State Obligations to Protect the Right to Respect for Private Life under Article 8 of the ECHR and the Challenge of the Internet

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1. Introduction to Negative and Positive Obligations under Article 8 of the Convention

The European Convention on Human Rights refers to an obligation to respect human rights. According to Article 1 of the Convention “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Normally these obligations are divided into negative and positive obligations. Negative obligation means that a state is compelled to abstain from interference in Convention guarantees. Article 8 (right to respect for private and family life) also has wider obligations, parallel to the negative obligation not to interfere in an individual’s rights; there is also a positive obligation, which is an inherent part of effective respect for private and family life.1 Positive obligations have also been found in the context of Article 2 (L.C.B. v. the United Kingdom, judgment of 9 June 1998,) Article 3 (Costello-Roberts v. the United Kingdom) and Article 5 (Storck v. Germany, 16 June 2005) of the Convention.2 The case of Özgür Gündem v. Turkey (2000) extended positive obligations to the sphere of freedom of expression.

It is important to analyse different obligations in light of the doctrinal structure of the European Convention on Human Rights as a whole. In Steven Greer’s constitutional structure positive obligations belong to the secondary constitutional principles. The

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1 Airey v. Ireland, 9 October 1979, § 32.
positive obligation under Article 8 of the Convention comes from the principle of effective protection (The Rights Principle/Primary Constitutional Principle) and Article 1, which requires states to secure Convention rights to everyone within their jurisdiction. The positive obligation emerges in different situations and typical ones include taking reasonable steps to protect individuals from infringement by other individuals, treatment of those detained under criminal justice processes and investigating credible claims for serious human rights violations. It is this interpretative link to the effectiveness principle and ultimately to the teleological interpretation (aim and purpose of the Convention) that supports the widening scope of positive obligations.

In this paper I discuss the recent addition to the positive obligation case-law. The case of K.U. v. Finland (2 December 2008) widens the application of Article 8 to the field of Internet privacy. The case follows the established positive obligation continuum of the ECtHR case-law (Markcx v. Belgium (13.6.1979, § 31); Airey v. Ireland (9.10.1979, § 32); X and Y v. the Netherlands (26.3.1985, § 23)). The continuum emphasises that effective protection of the right to private life extends beyond non-interference and the provision also includes an obligation to ensure that respect for private life is fulfilled in the relations between individuals. The Court implies that the Drittwirkung principle also exists within human rights interpretation. This means that the protection enjoyed by an individual goes further than mere traditional protection against acts of public authority.

The protection of the individual’s rights to private life leads to a number of different questions over the Drittwirkung effect of the Convention. The Convention case-law does not provide only traditional protection of human rights against interference by public authorities. The obligations could also include active measures to protect

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individuals against other individuals. Some scholars have pointed out that Drittwirkung in German legal thinking means that individuals may rely on a national bill of rights to bring a claim against a private person who has violated his rights under that instrument. The obligation under the ECHR rests with the State. The Convention only indirectly guarantees human rights protection between individuals. The Convention establishes an obligation on a national legislator to enact legislation to protect individuals or police and prosecutors to investigate the possible measure and whether it has violated the rights of an individual.

The balance between right to respect for private life and freedom of expression has always been a delicate issue and it is difficult to give an answer which is generally applicable to all situations. The human rights discourse around the Internet is concentrated on the extreme questions of hate speech and child pornography. Some essential questions may have been forgotten when the focus is only on a few problems. The K.U. case is important because it opens up a wider and more generable test concerning right to private life on the Internet. What protective measures are required of national authorities? What special concerns on the Internet must be addressed creating a framework that protects individuals from infringement by other individuals?

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2. Expansion of the Positive Obligations Doctrine under Article 8 of the ECHR

The scope of Article 8 includes a wide range of questions e.g. search and seizure, secret surveillance, immigration law, paternity and identity rights, child and family law, assisted reproduction, suicide, prisoners’ rights, inheritance, tenants’ rights and environmental protection. The Court has often used four different interests mentioned in Article 8 (private life, family life, home and correspondence), but it avoids precisely articulating which individual interest is at stake.

In the case of Liberty and Others v. the United Kingdom, the Court, for example, considered that telephone, facsimile and e-mail communications are covered by the notions of “private life” and “correspondence” within the meaning of Article 8. Some authors have criticised the absence of a theoretical conspectus. They have pointed out that this may lead to account of jurisprudence inevitably descriptive and prediction about its likely progress hazardous. The Court has also used a definition of privacy in a number of cases, but it has not elaborated on the exact meaning and scope of the concept.

There is clearly an expansive approach to the scope of private life. The account of private life is difficult because there are widening categories of private life combined with a lack of rigour in classifying cases in practice. Some scholars have pointed out that it is relatively straightforward to establish the relevance of private life interest under Article 8.1 of the Convention; the greater challenge is in providing that there has been disproportionate interference with that interest.

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6 See Liberty and Others v. the United Kingdom, (1 July 2008), § 56.
The positive obligations doctrine has developed in a number of different substantive continuaums under Article 8 of the Convention. The famous cases have been related to the treatment rights of children born out of wedlock (Marckx; Vermeire), immigrants and their right to respect for family life (Abdulaziz, Cabales and Balkandali) and treatment of sexual minorities (Rees; Christine Goodwin). The other parallel substantive continuum was started by the landmark judgment of X. and Y. v. the Netherlands (1985) concerning the protection of the physical integrity of the mentally handicapped.

In the case of X. and Y v. the Netherlands, there was no possible safeguard in the case of a mentally handicapped girl being sexually abused. The legal representative could not institute proceedings on her behalf. The facts disclose a gap in Dutch criminal law. According to the Court, effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.\footnote{See X and Y v. the Netherlands, § 27.} This approach is also relevant for protecting people from other types of sexual offences. In the case of M.C. v. Bulgaria (2003), the Court mentions effective protection of individual’s sexual autonomy. According to the Court, any rigid approach to the prosecution of sexual offences risks certain types of rape going unpunished. The positive obligation must be seen in requiring penalisation and effective prosecution of any non-consensual sexual act.\footnote{See M.C. v. Bulgaria (4 December 2003), § 166.}

In the Christine Goodwin case the Court decided on the extent of positive obligations concerning the rights of transsexuals. The Court elaborated what should be understood by the notion of “respect” as understood in Article 8. The definition was not clear-cut, especially as far as the positive obligations inherent in that concept
were concerned. The Court considered that having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements would vary considerably from case to case. This diversity could lead to a variety of levels of scrutiny in comparison to other treaty provisions. The margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention. In determining whether or not a positive obligation exists, regard must also be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention.11

The Christine Goodwin case was a ground-breaking decision on the issue of transsexuals, but it did not solve the weaknesses that are inherent in the doctrine. National authorities are not helped by the vague formulations of the Court’s argumentation and reference to the close relationship to the limitation clause interpretation. Since the Powell and Rayner case (21.2.1990), the Court has argued in favour of consistent interpretation of positive and negative obligations12. The analysis in both cases, according to the Court, is based on a broadly similar application of the principles. The Court recalled that in both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole and the margin of appreciation is also used in both contexts, meaning that the State enjoys discretion in determining how to ensure compliance with the Convention.

A broadly similar application of principles does not mean that the application is totally similar in both contexts, but it refers to similar elements involved in both

12 See Powell and Rayner v. the United Kingdom (1990), § 41.
interpretative processes. Inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. In order to find a comprehensive test model, the basic element is the balancing of rights and interests and understanding the positive obligations in light of the general doctrines of European Human Rights Law.

3. Is There a Test to Examine Positive Obligations?

The Court since the Powell and Rayner case (21.2.1990) has argued in favour of a consistent interpretation of positive and negative obligations. The analysis in both cases, according to the Court, is based on a broadly similar application of the principles. The Court recalled that in both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole and the margin of appreciation is also used in both contexts, meaning that the State enjoys discretion in determining how to ensure compliance with the Convention.

The form of limitation clauses differs under different Convention provisions. The basic structure, however, consists of three required elements, 1) limitation has to be lawful (in accordance with the law, prescribed by the law), 2) limitation has to be connected with one or more legitimate aims, e.g. public order, protecting health or morals) 3) limitation has to be necessary in a democratic society.

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13 Soering v. the United Kingdom, § 89. The argument is controversial because there are those rights where the balancing exercise does not work. Especially this is due to concerning non-derogable rights like the prohibition of torture and inhuman or degrading treatment (Article 3)
14 See Powell and Rayner v. the United Kingdom, A 172, 21.2.1990, § 41.
Iain Cameron describes the Court’s approach to limitation clause cases as follows: “First they consider whether the action complained falls within the scope of the right in question and whether it infringes this right. Having found that the right has been infringed, they proceed to consider whether the action taken by the state falls within one of the accommodation clauses.” This means whether it had a legitimate aim. The third phase would be to determine whether the infringement is in accordance with the law and the fourth and final step would be to determine if the infringement was necessary in a democratic society. \(^ {15} \) I have used the term “three-phase test”, leaving the first step described above by Cameron as a sort a preliminary phase, i.e. a necessary precondition, before the real testing of the requirements set out by the clause would begin. \(^ {16} \)

The case-law seems to indicate that there is to some extent a different version of a test regarding positive obligations. It is not a comprehensive three-phase test, but instead it concentrates on the necessity phase. The preliminary phase is similar in both cases. It is important to consider whether the facts fall within the scope of Article 8. The main question in a positive obligation test is the balancing of rights of the individual and general interest. If there is no general interest the emphasis is on the applicant’s right to the effective protection of his or her private life. This was the case e.g. in the *Von Hannover* judgment. A strong general interest argument refers to a wide margin of appreciation. This has been inherent in the cases of *Odièvre* (13.2.2003, § 49), *Hatton and Others* (8.7.2003) and *Evans* (10.4.2007).

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It seems that there are similarities with the application of the margin of appreciation in both contexts. The variety of the margin afforded to national authorities refers to certain factors and these factors seem to be analogous in both contexts. The Court refers in the positive obligation context e.g. to the lack of consensus in the Contracting States (Christine Goodwin, § 85). The national authorities, whose duty it is in a democratic society also to consider the interests of society as a whole, should enjoy a wide margin of appreciation (Fretté, § 41).

The balancing exercise includes both the legislation and application of the legislation. In the case of X. and Y v. the Netherlands, the Court analysed whether there was a gap in the criminal law. The protection by civil law was insufficient. Effective deterrence is indispensable in this area and the Court noted that it can be achieved only by criminal law provisions. In the case of Von Hannover v. Germany, the problem was not so much about the legislation rather than the interpretation of the legislation. The Court mentions that “increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data”. The legislation afforded only minimal protection to those people who are considered to be “a figure of contemporary society “par excellence””. The Court considered that such a limited protection could be appropriate for politicians exercising official functions but not to persons like the applicant.

4. Freedom of Expression and Finding a Balance with Right to Private Life

The Strasbourg case-law refers to an important element in the positive obligations doctrine. The positive obligations may involve the adoption of measures in the sphere of the relations of individuals between themselves. This is an important element that

17 X and Y v. the Netherlands, § 27.
can be fruitful in expanding the scope of Article 8 into the new forms of intrusions on right to private life. The new information technologies provide opportunities for individuals to abuse their freedom of expression and violate rights of others in the process. This means that the authorities have to ensure the possibilities to provide effective deterrence and this can be obtained through criminal law provisions. At the same time it has to be remembered that the Internet has become an important media for a public debate. No legal framework should weaken this part of the Internet with excessive restrictions on freedom of expression and confidentiality.

Balancing the right to private life and freedom of expression is a complex process in the Internet environment. As mentioned, the Court in the Von Hannover case pointed out that “increased vigilance in protecting private life is necessary to contend with new communication technologies”. When we look at the ECtHR’s interpretation of freedom of expression, there are several factors influencing the determination of the scope of freedom of expression. The question of the influence of modern communication technologies is mainly discussed in connection with broadcasting cases. The Court has acknowledged that account must be taken of the fact that the audio-visual media have a more immediate and powerful effect than the print media. However, the focus is generally more on the nature of the speech and whether the freedom of expression in a particular case belonged to the core of the right or not.

Limitations on political expression are under the strictest scrutiny. People in powerful positions have to tolerate wider criticism. The limits of acceptable criticism are wider as regards a leading politician as such than as regards a private individual. In the Lingens case, the Court noted that, unlike other individuals, a politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both

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18 See e.g. Murphy v. Ireland, § 69.
journalists and the public at large, and he must consequently display a greater degree of tolerance.19

The Court has elaborated the general principles governing the protection of private life and the freedom of expression in the case of Von Hannover v. Germany (2004). The generality of the Court’s interpretation is undermined by the connection to the paparazzi phenomenon. The case was related to publication of so-called “paparazzi” photos of Princess Caroline of Monaco. According to the Court, private life extends to aspects related to personal identity. Private life 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. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of “private life”.20 The main reason for the Court to put emphasis on the right to private life rather than freedom of expression is clearly the lack of any general interest for the publication of photos and articles. The Court noted that the publication of the photos and articles in question, the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant’s private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public.21

The Court has reiterated the same principles in other circumstances. However, there is also reference to stricter protection of private life in the subsequent judgments. In the Sciacca case (11 January 2005) the applicant’s status as an “ordinary person” enlarged the zone of interaction which may fall within the scope of private life. According to the

19 Lingens v. Austria, § 42.
21 See Von Hannover v. Germany, § 65.
Court the fact that the applicant was the subject of criminal proceedings cannot curtail the scope of such protection. Information related to an individual’s state of health is especially important concerning the protection of the right to private life. In the case of *Armonienè v. Lithuania* (25 November 2008), a newspaper published a story revealing that the applicant’s husband was an AIDS victim. The Court considered that this was a case of outrageous abuse of press freedom and the severe legislative limitations on judicial discretion in redressing the damage failed to provide the protection legitimately expected under Article 8.

5. **K.U. v. Finland (2008): Internet and the Right to Respect for Private Life under Article 8: Protection against Other Individuals**

The Finnish case of *K.U. v. Finland* (Application no. 2872/02, 2 December 2008) provides an interesting excursion into the positive obligations and protection of right to private life in the sphere of the relations between individuals themselves. The context is related to new technology and its unprecedented possibilities in comparison to traditional forms of media. The message of the judgment is that, while the Internet is different in many aspects compared to traditional media, this should not prevent the application of the established positive obligation case-law to this context.

The different elements have to be taken into consideration while weighing the freedom of expression and right to respect for private life on the Internet. First of all, the Internet is often without an editorial process that would prevent defamatory texts

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22 Sciacca v. Italy (11 January 2005).
23 See Armonienè v. Lithuania (25 November 2008), § 47. See also Biriuk v. Lithuania (25 November 2008), § 46.
or the disclosure of private life information. If the regular mass media are reluctant to publish the names of persons under a trial or even under police investigations, the Internet, especially Internet chats, tend to reveal the same identity without any fear of compensation on a victim. Secondly, the Internet is a forum where freedom of expression is often used under anonymity. In addition, it could be difficult to identify the real sender. One of the elements that can be determined as problematic is the ability to restore information. Material can be surfaced in other servers although the original information has been disclosed. This ability means that it is easy to collect information and also to make connections to earlier incidents, which can be damaging to reputation and private life.

Legal scholars have discussed the human rights challenges related to new technologies. Rhona K.M. Smith finds that the biggest challenge to the freedom of expression is the World Wide Web and global Internet usage. The challenge is related to issues like incitement to racial hatred and child sexual exploitation. Smith reiterates the particular features of the freedom of expression. It operates on both vertical and horizontal levels. States are obligated to ensure that national law protects the freedom of expression at both levels, providing appropriate safeguards and remedies in the event of infringement. The problem in the Internet discourse is to a certain extent that the examples are often the extremes (child pornography/racial hatred) and the impact on every-day life is forgotten.

24 Adam Newey. Freedom of Expression: Censorship in Private Hands, in Liberating cyberspace: civil liberties, human rights, and the Internet, edited by Liberty 1999, pp. 13-17. Newey states that compared to traditional media the essential is the Internet shifts “the locus of editorial control away from the broadcasters and publishers towards viewers and users”.
The case of K.U. v. Finland is one of the exceptional judgments dealing with the Internet in the European court system. What makes the case interesting is the focus on legal framework and other positive obligations to be adopted to provide horizontal protection. The requirement to adopt a protective legal framework is typical of the Internet era and its potential problems regarding the protection of the right to private life.

The K.U case began with a dating site on the Internet in 1999. An unknown person or persons placed an advertisement in the name of the applicant, who was 12 years old at the time, without his knowledge. The advertisement mentioned his age and year of birth, gave a detailed description of his physical characteristics, a link to the web page he had at the time which showed his picture, as well as his telephone number, which was accurate save for one digit. The young applicant was subjected to an advertisement of a sexual nature. In the advertisement, it was claimed that he was looking for an intimate relationship with a boy of his age or older “to show him the way”.

The problem was that the identity of the person who had placed the advertisement could not be obtained from the Internet provider. The legislation in place did not have any enforcement procedure to address such a situation. Although seen in domestic law terms as calumny, the Court preferred to highlight particular aspects of the notion of private life (physical and moral integrity of the person), having regard to the potential threat to the applicant’s physical and mental welfare brought about by the impugned situation and to his vulnerability in view of his young age. The
Court pointed out that there was a question of severe interference with the applicant’s private life.\(^{27}\)

The positive obligations doctrine was brought forward in the Court’s reasoning. As in the landmark case of *X and Y v. the Netherlands* (1985), positive obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The Court noted that there are different ways of ensuring respect for private life and the nature of the State’s obligation will depend on the particular aspect of private life at issue. The Court referred to the margin of appreciation, but at the same time stated that effective deterrence requires efficient criminal law provisions.

“While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is, in principle, within the State’s margin of appreciation, effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions.”\(^{28}\)

The Court refers to the established doctrine and limits the potential alternatives that the State normally has under the margin of appreciation. It is clear that as in the Dutch case effective deterrence requires here, too, criminal law provisions that would adequately protect an individual against the situation. The Court stated that even though the situation is not as grave as was the case of X and Y v. the Netherlands; it should not be treated as trivial. According to the Court “[t]he act was criminal, involved a minor and made him a target for approaches by paedophiles”.\(^{29}\) In the case-law subsequent to X. and Y v. the Netherlands, the Court did not exclude that the State’s positive obligations under Article 8 to safeguard the individual’s physical or moral integrity may extend to questions relating to the effectiveness of a criminal

\(^{27}\) See K.U. v. Finland (2008), § 41.

\(^{28}\) See K.U. v. Finland (2008), § 43.

\(^{29}\) See K.U. v. Finland, § 45.
investigation even where the criminal liability of agents of the State is not at issue (Osman v. the United Kingdom, 28 October 1998, § 128)

In the K.U. case, the Court collected comparative international material on cybercrime. However, the influence of this material is not very transparent in the law part of the judgment. The Court used the material as evidence that the national authorities were aware of the problems related to the Internet.30 The international instruments first and foremost show the wide concern over the consequences of the revolution in information technologies. They address the challenge that the new technologies present, necessitating the adoption of international legal instruments to combat cybercrime. The Court referred in “International material” to the European Convention on Cybercrime (CETS 185, 23.11.2001. in force 1.7.2004). The Convention also has an additional Protocol, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS 189, 28.1.2003, 1.3.2006). These treaties aim at harmonising the domestic criminal law in the area of cybercrime and provide the necessary investigatory powers for offences.31 The summary of these instruments is the need to protect individuals on the Internet.

The Court found that positive obligation should not impose an impossible or disproportionate burden on the legislator. The Court noted that the crimes related to the Internet should be controlled, prevented and investigated by powers exercised in a manner that fully respects the due process and other guarantees. It was well-known that the Internet, precisely because of its anonymous character, could be used for criminal purposes. The widespread problem of child sexual abuse was also known to the authorities and therefore it cannot be said that the Government did not

30 See ibid § 48.
have an opportunity to correct situation and put in place a system to protect children from paedophiliac approaches via the Internet.

The reference to measures against child pornography weighs heavily in favour of positive obligations in the balancing process. The problem is that these measures tend to underestimate the consequences of the infringements to other legitimate areas of Internet usage. This has led to situations where totally legitimate sites are prohibited in the name of child pornography. It is not easy to find limitations which could be aimed at the real target. Often the limitations will also inevitable restrict other legitimate forms of Internet usage. It also provides an opportunity to control Internet usage in general without having to find relevant and sufficient reasons for the interference in question.\textsuperscript{32}

The Court noted that privacy and freedom of expression on the Internet yield on occasion to other legal imperatives. The Court emphasised that it is nonetheless the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context. No such framework, however, was in place at the material time, with the result that Finland’s positive obligation with respect to the applicant could not be discharged. This deficiency was later addressed. However, the mechanisms introduced by the Exercise of Freedom of Expression in Mass Media Act came too late for the applicant. The mechanism mentioned in the judgment allows an injured party or public prosecutor to request a court to order the keeper of a transmitter, server or other similar device to release information which allows the identification of the sender of a network message. As in many previous

cases, in the K.U. case, too, the Court uses the interpretative support of subsequent national measures. National authorities had also acknowledged the failure and addressed the problem with a legislative amendment. The Government’s argument was that the new legislation reflects the legislator's reaction to social development where an increased use – and at the same time abuse – of the Internet has required a redefinition of the limits of protection. The Court found that this was already the case at the time of the events in question.\textsuperscript{33}

The K.U. case provides a start for criteria on protecting right to private life on the Internet. Even the notion of private life could encompass new elements. Just recently the Finnish media reported on a landmark case that was brought before a Finnish district court. The question was whether one may steal someone’s virtual life with impunity. The case was settled and the applicant was paid 4,000 euros. The case was about the virtual theft of a character in the World of Warcraft. The claimant had developed the character for almost two years and invested 200 days in it. Looking at the circumstances the subject-matter could easily fall within the ambit of Article 8. The inconvenience suffered by the applicant due to the theft of a virtual life was significant enough to raise questions under Article 8.\textsuperscript{34} The life in Internet should be protected against infringements by other individuals. There should not be different protection according to the context where the criminal act was perpetrated. This requires that criminal law is technology neutral.

\textsuperscript{33} See K.U. v. Finland, § 49.

\textsuperscript{34} The paper Helsingin Sanomat 7 November 2009, C1. Varastettu elämä (Stolen life).
6. Conclusions on the Different Obligations under Article 8

The obligations under Article 8 have widened the scope of private life to fields that were not foreseen by the drafters of the Convention. The Internet, like many other new technological innovations, can be used in a harmful manner against the right to private life. The state’s obligation to protect right to private life includes not only a negative obligation to abstain from interfering with the rights of the individual. The positive obligation has become a traditional part of the right to private life and thus the outcome of the K.U. case is foreseeable and in accordance with the positive obligation continuum of the ECtHR.

The protection of right to private life should not depend on the media used. The Internet should be seen as equal to print or traditional audiovisual media. But the Internet also requires more effort on protection at the horizontal level. There are potential risks that have to be addressed by making the legislative framework include safeguards that protect individuals against other individuals. In the traditional media the responsibility rests ultimately with the editor. For the Internet websites the same responsibility is understood differently.

The discourse on Internet usage has focused on the extreme examples of child pornography and incitement to racial hatred. I think it is important to ask whether it is reasonable to analyse the problems of Internet only in these extreme contexts. Is it really possible to use analogy of child pornography to other forms of freedom of expression cases on the Internet? Child pornography is one of those examples where it is easy to justify uncompromising measures against those who have committed these offences or even aided in the dissemination of such material. The same extreme situation occurs when we consider restrictions against incitement to racial hatred. It is easy to justify measures taken against those who abuse their freedom of
expression.\textsuperscript{35} However, most of the cases are much more complex and demand very careful evaluation of the various factors.

The Court’s case-law requires that legislator set up a framework that protects individuals against other individuals on the Internet. The Court does not provide detailed criteria on how this obligation is fulfilled. There are, however, some main characteristics that can be found in the case-law. The Court is always interested in ensuring that there exists a national remedy that the individual can take his or her claim before the national courts. The problem is considered to be very serious if there is a gap in criminal law that prevents an individual from instigating proceedings against those who have violated his or her rights.

The Court often relies on the national practice and legislation that have been updated and corrected since the act in question. This was also the case in K.U. v. Finland. The Finnish authorities had also realised the existing gap and the national legislation was amended. This development after the original case confirmed the Court’s finding that there was a positive obligation for the national authorities. It is also important to accept the message that the national authorities cannot escape their responsibility due to a lack of international treaties at the time.\textsuperscript{36} It is sufficient for the positive obligation that the authorities have been aware of the serious problems related to the Internet and its use for criminal purposes.

\textsuperscript{35} Convention on Cybercrime Additional Protocol, concerning criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS 189, 28.1.2003, 1.3.2006). See especially Art. 3-7 of the Protocol.

\textsuperscript{36} The Convention on Cybercrime was drafted 23.11.2001 and came into force 1.7.2004.