more limited

57 Ibid., p. 196.
58 Ibid., p. 281.
59 Ibid., p. 382.
60 Ibid.
scope, or it may have been a conscious choice by the author, it provides an unbiased account of the jurisprudence in a cases-and-materials fashion. Categorisations in horizontal, social or any other dimension play no role at all, an observation that points to the fact that positive obligations are not exactly the occasion that satisfies or links all previous literature on human rights.

It should be noted that in those studies, a critical explanation (exegesis) on the actual operation of positive obligations is largely absent, with the result that every positive measure may be classified as a positive obligation (see, for example, the case of McCann and Others) and/or categorised for the sake of categorisation. Although the ‘holistic’ appreciation of human rights is a valid point that reflects also the current political climate, the term ‘social’ cannot be used every time a positive action is required from the state ‘for lack of a better all encompassing description, . . . , to differentiate them from positive obligations of the horizontal dimension’. Indeed, there is no basis at all in putting the cases of Osman and Powell and Rayner in the ‘horizontal’ basket and Z and Others and Guerra and Others in the ‘social’ one.

In the following section, we deal with the issue of horizontality which has attracted considerable scholarly commentary, if only to show that the normal function of the state to regulate private activities has been presented as a new issue under a new name (i.e. ‘horizontality’), which is marketed as a new normative category recycling over and again the same question of if the state must guarantee human rights in the relationships between private individuals.

1.4.3.1 The horizontality issue: forced or dangerous?

THE FORCED DEBATE

One of the most widely cited books in recent times on the issue of horizontality is Human Rights in the Private Sphere by Andrew Clapham from his doctoral thesis, ‘The Privatization of European Human Rights’. The author starts from the point that ‘the State should not be considered to have a

62 Without having to go into a review, starting from the very first case that is covered by Mowbray, The Development, p. 7, (i.e. McCann and Others v. the United Kingdom [1995] no. 18984/91), it is noted that the Court at no point refers to positive obligations in its judgement. An explanation is, therefore, required as to why McCann and Others is classified as a positive obligation case. Cf. discussion of McCann and Others in Chapter 2, pp. 76–78.

63 Drögue, Positive Verpflichtungen, p. 382.

64 Ibid., pp. 381–382.


monopoly over the abuse of power” and sets off to ‘challenge the presumption that the fundamental rights and freedoms contained in the European Convention on Human Rights are irrelevant for cases which concern the sphere of relations between individuals’. He concludes that the ‘thesis presented in this study is that the European Convention on Human Rights ought to be interpreted so that it is applicable where victims face abuse from private actors’. He coins a more enhanced term which is explained as ‘it is the application of human rights law to the actions of private bodies which I label “human rights in the private sphere” or “the privatisation of human rights”’. An even more enhanced term is also discussed which is the ‘ ecological’ liability of the state, quoting Evrigenis, who had argued that

[the State] is not merely answerable for violations committed by itself but also, in a more general sense, for all violations committed within its territory. One could say, indeed, that the modern State has a kind of ‘ ecological liability’ in the human rights field.

The method used in taking up the research challenge is comparative, while the first Part of the thesis is devoted to the legal system of the United Kingdom. In the record of history, however, the assertion that the rights of individuals are violated by other individuals in the relationships between themselves is as old as the first organised human society since time immemorial. That states regulate private relationships and behaviour is something that is also traced from those times. With regard to the comparative study adopted, it is admitted that

68 Ibid., p. 1.
69 Ibid., p. 343.
70 Ibid., p. 1.
72 P. Vegleris, in A.H. Robertson (ed.), Privacy and Human Rights; J. De Meyer, in A.H. Robertson (ed.), Privacy and Human Rights; G. Ténékidès, ‘La Cité d’Athènes et les Droits de l’Homme’, in F. Matscher and H. Petzold (eds), Protecting Human Rights: The European Dimension: Studies in Honour of G.J. Wiarda (Köln: Heymann, 1988), pp. 605–637; Decalogue; etc. See also E. Thompson, The Making of the English Working Class (London: Penguin, new edn, 1991): ‘Not only freedom from the intrusions of the State but also belief in the equality of rich and poor before the law was a source of authentic popular congratulation. Sensational reading-matter, such as the New Negate Calendar: or Malefactor’s Bloody Register, recorded with satisfaction … such cases as that of Leeds’ “domineering villainous lord of the manor” who was executed in 1748 for killing one of his own tenants in a fit of temper.’, p. 90. ‘In 1776 Wilkes went so far as to plead in the House of Commons for the political rights of the “meanest mechanic, the poorest peasant and day labourer”, who, “has important rights respecting his personal liberty, that of his wife and children, his property however considerable, his wages … which are in many trades and manufactures regulated by the Parliament.”’, p. 91.
[a]ll the above arguments have been taken out of context, and from various diverse traditions and disciplines, and none of them are really addressed to the question of human rights; but, the question of human rights in Europe does arise in each of the contexts referred to above – family life, work life, administrative life, sexual life.73

From the limited discussion on ‘human rights’ and the ‘international obligations’ of the states under the Convention, it is suggested that the European Court should follow the development of the Inter-American Court of Human Rights in the case of Velasquez Rodriguez in 1988,74 as

in the Americas the Commission and the Court of Human Rights already deal with private action and the threat to human rights; therefore according to the European Court’s own contextual evolutive method of interpretation the European Court should similarly offer practical and effective protection even where the link to the state cannot be easily established.75

However, it should be stressed that in that case the Inter-American Court examined the state’s obligations in circumstances arising out of the disappearance of an individual. In scholarly commentary, the Velasquez Rodriguez case is also discussed in relation to procedural obligations in the form of legal safeguards (e.g. investigations) that state agents must take in ex post facto circumstances in order to enforce the law.76 In Europe, the issue of human rights protection against non-state actors is not restricted to such basic issues, not to mention that private actors are not clearly involved in cases where a known disappearance phenomenon is observed.77

73 Clapham, Human Rights, p. 132.
76 See, e.g., F. Ni Aolain ‘The Evolving Jurisprudence of the European Convention Concerning the Right to Life’ (2001) 1 NQHR 21–42, who makes a comparative reference to the case of Velasquez Rodriguez in analysing the development of ex post legal safeguards in justifiable lethal operations of the police, as seen in McCann and Others v. the United Kingdom, p. 33.
77 Velasquez Rodriguez v. Honduras [1988] I.A. Ct. of Human Rights, Series C, No. 4, paras 119, 147, 150. and para. 182: ‘The Court is convinced, and has so found, that the disappearance of Monfredo Velasquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfil the duties it assumed under Article 1 (1) of the Convention, which obligated it to guarantee Monfredo Velasquez the free and full exercise of his human rights.’ For similar case-law of the European Convention, see, e.g., A. Reidy, F. Hampson, K. Boyle, ‘Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey’ (1997) 15(2) NQHR 161–173; C. Buckley, ‘The European Convention on Human Rights and the Right to Life in Turkey’ (2001) 1 HRLR 35–65; Greer, The European Convention, pp. 27–28. See further discussion in Chapter 4, pp. 200–201.
Clapham closes the theory part of his study in French quoting a passage from a 1971 article of Marc-André Eissen. However, the French article, which had been cited by Andrew Drzemczewski in 1979, and later, once again, by Dean Spielmann in 1995 and 1998, does not deal with the general issue of if the Convention rights are relevant for cases which concern the sphere of relations between individuals (the if question), as Clapham argues, but with the pertinent question of how human rights protection in private relationships can be organised within the supranational system of the Convention. All authors mentioned above had put forward a specific proposal (discussed below in ‘the *drittwirkung proposal*’ sub-section, pp. 42–43), taking the if question as their working base.

In addition, the discussion of the Commission’s inadmissibility decision in 1985 in *Van der Heijden*, in which it was stated that ‘[the Commission] may not receive applications directed against individuals – in this case, Foundation, which is a private law corporation’ due to the operation of the former Article 25, para. 1 (current Article 34), does not prove that human rights protection against private parties had not been recognised by the Convention so as to justify a comparative analysis that suggests the paradigm of *Velasquez Rodriguez*. It comes as a surprise that the author himself is aware that positive obligations have already been part of the jurisprudence, as he gives a brief discussion of the relevant cases, such as *Airey* (1979); *X and Y* (1984); *Hughes* (1986); Plattform ‘Arzte fur das Leben’ (1988); *Powell and Rayner* (1990), which prove that the Court has answered


the *if* question by rendering the state indirectly responsible for violations of human rights by non-state actors.\(^{83}\)

Moreover, the *if* question (i.e. if human rights are relevant in private interactions) is not conditioned on the ‘publicness’ of private activities. From the limited discussion of the technical issue of how the protection of human rights in the private sphere can be organised under the capabilities of the system of the Convention (the *how* question), special attention is given to the admissibility case of Hughes.\(^{84}\) The case concerned a part-time cleaner at a private high school who had taken time off due to his suffering from chest pains but returned to the school to collect his wages and on that day he was discovered collapsed in the school’s premises. The complaint before the Commission was about the failure of the domestic law to sanction in negligence any delays in taking prompt emergency steps to help an individual in such circumstances (i.e. to call an ambulance immediately). However, it cannot be said that the positive obligation of the state only arises because ‘education is usually considered a function of the state and all private schools are to some extent subsidised by the state whether through grants, scholarships and tax relief’.\(^{85}\) At no point in the Commission’s reasoning did the question of whether the school is public or private play any role in deciding the admissibility issue.\(^{86}\) Not to mention that when a part-time cleaner collapses in a school or a cinema theatre, this fact alone does not bring the case within the context of education or culture. If the applicant’s husband went to his workplace for purposes relating to the employment contract, then the corresponding context is that of health and safety in the workplace. Alternatively, if his contract had been suspended or not applicable in the circumstances concerned, then the case should be looked at in the context of occupiers’ liability for accidents occurring in their premises.

As regards the only pertinent question of how to determine the content of positive obligations, there is one single proposal that ‘a “but for” test could be utilized to fix [the state’s] responsibility where there was a high probability that the private violation could have been prevented by state action’.\(^{87}\) With reference to the case of Hughes,\(^{88}\) it should be said that the domestic judge relied on medical evidence to find that ‘even if an ambulance had been summoned immediately, it would have been too late’. As a

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\(^{84}\) Hughes v. the United Kingdom, ibid.

\(^{85}\) See also Powell and Rayner v. the United Kingdom [1990] no. 9310/81 from the same period.


\(^{87}\) For the application of this proposal to other cases, see Clapham, Human Rights, pp. 196–197, 199, 201, 206, 214, 240.
result, the civil law action for compensation failed to establish an element of causation between the harm suffered by the individual and the employer’s negligence. The Commission agreed with the domestic decision and stated that ‘the existence of any express obligation to take prompt emergency action would not have been of any avail to the applicant’s husband’. In analysing this point, Clapham explains that

This phrase [Everyone’s right to life shall be protected by law, under Article 2] would not seem to impose positive obligations or responsibility for omissions on private individuals. However, even if we grant that Article 2 implies that everyone is bound to take positive measures to guarantee other people’s right to life, and that in these circumstances the teachers owed the deceased such a duty, we still have to show that but for the government’s lack of legislation this particular duty probably would have been avoided. It is unlikely, with regard to the facts as they emerge from that decision, that legislation or other administrative measures would have had the effect of preventing the loss of life.89

To check the seriousness of this approach, we have to contradict it with the following factual hypothesis: on the following day of the Commission’s decision, another employee at the same private school is found on the floor. The staff again stay aloof of the incident and with a two-hour delay they call the police first (as in Hughes), although no criminal act is suspected. Once at the scene the police call the ambulance service (as in Hughes) and in hospital, the employee dies after some minutes. Medical evidence could well suggest this time that a prompt transfer to the hospital would have saved the employee’s life. Therefore, can it ever be suggested that positive obligations in the form of a prior ‘legislation or other administrative measures’ arise for the state upon circumstantial chances of ex post results?

The ex post assessment, which is perfectly suitable for examining negligence in the duty of care in a civil law action for compensation, sits uneasily with the constitutional complaint before the Court which exclusively concerns the determination of the minimum structure of a system of protection that is presupposed to exist in known contextual circumstances. Indeed, when the Court considers the state’s positive obligations, the examination focuses not on the individual responsibility of private parties, but rather on the state’s prior regulations of health and safety standards and the relevant administrative practices that guarantee their implementation. In that connection, a given ex post result cannot be relied upon to negate the positive obligation that the Convention imposes on the state’s legal system as a whole. Unlike tortious (civil law) principles assessing the level of compensation, at the European level, we are concerned with the preliminary issue of setting the very minimum standards against which any

89 Ibid., p. 206.
negligence will come to be assessed *ex post*. In this account, the only pertinent question in *Hughes* is whether the state had regulated in advance health and safety standards in the workplace or occupiers’ premises that are open to the public. The text of the Commission’s decision does not inform of the applicable regulatory framework at the domestic level. Under current law, health and safety measures are duly regulated in the respondent state’s legal system and, therefore, the ‘but for’ causation test to examine a remedial action in *ex post* circumstances remains unchallenged.\(^90\)

The ‘but for test’ has also been argued, probably for the first time in history, in the context of violence against the person. With reference to the case of *X and Y*, it has been proposed that ‘States will be liable under the Convention, where, “but for” the absence of legislation prohibiting the behaviour complained of, the violation of human rights would probably not have occurred.’\(^91\)

From the foregoing analysis, it can be said that the issue that ‘the Convention rights are relevant for cases which concern the sphere of relations between individuals’ concerns a message that was sufficiently communicated in informed scholarly commentary in the 1960s and 1970s. The debate closed after that message was officially announced in the judgments of *Marckx* and *Airey* in 1979 which made it unequivocally clear that the protection of human rights against private actors raises the state’s indirect responsibility in the doctrinal form of positive obligations.

The reason why the study of positive obligations is not moving fast enough is because it is still trapped in the circular general debate over the very relevance of the Convention rights in the private sphere in which the same things are stated over and over again, setting the perspective from which human rights protection within the system of the Convention has to be approached. In addition, as the subject matter of study is ultimately destined to lay people (as represented by legal practitioners), scholarly debate should be reasonably accessible to them. In this respect, the jargon of ‘horizontality’, ‘privatization of human rights’ and ‘ecological liability of the state’ for non-ecological issues, is far from helpful.

Closing this sub-section, we adopt a rather fashionable technique by quoting a passage from an article by Murray Hunt, who points out:

> The vocabulary of “horizontality” commits participants in the discourse to a prior assumption about the separateness of the public and private spheres which is highly controversial. It concedes the starting point in the debate to those who believe there to be a firm distinction between the public and the private spheres…. The [geometric] metaphor

\(^{90}\) K. Williams, ‘Medical Samaritans: Is There a Duty to Treat?’ (2001) 21 *OJLS* 393–413, ‘The existence of duty does not necessarily lead to a finding of liability, of course, since a claimant must go on to show breach and causation’, page corresponding to footnote 104.\(^{91}\) Clapham, *Human Rights*, p. 196.
presupposes that there is a fundamental distinction between public and private spheres of law’s operation, and by framing the debate in this way it “assumes the very thing that needs to be debated.”

THE DANGEROUS DEBATE

Subsequently, and in growing realisation (at last) that positive obligations are being imposed on the states to actively protect human rights in the private sphere, the ‘horizontality’ debate has turned to the alleged ‘dangerous’ or ‘disastrous consequences’ for the national private law. Some key arguments supporting this position have to be addressed here, as they re-open the question of legitimacy of positive obligations in the system of the Convention.

In this section, we respond to the points raised by Olha Cherednychenko in the article ‘Towards the Control of Private Acts by the European Court of Human Rights?’ in relation to the case of Pla and Puncernau. In that case, the Court dealt with a domestic courts’ interpretation of a clause in a will that it found to be discriminatory in violation of Article 14 taken in conjunction with Article 8. The applicants complained that in determining inheritance rights, the High Court of Justice and the Constitutional Court had breached their right to respect for private and family life by unjustifiably discriminating against the first applicant on the ground of his filiation (a distinction was made between adopted and biological children).

We quote the passage from the judgment that was made the subject of particular discussion:

Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court’s interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention.


93 Cherednychenko, ‘Towards the Control of Private Acts by the European Court of Human Rights?’

Cherednychenko expressed strong concerns about ‘disastrous consequences’ from such an approach for the private autonomy and freedom of contract, as guaranteed by the state’s private law, citing in support a US academic arguing about ‘the unsettling effect on private transactions’ by ‘the ubiquitous Convention rights’.95

With regard to these legitimate concerns, it should be said, first, that there is no such thing as absolute private autonomy. Private autonomy is cherished but is regulated by private law in accordance with the values of the society, as expressed by its constitution and the social pressure to which the legislator responds.96 Not only do human rights help inform the content of private law, but social rights as well (see minimum national wage implied in freely negotiated employment contracts).97

The other argument about ‘the unsettling effect on private transactions’ by ‘the ubiquitous Convention rights’ has to be addressed by analysing the word ‘ubiquitous’ with reference to the judges’ own reasoning.

The first point to note is that the Court did not review the clauses of the will, which is by its very nature selective and ‘discriminatory’, and as judge Garlicki said in his dissenting opinion, ‘[t]he whole idea of a will is to depart from the general system of inheritance, that is, to discriminate

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97 J. Rivero, in Amicorum Discipulorumque Liber René Cassin III: Protection des Droits de l’Homme dans les Rapports Entre Personnes Privées, p. 312. See also S. Simitis, ‘The Rediscovery of the Individual in Labour Law’, in R. Rogowski and T. Wilthagen (eds), Reflexive Labour Law (Deventer: Kluwer, 1994), pp. 183–205, who starts from the point that ‘“Constitutionalization” emerges as the highest degree of juridification of labour relations’, p. 183, to explain that ‘[t]he legislator was thus forced to override the otherwise infallible maxim “qui dit contractual dit juste” and in the name of social stability to impose the basic security which supposedly would have been provided to the employee through the individual agreement of his or her working conditions.’, p. 185.
between potential heirs. In that case the clauses of the will in question did not provide for any distinction between biological and adopted children. It was the interpretation of the domestic court that made this distinction discriminatory within the scope of Article 14. In that respect, the European judges have treated the complaint as an interference of the state, rather than as a positive obligation and reasoned that ‘[i]n the present case, the Court does not discern any legitimate aim pursued by the decision in question or any objective and reasonable justification on which the distinction made by the domestic court might be based.’

Moving beyond the observation that the Court has reviewed the domestic courts’ approach rather than the private dealings, it can still reasonably be argued that by intervening in a case arising from a will dispute, the European judges may have gone too far. There is, however, a fundamental difference between criticising one isolated judgment and proclaiming ‘disastrous consequences’ and ‘the unsettling effect on private transactions’ by ‘the ubiquitous Convention rights’.

It should be recalled that positive obligations have emerged in the 1970s jurisprudence as a response to human rights violations by private parties. Therefore, as a matter of accuracy, there is no general ‘Control of Private Acts by the European Court of Human Rights’, but a ‘Control of Private Acts that Interfere with Human Rights’. Even in Pla and Puncernau, it is clear that private law is subjected to the Court’s scrutiny if its effect allows for a behaviour that is ‘unreasonable, arbitrary or blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention’.

But let us set aside isolated cases with wills and say that we deal with an express violation of a human right, actual or potential, arising out of the terms of a contract between private individuals. In such private dealings, the criticism about ‘the ubiquitous Convention rights’, as quoted above, is misplaced, because the Convention rights are not ubiquitous, but come into play in so far as the relevant thresholds of applicability are met. These thresholds correspond to pan-European minima and concern basic human rights standards. Admissibility issues and actionable

99 Ibid., para. 59 (cited case omitted).
100 Ibid., para. 59 (cited case omitted).
thresholds determining the scope of the Convention rights are preliminary questions in the Court’s examination that have already been introduced above and are further discussed in the following chapters, as a part of the technical proposal for the management of the wide scope of positive obligations.

The conclusion for the horizontality section concerns a critical starting point, as confirmed by Peter Benson, that

the question is not whether private law in general or contract law in particular can be constrained by public policy or whether legislation may authorise and indeed bind courts to do so. It is uncontroversial that private law is and should be regulated by, and indeed be subordinated to, requirements of public policy.102

In the system of the Convention, the European Court reviews the standards of the states’ public policy on human rights and fundamental freedoms in relation to the activities and relationships between private individuals (including activities funded or run by the state, such as schools, hospitals, industry, etc.).103 It follows, therefore, that European human rights law does not target the intrinsic normative resources of private law but only sets pan-European minimum standards of human rights protection,104 as the states themselves have jointly required by setting up the Convention system. Thereafter, it is for the states, as the Commission pointed out, ‘to ensure that their domestic body of law is compatible with the Convention’.105

1.4.4 The substantive debate: the co(i)nstitutional guarantees

It is the normal function of the state to regulate the activities of private individuals, whether the political regime is tribal theocracy, oligarchy or democracy. The novelty of human rights and fundamental freedoms, as appeared few centuries ago, was to set constitutional guarantees in order to secure the emergence of citizens (demos/polites) in the control of power (cratos), and hence, the establishment of the natural political environment of democracy, with the principle of equality and the rule of law as the absolute corollaries. Within this reality, the next phase of political science concerns the question of how the various constitutional balances are to be arranged, first, between the state (the collective entity) and the citizen as the atomic unit of that collective, and second, and at the same time, between the citizens themselves.

This question relates, in essence, to the institutional framework that offers the public authoritative forum in which various human rights issues are brought to the attention of the state so as to be debated (the absolute prerequisite), assessed and finally addressed. Human rights and fundamental freedoms are fundamental guarantees forming part of the state’s constitution which can only be implemented by an institutional framework (i.e. constitution as co(i)nstitution(s)).

At the European supranational level, the institutional forum and the constitutional guarantees are provided for by the Convention itself. All balances and technical details that the Court’s judgments contain form the substantive law of the Convention that gives rise to negative or positive obligations for the contracting states. The content of positive obligations is not simply exhausted with the regulation of human rights standards for the operation of the activities of private parties. It encompasses indispensably the institutional forum that has to exist at the domestic level to enable a human right claim to be raised in the first place. Specific Convention provisions under Articles 35.1 (exhaustion of domestic remedies) and 13 (domestic remedies) combined with Article 34 (individual petition) require that a basic institutional framework exist domestically. The institutional framework breaks down to public administrative structures and further procedural safeguards therein.

In order to appreciate the advanced level at which positive obligations are examined and covered in subsequent chapters, it is necessary to discuss the Court’s internal debate on the improvement of quality and effectiveness of its judicial supervision. Before that, two stops have to be made to include discussion from the parallel debates at the national and international levels that are constantly informed by, and constantly inform, the system of the Convention.

106 From Latin: constitutio, i-sti-tutio; Greek: syste ma, i-stes-mi (to make to stand); German: stehen; English: to stand.
1.4.4.1 The national constitutional debate

The establishment of an international community of states through the setting up of international institutions in the aftermath of WWII has provided the opportunity to reinforce the constitutional guarantees and the attached institutional framework in many countries (e.g. universal voting,\(^{107}\) Constitutional courts).\(^{108}\)

However, the constitutional debate was seriously impaired because various intellectual schools, which had originally emerged from genuine internal social dynamics, were subsequently hijacked to serve as intellectual flags for the marketing of Cold War politics and its manicheistic propaganda that set artificial antagonistic fronts to benefit those maintaining power at both international and domestic levels.\(^{109}\) Whether the justifications had been exaggerated or not, the fact is that, until very recently, in many European countries the concept of liberalism would be explored after the liberty (independence), actual or real, of the state.

The end of the Cold War era has marked a period of international stability within which European politics live a phase of normalisation, as affirmed by the considerable expansion of the European Union and the Council of Europe eastwards. The peaceful climate that has been created and the foundation of institutional justice in the form of European international law has reduced the historic role of the external enemy that has served, deservedly or not, as the ever-available excuse or purpose of the state’s affairs.\(^{110}\) International stability has allowed the domestic constitu-

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107 In most European states, universal voting for all men and women of an adult age was recognised for the first time after WWII. See also Martin Luther King’s campaign for electoral rights of black Americans in the USA in the 1960s. The emancipation of women through electoral rights and their active involvement in the constitutional debate that effectively ended the masculine monopoly of world politics has yet to be evaluated, given that it is only a phenomenon of modern history. See, generally, L. Snellgrove, *Suffragettes and Votes for Women* (London: Longmans, 1964). It is no accident that the applicants in the first positive obligations cases (i.e. *Marckx* and *Airey*) were women. See also K. Engle, ‘After the Collapse of the Public/Private Distinction: Strategizing Women’s Rights’, in D. Dollmeyer (ed.), *Reconceiving Reality: Women and International Law* (Washington, DC: American Society of International Law, 1993), pp. 143–155.

108 The appetite for unilateralism of some European states has not faded away immediately or completely. See, e.g., the Suez crisis, the war against Algeria, the occupation of Northern Cyprus. Friedmann, *The Changing Structure*, pp. 22–27.


tional debate to concentrate more on an introspective and in-depth evaluation of the state’s system that is constantly influenced by comparative examples (including the Convention’s). As the external enemy is no longer omnipresent, the constitutional debate is moving beyond biased language to arrange objectively human rights guarantees in the great range of circumstances in which they are relevant. The current advanced level and trends of constitutional debate can easily be seen in the proliferation of specialised publication fora and academic conferences.

In the following, we bullet point a non-exhaustive list of the institutional guarantees through which various balances and arrangements of human rights are organised, and move on to discuss in more detail one of these guarantees that has influenced the discourse on positive obligations at the European level.

• National Parliament shapes private law in accordance with constitutional human rights provisions. Supreme Constitutional Courts are able to strike down unconstitutional legislation, or to issue declarations of incompatibility.

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111 Mertens, *Le Droit de Recours*, p. 7, quoting Elihu Lauterpacht, ‘Some Concepts of Human Rights’ (1965) 11 Howard Law Journal 265: ‘One of the most interesting phenomena in the history of the protection of Human Rights is the interconnection between national and international activity in the field. International consciousness of Human Rights has grown out of national consciousness of the problem; and, in turn, contemporary national concern with the situation in many parts of the world itself stems from the extent of such international awareness’.

112 C. Bird, *The Myth of Liberal Individualism* (Cambridge: Cambridge University Press, 1999), p. 3: ‘A fundamental prejudice of our time, perhaps attributable to the infiltration of a party political model of deliberation into intellectual consciousness, is the expectation that political programmes and ideals coalesce into distinct ideological traditions.’


114 For the ongoing co(i)nstitutional debate at the domestic level, see, e.g., R. Masterman, ‘Determinative in the Abstract? Article 6(1) and the Separation of Powers’ (2005) 6 EHRLR 628–648.

• Human Rights Ombudsmen or specialised committees (e.g. independent or parliamentary) i) receive complaints, ii) undertake their own case-studies, as informed by international developments, iii) evaluate the Convention’s jurisprudence, etc., iv) make specific proposals to the Parliament and other competent administrative bodies for new laws or amendments.

• Judges are empowered with broad and flexible interpretative tools to balance competing interests in accordance with the provisions of constitutional human rights.

• Rights of access are accorded to individuals i) by way of judicial review (presupposing that the state’s authorities have assumed supervising control of the activities in which human rights issues are involved) or ii) through the possibility of invoking the human rights provisions of the constitution in legal disputes between private individuals (Drittwirkung der Grundrechte).

From the various institutional approaches listed above, it is drittwirkung that has mostly been associated with the discourse on positive obligations in scholarly literature. A brief account of the old discussion and a re-evaluation of its current relevance are presented in a separate section.

1.4.4.2 The drittwirkung proposal

An alternative solution for the protection of human rights from the acts of private individuals in the system of the Convention has been proposed in the form of drittwirkung (i.e. the third-party effect of Basic Rights). Originating in the German legal order, drittwirkung is a judge-made constitutional guarantee that allows private individuals to invoke the human rights provisions of the national constitution to challenge in domestic courts the acts of other private individuals, whether or not the state’s private law applies under the circumstances. Drittwirkung has been proposed for the system of the Convention in various influential writings of the 1960s and 1970s, such as that of Eissen (1971), mentioned above, whose proposal was repeated by Drzemczewski (1979), and even post-Marckx by Spielmann (1995, 1998).116 The possibility of drittwirkung could

only be realised under two options: first, in direct application, by allowing private individuals to be challenged before the Court through a modification of Article 25 (current Article 34) that restricts petitions against the contracting states only; and second, in indirect application, by imposing the third-party effect of *drittwirkung* as a structural/institutional obligation on the state’s legal order.

Before analysing the merits of the *drittwirkung* proposal, it is first noted that such a drastic institutional change was advanced by merely counting the countries in which *drittwirkung* had been adopted, while, at the same time, it was admitted that there was a ‘complex problem’ surrounding *drittwirkung*. But a comparative approach in the absence of a prior technical analysis in the actual merits, the operating legal principles, and the difficulties involved, including the additional ones regarding the transposition of external principles to the structures of the Convention system, cannot be justified.

If *drittwirkung* was imposed at the domestic level as an institutional guarantee, then it would not be difficult to distinguish domestic cases on their particular facts, producing a mammoth case-law system in which it would be impossible to find the pan-European standard. As any judicial reasoning would be connected to the specific legal principles of the domestic legal order, there would be more points for distinction that would leave us with a collection of unconnected ad hoc decisions. With no European standards emerging, the Convention would lose its relevance.

By contrast, if *drittwirkung* were given direct application within the system of the Convention, justice would mainly be done at European level, with the Court acting as a federal court, which cannot be under current structures. For the history record, the Court decided that the best way forward was to question the responsibility of the state due to its indirect involvement in human rights violations by non-state actors, as had been proposed by, *inter alios*, De Meyer in the early 1970s.

There are, however, further problems with the practical realisation of *drittwirkung* at the domestic level that need to be addressed, because the domestic system is the main depository through which positive obligations are implemented by the state. First, it is worth noting that the above-mentioned influential writings for the *drittwirkung* proposal have come from non-German authors. This is probably because *drittwirkung* in Germany has a *real* application and it has been made clear since the *Lüth* case.

117 Drzemczewski, ibid., p. 163.
119 BVerfG, 15 January 1958, BVerfGE 7, 198, p. 205. BVerfG is an abbreviation of the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) and BVerfGE that of a series of its decisions (*Entscheidungen*).
– introducing the constitutional principle that the German private law may not be in conflict with constitutional values – that the dispute between private parties ‘remains substantively and procedurally a civil law dispute’. Indeed, a clear distinction between private and public law is still widely observed in the German legal order.

In addition, there are some critical parameters that prevent or facilitate the application of drittwirkung domestically. By way of example, if drittwirkung is proposed in the French legal system, then we need to see that in the German Basic Rights the right to develop one’s personality stands as a cornerstone value capable of inducing the development of more narrow human rights interests. If this is absent, then it is difficult to see against which value a constitutional balance will be assessed and how it will be explained in detail so as not to undeservedly interrupt the normal functioning of private law. And are such constitutional human rights balances sufficiently explained or simply pronounced by the Conseil Constitutionnel?

Accordingly, it is not the drittwirkung that has been proposed but a profound change of the national legal structure.

The judicial action between individuals over constitutional rights, as permitted by drittwirkung, has further implications that relate to the normal functioning of private law and the retroactivity of legal liability of private parties. One of the main functions of law is to educate people’s behaviour and ensure a climate of stability and economic development. The private individual reasonably expects to know where their rights extend and where they are limited. An individual does not exactly violate a legal standard when that standard is discovered for the first time in the very judicial case against that individual. This is the logic behind the entrenched principle of nulla poena sine lege that has been codified under Article 7 of the Convention in respect of criminal liability, as follows: ‘[n]o one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed.’

120 See, e.g., Cherednychenko, ‘Towards the Control of Private Acts by the European Court of Human Rights?’, footnote 36.
122 German Basic Law: Article 2 (1): ‘Everyone has the right to free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or against morality.’
124 P. Benson, in D. Friedmann and D. Barak-Erez (eds), Human Rights in Private Law, p. 221: ‘protected interests must be determinable as such independently of and prior to the defendant’s wrongful action, intentional or not. This requirement reflects the logic of the fundamental idea at common law that there can be no liability for non-feasance.’
Moreover, as a matter of general policy, the constitutional debate is not only made by putting private parties to fight in adversarial positions, because the direct adversarial contact contributes towards and exasperates old complexes of class divisions. The constitutional debate can be made in other ways (see some institutional options above) or in other fora – mainly, the Parliament that can regulate in advance the contextual application of human rights in private law and in a more informed and detailed manner.\textsuperscript{125}

Despite the above criticism on the \textit{drittwirkung} constitutional principle, we are not entitled to conclude that the whole \textit{drittwirkung} proposal has been overrated. This is because \textit{drittwirkung} offers the unique possibility of institutionalising access to enforce the constitutional contract in the absence of institutional access (e.g. judicial review of the decisions of the competent public administration supervising the given activity of private parties). It is this uniqueness that captivated the minds of all those scholars who readily proposed its application in the system of the Convention.\textsuperscript{126} \textit{Drittwirkung} does not wait for the Parliament to decide if and when it would be a good idea to address a human right issue in a given context of private relationships nor is influenced by external considerations, such as the voting power of various social factions.

The \textit{drittwirkung} debate has always been an enlightened one, since it was officially launched in the freedom of expression case of \textit{Lüth}. It should be noted that in cases that arise from special contexts in which conflicting constitutional rights (e.g. reputation versus freedom of expression) are

\textsuperscript{125} J. Rivero, in \textit{Amicorum Discipulorumque Liber René Cassin III: Protection des Droits de l’Homme dans les Rapports Entre Personnes Privées}, p. 316: ‘But it is the law, and the law only that can fix these borders. Thus, the liberal thought, in its most orthodox form, underlines the need to guarantee the peaceful co-existence of liberties in the relationships between private individuals, while the state is conferred with an exclusive competence.’, (translation). In \textit{Plattform ‘Arzte fur das Leben’ v. Austria}, the Court dealt with a complaint that the state did not guarantee the applicants’ right to demonstrate (Article 11), as they were obstructed by a counter-demonstration. The government argued that unlike other provisions of the state’s constitution that apply to relations between individuals, the corresponding provision to Article 11 of the Convention did not have this effect (para. 29). However, although no \textit{drittwirkung} effect could apply in such circumstances at the domestic level, both the Commission and the Court found that the state through the legislator had already regulated the private relationship concerned in criminal law and provided for enforcement duties of public officials empowering them to disperse an unlawful demonstration (para. 33). For a detailed account of the domestic legal framework, see the Commission’s admissibility decision of 17 October 1985.

involved, the intervention of the judiciary to determine legal balances is rather common ground and pragmatic, and has been the practice in many states. But to develop a fully fledged theory that has persisted and expanded for some decades and is celebrated in every occasion, must, first, be approached seriously as a declaration of the independence of the judiciary and the demos (within the meaning of the separation of powers) to develop and enforce the constitutional guarantees.

For detailed discussion of drittwirkung in the German legal order, see, e.g., B. Markesinis and S. Enchelmaier, ‘The Applicability of Human Rights as Between Individuals under German Constitutional Law’, in B. Markesinis (ed.), Protecting Privacy (Oxford: Oxford University Press, 1999), pp. 191–243. Most of the cases discussed in that contribution concern freedom of expression issues (expression versus reputation). From the very limited discussion of cases not arising from such a context, we note the action of a farmer against the granting of permission to a private power-generating company to build a nuclear power station near a village. In such circumstances not involving competing constitutional rights, a constitutional review was not allowed, as the ‘court came to the conclusion that Parliament had done its utmost [through regulation] to prevent all reasonably foreseeable danger’, p. 220, citing BVerfGE 49/89 (Kalkar), pp. 141, 142 (August 1978). In general, drittwirkung has been and is still dominant when competing constitutional interests are involved, as in freedom of expression cases. As expression is infinite, any disputes between private parties call for judicial intervention to determine the exact borders, while the ad hoc assessment of facts is pertinent. Commenting on the case of BVerfGE 93, 266 (‘Soldiers are Murderers’ II), 292, 3 (October 1995), arising, once again, from the freedom of expression context, the authors admit that ‘since all circumstances of the case have to be taken into consideration, the result of such weighing is not predictable in advance.’, p. 233.

Most of the constitutional human rights are not absolute, e.g., Article 5 of the 1949 German Constitution (Grundgesetz) protects free speech, but Article 5 (2) makes protection subject to qualifications and provisions of law. See also Article 118 of the 1919 Weimar Constitution. See, much earlier, Declaration of the Rights of Man and of the Citizen (1789), Article 4 (quoted in note 41 above) and Article 11: ‘The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.’

J. Rivero, in Amicorum Discipulorumque Liber René Cassin III: Protection des Droits de l’Homme dans les Rapports Entre Personnes Privées, discussing an anti-demonstration case (that is, from the enlarged freedom of expression context) in a French administrative court in 1933, p. 314. In the system of the Convention, positive obligations were not developed from cases involving competing human rights interests, see, e.g., the freedom of expression case of Sunday Times v. the United Kingdom [1979] no. 6538/74, from the same period in which positive obligations were applied for the first time in the cases of Marckx and Airey. See also early parallel developments in the jurisprudence of the US Supreme Court in balancing competing interests in freedom of expression cases: Dennis v. United States, 341 U.S. 494 (1951), concurring opinion by Frankfurter, J.; Barenblatt v. United States, 360 U.S. 109 (1959); Konigsberg v. State Bar, 366 U.S. 36 (1961). L. Frantz, ‘The First Amendment in the Balance’ (1962) 71 YLJ 1424.

J. Bomhoff, ‘Lüth’s 50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing’ (2008) 9 GLJ 121–124, p. 124: ‘Lüth, in this view, becomes the embodiment of the European legal culture’s will to believe that a formal, legal conception of the judicial weighing of interests or values is possible. Balancing, in this German or Continental view, does not have to be about policy choices, compromises
In short, *drittwirkung* can work well in a rigorous legal system where private relationships are regulated in advance by the legislator so as not to put the judiciary in a difficult position to hear a constitutional complaint due to the wide implications explained above. Accordingly, the open possibility of a constitutional claim motivates the state’s legal mechanism to act in advance and realise the constitutional guarantees of which human rights are seen as basic. In that connection, the intellectual influence of *drittwirkung* for the development of positive obligations of the state within the system of the Convention is undeniable and continuous.

1.4.4.3 The international debate: international responses to international phenomena

The protection of human rights of individuals from acts of other private parties should not be questioned as such, because this is one of the basic and natural functions of the modern state of citizens. It is argued, however, that these are matters for the national state to solve, meaning practically that positive obligations should not be imposed by the Convention.\(^{131}\) It is generally admitted that by engaging the state’s liability for the acts of private parties, a great range of socio-economic issues have passed under European supervision, whose standards may conflict with the public policies of the elected legislators. It suffices, however, to point that the Convention is an independent source of power to which the states have voluntarily consented and, therefore, wherever and whenever a human right violation occurs, the state is answerable to the Convention’s system. However, additional justifications exist and should be stated, if only to appreciate the potential of positive obligations and their advanced application and development that we cover in the following chapters.

First, it should be stressed that human rights and fundamental freedoms are constitutional guarantees that cannot easily be swept away by majoritarian policies of the government of the day. Although the social revolutions of liberalism, socialism and feminism have essentially

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\(^{131}\) *Powell and Rayner v. the United Kingdom* (dec.) [1986] no. 9310/81 (Report of 19 January 1989): ‘In the submission of the Government, while the scope of Article 8 is wide, the Article could not on its proper construction be extended to provide guarantees against any act which directly or indirectly affects a person’s comfort or enjoyment of his private or home life. Still less could the Article be interpreted as requiring a State to take positive steps to prevent or control the activities of non-Governmental bodies or private individuals which incidentally have, or may have, this effect.’
achieved one thing in common, namely universal voting, there are groups of individuals such as children, the disabled, the elderly, prisoners and immigrants whose ability to exercise social and political pressure is limited.

The case of immigrants needs particular attention, as this concerns individuals in the normal condition of active adulthood. It should be mentioned that, although immigrants are not given full or any electoral rights, this does not prevent host states from adding their *gastarbeiter* (guest-workers) to their overall population (numbers in millions) in order to acquire greater voting power at the European Union level. Because the mobility of individuals in Europe, and in the world in general, is an international phenomenon of massive proportions, basic human rights issues cannot simply be left to majoritarian domestic policies. In addition, the social classes, from which the domestic bargaining had originally emerged and some human rights had been won, are now verging on extinction in some developed countries, leaving the heavy-duty immigrant worker to influence majoritarian policies in the current social bargaining process, while having no electoral rights. In other cases, the economic potential of some countries, as reflected by the private sector being taxed in their jurisdiction, is often expressed through selling services around the world and/or moving manufacturing in non-EU or non-Convention countries where human rights standards are very relaxed.132

But even if we set aside for a moment the millions of immigrants that exist in member states, domestic bargaining policies belong to the era before the internationalisation of capital, trade and labour. For more than a generation, a significant amount of important legislation that affects the lives of individuals within a given state is taken and, more seriously, is negotiated beyond national frontiers.133 At the supranational level of the European Union, whose member states have all contracted to the Convention, a substantial number of economic and commercial issues are decided by European institutions. Therefore, it is expected that international phenomena should be tackled by international responses. The Convention is this international institution/forum with the requisite leverage to


influence international human rights standards for the activities of private individuals.  

A good example of the Convention’s indirect influence on the European Union’s economic policies, or simply the self-instinct to restore the participatory ability of the individual, who is regularly faced with international decisions involving human rights issues, can be seen in the safeguards of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data. Although the exact merits of this most sophisticated document are beyond the confines of this study, it suffices for our purposes to note the same aim for which the extended scope of the Convention seeks justification, namely to secure the constitutionality of human rights in order to restore the participatory ability of the individual in the bargaining process which is no longer taking place at the domestic level.

It is easy, therefore, to note that it is the legal forum that has to be secured first in order to influence pan-European human rights standards in private sector activities. It pays, at this junction, to revisit the argument of the government in the case of Hatton and Others, in which the Court was called to adjudicate whether the granting of permission for increased night flights to a private corporation, which controls and manages an airport in central London, violated the right to private life of some individuals who suffered sleep prevention as a result. The government’s main argument was as follows:

all other principal European hub airports had less severe restrictions on night flights than those imposed at the three London airports. Paris Charles de Gaulle and Amsterdam Schiphol had no restrictions at all on the total number of Chapter 3 aircraft which could operate at night, while Frankfurt had restrictions on landings by Chapter 3 aircraft between 1 and 4 a.m. If restrictions on night flights at Heathrow


135 As explained by Spiros Simitis, one of the architects of the European Data Protection project, with reference to the reinforced position of the individual employee: ‘With its 1995 Directive on Data Protection, the European Union highlighted its commitment to the constitutionalisation of European law and, in particular, underlined its vision of the individual European as a rights-bearing individual; empowered through “knowledge” and thus advantaged in communicative processes of political/social/legal bargaining. As such, the move to a data protection regime founded upon notions of individual empowerment, also mirrors a recent and fundamental re-alignment in the guiding principles of regulative labour law, which has seen the paradigm of “collective laissez-faire” challenged, if not superseded, by a redirected emphasis upon the communicative empowerment of the individual employee rather than the representative function of employees’ representatives.’, ‘Reconsidering the Premises of Labour Law: Prolegomena to an EU Regulation on the Protection of the Employees’ Personal Data’ (1999) 5 ELJ 45–62, p. 45. See also S. Simitis, in R. Rogowski and T. Wilthagen (eds), Reflexive Labour Law.
were made more stringent, UK airlines would be placed at a significant competitive disadvantage. . . . If they were forced to operate during the day they could provide fewer viable connections with regional services at both ends, making London a less attractive place in which to do business.  

It is clear from this passage that the government favours economic policies that are influenced by international competition. It should be reassuring for a government, even if it is found in violation of the Convention, that European uniform standards can be set with the adjudication of the given complaint. Within the geopolitical area of the Council of Europe, the European Court stands as a neutral player that can lay down minimum pan-European human rights standards to prevent the domino effect of human rights compromises, which are driven by competition responses. The Court’s ruling in an isolated case sets a uniform standard when individuals in other member states are able to bring their own complaint against similar compromising practices, thereby ensuring due compliance of European human rights law.

If we have to choose one case from the jurisprudence that summarises all points made above and further proves the potential of the Convention in fostering uniform human rights standards vis-à-vis the activities of private individuals, it is, perhaps, the case of Guerra and Others that does us this favour. The applicants were forty inhabitants who lived in vicinity of a private chemical factory, which was classified as of high risk, according to the criteria of Presidential Decree no. 175 of 18 May 1988 (‘DPR 175/88’) transposing Directive 82/501/EEC of the Council of the European Communities (the ‘Seveso’ directive) on the major-accident hazards of certain industrial activities dangerous to the environment and the well-being of the local population. A committee of technical experts established that, due to the factory’s geographical position, emissions from it to the atmosphere were often channelled towards the populated areas. The applicants complained that the state failed to provide information about the risks posed by the industrial activity and on how to proceed in the event of a major accident. Such measures were required also by Articles 11 § 3 and 17 § 2 of Presidential Decree no. 175/88 (‘DPR 175/88’).
The Court found the state in violation of its positive obligation under Article 8 to guarantee precautionary measures in the form of pre-emptive information about potential dangers emanating from the industrial activity. Although such precautionary measures had already been regulated at the binding level of EU law, but had not been implemented by the respondent state, the applicants did not pursue their complaints in the EU institutions. At the Convention’s level, the fact that some measures had already been regulated was of no relevance, as positive obligations to actively protect individuals against the activities of private actors are inherent, and, therefore, they do not exist simply because of some prior national or international provisions.

The action of the applicants in Guerra and Others manifests in the clearest way the increasing realisation by the ordinary individual of the unique opportunity of positive obligations that empower her/him, for the first time, to directly assert the protection of human rights in the activities of private parties that the state, as the collective political entity, must regulate and continuously guarantee.

1.5 The on-going debate: re-evaluating the subsidiary function of the court

The culmination and concretisation of all points made above should be reflected in the technical legal framework that determines positive obligations on the ground (the how question). While technical details will be covered in the remaining chapters, in the introductory chapter the basics of the Court’s approach have to be discerned and secured as a point of reference.

It is first noted that the European judges are continuously deliberating on the constitutional role of the Court in building a European public order of minimum pan-European standards in the area of human rights and fundamental freedoms in order to achieve and continuously maintain


141 Wildhaber, ‘A Constitutional Future for the European Court of Human Rights?’, pp. 162–163, uses the term: ‘common minimum standards’ on p. 164 and points out: ‘[t]he Charter of Fundamental Rights, proclaimed in Nice on 7 December 2000, takes the Convention as setting out the minimum level of protection to be secured, while making clear that the minimum level did not prevent a higher level of protection.’, p. 165.
the object and purpose of the Convention.\textsuperscript{142} As Steven Greer has pointed out, ‘[n]o longer does [the Convention] express the identity of western European liberal democracy in contrast with the rival communist model of central and eastern Europe; it now provides an “abstract constitutional identity” for the entire continent.’\textsuperscript{143}

It is also possible to exact the technical framework by reference to the job that needs to be done by the European judges without adopting the term ‘constitutional’ to describe the role of the Court.\textsuperscript{144} Adjectives, however, are used as convenient points of reference to short-cut details that would otherwise have to be repeated at every occasion. The Court has long been seen as a constitutional court simply because ‘the issues which it is called upon to decide are constitutional issues in so far as they concern fundamental rights within Europe.’\textsuperscript{145} As the subject matter is itself constitutional, the Convention is in essence a constitutional document and therefore its institutional organ is described accordingly.\textsuperscript{146} ‘That there may be some functions which national constitutional courts do not perform, or perform in addition, does not affect the constitutionality of the Court’s function.’\textsuperscript{147} It should also be stressed that the concept of constitution is not static so as to impose qualifying criteria of past traditions that no longer reflect current social and political realities and evolving practices and perceptions. What is currently observed, as Giorgos Pinakides has recently reaffirmed, is that ‘international

\textsuperscript{142} See e.g. Loizidou v. Turkey [1995] no. 15318/89, para. 75; Kakoulli and Others v. Turkey (dec.) [2001] no. 38595/97; Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland [2005] no. 45036/98, para. 156. See also Council of Europe’s Recommendation Rec1606(2003) of the Parliamentary Assembly of the Council of Europe on areas where the European Convention on Human Rights cannot be implemented (23 June 2003): ‘All Member States of the Council of Europe have ratified the Convention which has gradually acquired, in the words of the Court, the status of a “constitutional instrument of European public order (\textit{ordre public}) for the protection of individual human beings”’; Memorandum by the European Court of Human Rights from the Third Summit of the Council of Europe ‘The Court would emphasise “the central role that the European Convention on Human Rights (ECHR) must continue to play as a constitutional instrument of European public order, on which the democratic stability of the Continent depends”. Because of its pan-European dimension, moreover, the Strasbourg system provides the only framework within which it will be possible to develop a common European conception of human rights.’, para. 1, (footnote omitted), available at www.echr.coe.int/eng/Press/2005/April/SummitCourtMemo.htm (accessed June 2010). See also Explanatory Report of Protocol No. 14 (CETS No. 194): Article 12 to the Amending Protocol, para. 77.

\textsuperscript{143} Greer, \textit{The European Convention}, pp. 170–171.

\textsuperscript{144} Wildhaber, ‘A Constitutional Future for the European Court of Human Rights?’, section 1: A European Constitutional Court, p. 161: ‘Whether the European Court of Human Rights is itself a “Constitutional Court” is largely a question of semantics.’

\textsuperscript{145} Ibid.

\textsuperscript{146} Φ. Βεγλέρης (F. Vegleris), ‘Η Σύμβαση των Δικαιωμάτων του Ανθρώπου και το Σύνταγμα’ [1976] ΤοΣ 385, p. 394.

\textsuperscript{147} Γ. Πινακίδης (G. Pinakides), ‘Η Συνταγματική Υφή της Ευρωπαϊκής Σύμβασης Δικαιωμάτων του Ανθρώπου’ (2007) 33 ΔτΑ 71–95.
The working base

Either de jure or de facto, the system of the Convention has managed to establish itself through the binding judgments of its Court which have all been complied with, at least at the ad hoc level (i.e. the applicant’s claims), and very often at the structural level and over issues that involve positive obligations in a wide range of circumstances in which no national Constitutional court has competence or ever dared to reach (i.e. where mega-theories and principles have to meet practice). The Convention is a supranational system that has set an independent and sovereign centre of power whose advent in the European legal order has not set antagonist fronts, but channels of co-operation with national systems and between them with the Convention as the common communication forum. Notable is the paradigm of English law in which the Convention’s jurisprudence is directly invoked, examined and analysed in litigation proceedings and judgments. Of course, such a national practice is the quintessence of a common European public order, as confirmed in the words of the former president of the Court, judge Luzius Wildhaber, that ‘[if] the national authorities are in position to apply Convention case-law to the questions before it, then much, if not all, of the Strasbourg Court’s work is done.’ Although the practice of the English courts may be seen as advanced, especially from the point of view of newer member states, it helps highlight the maximum practical result of the Convention’s object and purpose that guides not merely the debate of whether the role of the Court is constitutional, but the more pertinent issues of the general and practical description of the constitutional job that needs to be carried out at the European level. And this job is about building a European public order that is needed as a qualitative standard-setting framework of human rights protection to guide and force changes at the domestic level, which is the only level at which human rights are a living experience.

It may not be possible or desirable to engage in a debate on whether the Convention results in ‘constitutional or individual justice’. It is the constitutional framework that has to be targeted in order to secure justice to an individual at the domestic level and, conversely, it is through the

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149 See discussion on the dritttwirkung proposal section (pp. 46–48).
152 See, Greer, The European Convention, chapter 2: ‘Convention compliance’, p. 60.
153 For detailed discussion see, Greer, ibid., pp. 165–174.
micro-level of individual justice that any defects in the constitutional framework can be detected and addressed.\textsuperscript{154}

It should be seen as very basic that a supranational Court should look beyond the particular facts of an isolated complaint and deliver judgments that set standards and principles of broad reach in order to target structures and legal practices at the domestic level.\textsuperscript{155} Such standards should be able to apply in all member states, otherwise neither their legitimacy is secured nor does any European standard emerge to define a European public order. A more conscious approach is now forced by the ever-increasing number of applications pending before a judicial formation that rose in 2010 by 17 per cent to 139,650.\textsuperscript{156}

The Court develops its approach in conformity with the subsidiary nature of the Convention. For this purpose, it has long relied on the judge-made principle of the state’s margin of appreciation, whose application has not always been clear.\textsuperscript{157} What changes in the current technical approach, as observed in recent judgments and published commentary of

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\item\textsuperscript{155} F. Tulkens (a judge of the Court), ‘Human Rights, Rhetoric or Reality?’ (2001) 9(2) \textit{ER} 125–134, pp. 129: ‘At the outset, it should be recalled that: “notwithstanding the vital role played by international mechanisms, the effective protection of human rights begins and ends at the national level”… Human rights are not just logos, they are also praxis. That constraint means that the recognition of human rights is inseparable from the machinery used to ensure the rights’ respect and protection.’, citing the document of Council of Europe, ‘The Effectiveness of Human-Rights Protection 50 Years After the Universal Declaration’ (1998).
\end{footnotes}
judges writing in personal capacity, is a re-justification and re-orientation of the ‘logic of subsidiarity’, especially when reference is made to the caselaw on positive obligations, which pose much bigger challenges due to the wide range of their application. It should be noted that it is the ‘logic’ rather than the ‘principle’ that is stressed, reminding us that principles require a constant re-justification and re-interpretation to accommodate current needs. In essence, the re-alignment of subsidiarity marks the Court’s abandonment of general margins allowed to the states in an effort to achieve the long-awaited quality of its reasoning and describe European human rights standards that educate the state and guarantee legal protection at the domestic level. In this account, subsidiarity is an end aim and not the starting point, as may have appeared in the past. What comes first are the domestic structures and legal principles that the Court needs to define in order for the Convention to become subsidiary to the state’s legal system.

The general premises of the technical approach of the Court that affect the planning and application of positive obligations within the

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159 For insightful separate opinions in earlier case-law, see Fischer v. Austria [1995] no. 16922/90, per judge Jambrek: ‘It seems to me that reasoning not solely restricted to the scope and the circumstances of the case would contribute better to the quality of the Court’s case-law in the service of the Convention as a living constitutional instrument on European public order.’ And per judge Martens: ‘This refusal to decide the question once and for all is (merely) based on the Court’s doctrine that the Court “should confine itself as far as possible to examining the question raised by the case before it”. This doctrine is in my opinion no more than a regrettable petitio principii. No provision of the Convention compels the Court to decide in this way on a strict case-by-case basis. This self-imposed restriction may have been a wise policy when the Court began its career, but it is no longer appropriate. A case-law that is developed on a strict case-by-case basis necessarily leads to uncertainty as to both the exact purport of each judgment and the precise contents of the Court’s doctrine.… The Court rightly is wont to stress that the protection of the rights and freedoms under the Convention falls primarily to national authorities. It should, however, not overlook that the reverse side of this coin is that national authorities are obliged to seek guidance in its case-law.’, para. 16 (footnote omitted). See also Marcks v. Belgium [1979] no. 6833/74, para. 58. F. Sudre, ‘Les “ObligationsPositives” dans la Jurisprudence Européenne des Droits de l’Homme’, in P. Mahoney et al. (eds), Protecting Human Rights: The European Perspective: Studies in Memory of Rolv Ryssdal (Köln: Carl Heymanns Verlag, 2000), pp. 1359–1376, p. 1375: ‘The affirmation that is regularly repeated by the Court that “it is not for the Court to determine the measures that have to be taken” by the convicted State, is a pretence [pseudo-appearance]’ (translation). Greer, The European Convention, p. 228: ‘how can the Court deliver constitutional justice effectively without addressing the unresolved constitutional issues at the core of its adjudicative method more coherently?’

Convention system should be discussed here to support the choice in the structure of chapters and, also, to introduce the reader to some key technical issues that are fully elaborated in the following chapters.

The Court determines first the substantive law of the Convention. It explains the scope of the Convention rights and the entitlement to human rights protection taking into account the principle of equality that reminds the European judges of the potential of their decision to set a pan-European precedent. In appropriate circumstances, the capabilities and natural limits of the Convention, as well as those of the states and the economic disparities between them, are pertinent considerations in determining positive obligations in the wide range of circumstances in which the state does not directly interfere.

As long as the substantive law of positive obligations has been defined, the focus shifts on the procedural aspect of the state’s obligations, that is the means by which domestic law can implement the substantive content of human rights protection. In addition, the substantive law is also defined through procedural safeguards, which are seen as inherent in the objective determination of the content of protection. As a result, the Court’s review increasingly expands to the procedural framework through which interested individuals are able to participate in the enforcement and implementation of positive obligations at the domestic level. This trend coincides with the process of the Court’s continuous self-evaluation, which seeks to adjust its supranational supervision to the challenges of its ever-expanding business and the long-term effectiveness of the Convention.  

Appropriate procedures and structures induce the dialectics of justice at the domestic level, something that is particularly encouraged by the European institution. A modern democracy should provide for, or a democracy is modern when there are institutional structures of a procedural nature that allow the individual to initiate the social debate on the active protection of human rights and participate in the implementation of protection. It is the institutional level of access that determines and updates the content of positive obligations and it is the same level that guarantees their implementation in the domestic system.

Bibliography

Bibliography


De Meyer J., ‘The Right to Respect for Private and Family Life, Home and Communications in Relations Between Individuals, and the Resulting Obligations for States Parties to the Convention’, in A.H. Robertson (ed.), Privacy and Human...


Bibliography


Bibliography


(Rozakis Ch.) Ροζάκης Χ., Η Προστασία των Ανθρωπίνων Δικαιωμάτων σε μία Μεταβαλλόμενη Ευρώπη (Athens: Αντ.Ν. Σάκκουλα, 1994).


Σισιλιάνος Λ., ‘Η Προστασία του Περιβάλλοντος και η Ευρωπαϊκή Σύμβαση Δικαιωμάτων του Ανθρώπου – Η Εξέλιξη της Νομολογίας ως την Υπόθεση Λόπες Οστρα’ (1996) Νόμος και Φύση 33.

Smith R., ‘The Public is Being Regularly Deceived by the Drug Trials Funded by Pharmaceutical Companies, Loaded to Generate the Results they Need’, Guardian (14 January 2004).


Williams K., ‘Medical Samaritans: Is There a Duty to Treat?’ (2001) 21 *OJLS* 393–413.


Bibliography

Miscellaneous


