

Privacy: Primus Inter Pares

Privacy as a precondition for self-development, personal fulfilment and the free enjoyment of
fundamental human rights

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Abstract

The General Data Protection Regulation (GDPR) is Europe's new approach to enhance privacy as it promises to enforce harmonised data protection standards in the Member States¹. However, even though the regulation has the dedicated goal to enhance privacy, it also tries to balance competing rights, such as the free flow of data, transparency, national security and overriding economic interests. As a result, the supervisory authorities will determine new data protection standards. Their assessment and how they evaluate the importance of privacy will be the benchmark. However, supervisory authorities will argue from a standpoint that assumes that all competing interests are equal. By analysing and interpreting the jurisprudence of the European Court of Human Rights (ECtHR), I will argue that the dominant theoretical position treating all human rights as equal must be abandoned. Rather, I will show that jurisprudence contains an inherited hierarchy among certain rights in which privacy occupies an elevated position. The reasons are threefold: first, privacy is a critical element to personal fulfilment and self-development which has intrinsic value for human beings and a democratic society as it is the basis for pluralism. Second, free and undisturbed development of personality is a necessary precondition for the free exercise of certain human rights, e.g. right to education; freedom of expression; freedom of thought, conscience and religion; free elections; and freedom of assembly and association. Third, some level of privacy has to be ensured in order to freely exercise these human rights. I will conclude that these issues become even more pressing due to the universal implementation of digital technologies. Informational self-determination is one effective tool to guarantee privacy and to guard

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against discrimination, public humiliation or self-imposed stigma and push for effective remedies in case of privacy infringements and urge to consider stricter laws that prohibit requests or receipt of certain information (e.g. about race, sexual orientation, health status, or gender) that could form the basis of discrimination.

Keywords

Data protection, European Convention of Human Rights, information technologies, legal theory, personal fulfilment, privacy, self-development

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Table of Contents

Abstract	1
I. Introduction	3
II. Internal privacy.....	5
a. Freedom for personal development and fulfilment	5
b. Tolerance and equality: the nurturing and supportive environment	8
c. Safeguards - Informational-Self-determination to fight discrimination	10
III. External privacy	12
a. Right to education	12
b. Freedom of expression	13
IV. Premium privacy	16
a. The freedom of thought, conscience and religion	17
b. The right to free elections.....	17
c. The freedom of assembly and association.....	18
V. Privacy and technology	18
VI. Privacy: <i>primus inter pares</i>	21
VII. References	24

I. Introduction

In recent years a number of political scandals and regulatory actions in Europe have demonstrated the lasting political importance of privacy. The Snowden revelations, the annulment of both the Safe Harbour Agreement and the European Data Retention Directive, the ruling on the right to be forgotten, Europe's Privacy Shield agreement with the US all demonstrate that privacy remains a key political need.

One attempt to satisfy that need is the GDPR. It will implement both rights for data subjects as well as duties for data controllers. However, the right to privacy and to data protection is not an absolute right. There are other important interests to be considered. The balancing of competing needs is key in order to ensure both privacy and the free flow of data, as well as other fundamental human rights, such as freedom of expression and freedom of the press.

As a result, new supervisory authorities in each Member State will be tasked with determining the relative weight of competing interests on a case-by-case basis and set precedent and new

standards for future cases. In order to come to a fair and lawful assessment, it is crucial to bear in mind what pressing social needs are being protected. In addition, it is pivotal to realise the ramifications of privacy infringements as well as to fully capture the concept of privacy when rendering verdicts.

Even though the political situation in Europe indicates a more mindful approach, the discussion rarely revolves around the value of privacy. In other words, much is said about the need to *protect* privacy, but not about *why it is important for the individual and society*. This fact could prove to be an impediment to data protection, as supervisory authorities might not consider all the possible ramifications of privacy infringement, including the knock on effects for other human rights. If legislators, judges or supervisory authorities do not understand what constitutes privacy and why it is crucial for human beings and democracy, competing interests will not be correctly weighted relative to one another in future verdicts and legislation.

In this paper I contend that the value of privacy as guaranteed in the European Convention on Human Rights (ECHR; Art. 8 - Right to respect for private and family life) must be established in relation to other human rights. By analysing and interpreting the jurisprudence of the European Court of Human Rights (ECtHR), I will argue that the dominant theoretical position treating all human rights as equal must be abandoned. Rather, I will show that jurisprudence contains an inherited hierarchy among certain rights in which privacy occupies an elevated position. In this hierarchy privacy is required for personal development and self-fulfilment which has intrinsic value, and without which other human rights cannot be realised. Furthermore, privacy is a necessary precondition for the realisation of other human rights prescribed by the ECHR, specifically the right to education (Art. 2 1st P.); freedom of expression (Art. 10); freedom of thought, conscience and religion (Art. 9); free elections (Art. 3 1st P.); and freedom of assembly and association (Art. 11).

The elevated position of the right to privacy related to other human rights can be attributed to its treatment in the ECHR and ECtHR as a three-layer concept. First, privacy as enjoyed internally by an individual is a critical element to personality development and self-fulfilment. **‘Internal privacy’** concerns the freedom enjoyed by an individual to develop a personality and life of her choosing. Internal privacy has intrinsic value for the person as well as a democratic society, as it is the precondition for pluralism. Second, assuming one has developed a personality and can pursue a fulfilling life, free expression of one’s personality and life choices must be possible in external interactions. **‘External privacy’** concerns the creation of environments conducive to free expression, interaction and information seeking.

Third, building on external privacy, particular disclosures are legally granted additional protections due to their inherent sensitivity. ‘**Premium privacy**’ concerns the creation of spaces offering explicit protections for such highly sensitive disclosures concerning ethnicity, political and religious beliefs. Each of these three elements of the right to privacy (Art. 8 EHCR) are increasingly threatened by the rapid and widespread implementation of information technologies capable of tracking behaviour. I argue that, in response to the diffusion of potentially invasive information technologies, informational self-determination is an effective tool to maintain privacy and guard against knock on effects for other human rights. Effective remedies to enforce privacy law are also required in cases where informational self-determination cannot guard against privacy infringements as well as stricter laws that prohibit requests or receipt of certain information (e.g. about race, sexual orientation, health status, or gender) that could form the basis of discrimination.

II. Internal privacy

In this section I introduce the concept of “internal privacy”. This section shall demonstrate that according to the jurisprudence of the ECtHR privacy is valuable for the individual because it enables personal development and self-fulfilment. In addition, tolerance on part of other citizens and legal equality on the side of Member States are key to nurturing and encouraging self-fulfilment. Lastly, anti-discrimination and self-determination mechanisms are essential for self-fulfilment, as they are effective safeguards to ensure privacy.

a. Freedom for personal development and fulfilment

The Court names freedom, tolerance and equality as elements of Art. 8 ECHR (see also Logemann, 2004, p 294ff; Grabenwarter/Pabel, EMRK5 § 22 Rz 1ff). These elements complement each other. Citizens need freedom and an undisturbed and tolerant space where they can develop personality, build character and express themselves without being treated differently. Developing personality has intrinsic value for citizens, and is also beneficial for a democratic society as it enables pluralism. Diversity needs freedom and a secure space to thrive. People must first build their character before they can express their personality, as the Court states: “Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man” (ECtHR 7.12.1976, 5493/72, *Handyside/the United Kingdom* Rz 49).

The core element of this fundamental right is the development and fulfilment of the personality. This is the primary goal of Art. 8 of the ECHR: to guarantee the development and fulfilment of personality (EKMR 11.7.1980, 8307/78, *Deklerck/Belgium*). The objective is to actively promote the expression and development of the personality (ECtHR 24.6.2004, 59320/00, *Von Hannover/Germany* Rz 50). The ECtHR even talks about a right to personality and a right to personal development (ECtHR 28.1.2003, 44647/98, *Peck/the United Kingdom* Rz 57). States have to refrain from any action that could endanger the mental or physical integrity of their citizens. In addition, states have the positive obligation to ensure that third parties, such as companies and individuals, respect the private lives of data subjects (*Grabenwarter/Pabel*, EMRK⁵ § 22 Rz 1ff.)

Since the Court has no exhaustive definition of what constitutes privacy, personality and the private life, jurisprudence only gives an indicative list of life aspects that are to be free from monitoring (freedom) as they enable self-development and development of personality. Lifestyle, life choices and concepts and the way of life have to be protected from state intervention. Independent life choices require the free and unobserved development of own abilities. (see *Grabenwarter/Pabel*, EMRK⁵ § 22 Rz 1ff). Therefore, privacy is crucial for the development of personality.

Other aspects of one's personality are captured in Art. 8 include the protection of reputation, the right to one's likeness, and the right to self-presentation. The Court also considers a certain fashion style is an expression of personality, which falls within the scope. Self-presentation in public is also part of the rights granted by Art. 8 ECHR (see *Grabenwarter/Pabel*, EMRK⁵ § 22 Rz 1ff.). Furthermore, it includes gender identity, the name, sexual orientation and sexual life (ECtHR 28.1.2003, 44647/98, *Peck/the United Kingdom* Rz 57).

Further, the judgements give an overview of the areas that are closely connected to human nature and essential to build one's character. The court names areas that need to be free from intrusion that are integral parts of private life and are essential to develop one's personality. Art. 8 of the ECHR prevents intrusion of private and family life, the home (that enables personal safety and well-being (ECtHR 24.11.1986, 9063/80, *Gillow/the United Kingdom* Rz 55.) and correspondence. These four elements are essential for the free development of personality (see *Grabenwarter/Pabel*, EMRK⁵ § 22 Rz 1ff).

Personal development also transitions into the business world, where citizens can find personal fulfilment. The free choice of an occupation and its exercise as well as confidential business relationships fall within the scope of Art. 8 (*Grabenwarter/Pabel*, EMRK⁵ § 22 Rz 13.). Individual and private communication with business partners, customers, clients and patients is also worth protecting. The same applies for the actual office space. All these elements are advocated by the ECtHR and granted by Art. 8 ECHR (*Grabenwarter/Pabel*, EMRK⁵ § 22 Rz 14.).

Art. 8 protects both internal and external personal development, meaning it also protects relationships with other people, even in public. This means that as soon as people interact with others and this interaction is contributing to the development of the personality, this relationship is protected. This is based on the idea that the free development of the personality and freely engaging and communicating with other people requires privacy. This was established in the court's ruling Case of Hannover (ECtHR 24.6.2004, 59320/00, *Von Hannover/Germany*)².

The importance of having space where one can develop can also be seen in the verdicts due to the Court's generous interpretation of the phrase "places where one can reasonably assume not to be observed", as the case *Peck/United Kingdom* illustrates. The plaintiff attempted suicide on the street, which was filmed by surveillance cameras. The video material was passed on to the media and aired. The complainant stated that he was not aware of being filmed. In this case the Court ruled that the right to privacy also applies in public and therefore needs to be protected, even if video cameras are in operation (ECtHR 28.1.2003, 44647/98, *Peck/the United Kingdom* Rz 62 u 63).

In essence, the Court wants to create a space where people can flourish, develop, and change (cf. Floridi, 2011). In order to freely choose a life style a safe environment is needed where

² The verdict stated that Princess Karoline Hannover's privacy was infringed because photographers followed her and sold the pictures to newspapers. The Court sided with Karoline Hannover from Germany, although she is a member of the royal family and therefore a person of public interest. Public figures usually have to endure the curiosity of the public (EGMR 24.6.2004, 59320/00, *Von Hannover/Germany* Rz 64.). Nevertheless, the court ruled that privacy is essential for personal fulfilment and therefore, it must be possible to move unobserved in public if one can reasonably assume not to be observed (EGMR 24.6.2004, 59320/00, *Von Hannover/Germany* Rz 51).

personality and desire can be expressed without fearing ramifications. It shows that the core value of Art. 8 is self-development.

b. Tolerance and equality: the nurturing and supportive environment

Living freely and undisturbed also depends on the surroundings of the individual. Exploring and expressing one's personality requires a supportive environment. Personal fulfilment and development is a process and ever changing, meaning an environment is needed that can embrace change.

At this point, the other important element of Art. 8 comes into play: tolerance (see *Logemann*, 2004, 294 ff.). Jurisprudence clearly shows that the Court wants to protect different lifestyles and calls for acceptance and tolerance. Since the Convention is a "living instrument", it also protects new and emerging lifestyles and life choices.

Jurisprudence on sexual identity and illegitimate children shall serve as an example to demonstrate the importance of tolerance according to the Court. This section shall demonstrate how different life concepts that were once frowned-upon and in some cases even illegal, are nowadays normal and perfectly valid. In these cases, the Court took a stand for new life concepts and took an active part in integrating them into society.

Sexuality is one of the most intimate spheres of private life and therefore deserves special protection (ECtHR 27.9.1999, 33985/96 u 33986/96, *Smith and Grady/the United Kingdom* Rz 89.). The defendant in the *Dudgeon* case (ECtHR 22.10.1981, 7525/76, *Dudgeon/Ireland*) was convicted due to his homosexual relationship with his adult partner. Although both men were of age and the partners voluntarily engaged in their sexual relationship, Irish law punished such interaction. In this case, the ECtHR saw a violation of the right to privacy, although both the law and public opinion condemned these practices in Ireland. The Court's verdict reasoned that the attitude towards homosexuals is in transition and therefore the Irish notion is no longer compatible with the European standard. The Court also found that the two pillars of privacy, tolerance and openness, were violated (ECtHR 22.10.1981, 7525/76, *Dudgeon/Ireland* Rz 49 ff.). The Convention must be interpreted under present day conditions which is why certain laws lose their legitimacy over time (ECtHR 22.10.1981, 7525/76, *Dudgeon/Ireland* Rz 60; 26.10.1988, 10581/83, *Norris/Ireland* Rz 46.). Here the Court showed that personal (sexual) fulfilment must be supported by others, even though these life concepts were illegal at the time.

The same could also be observed with regard to transsexuals. The right to respect gender identity is - according to the ECtHR - certainly an aspect of Art. 8 ECHR (ECtHR 11.7.2002 (GK), 28957/95, *Christine Goodwin/the United Kingdom* Rz 71ff.). In case *Rees* (ECtHR 17.10.1986, 9532/81, *Rees/the United Kingdom* Rz 37.) the government refused to change the gender in the birth register after the sex change of a transsexual applicant. Interestingly enough, in 1981, the ECtHR saw no violation of Art. 8 ECHR and justified its verdict by referring to the fact that no common standard regarding such issues had yet been established.

However, in 2002 the Court conceded this opinion (ECtHR 11.7.2002 (GK), 28957/95, *Christine Goodwin/the United Kingdom* Rz 74ff.). In that judgment, the Court emphasised that the public opinion regarding transsexuals is changing, which is why the refusal to change the birth register is not in accordance with the Convention. The Court also stressed that the Convention on Human Rights has an evolutionary nature, which is why emerging lifestyles have to be protected (ECtHR 11.7.2002 (GK), 28957/95, *Christine Goodwin/the United Kingdom* Rz 74f.).

Here, the Court calls for tolerance. The Court states that different lifestyles can cause tensions but stresses that these tensions are typical in a democracy. Even if certain life concepts cause anger among the public, the right of self-realisation is more important. People have to be tolerant and open in order to enable others to freely choose their life concepts (ECtHR 11.7.2002 (GK), 28957/95, *Christine Goodwin/the United Kingdom* Rz 91.).

Tolerance goes hand in hand with equality. Not only is it important to tolerate and accept other people and their life choices, but they must also be treated equally. The Court promotes equality for all human beings as advocated in its jurisprudence regarding the equality of legitimate and illegitimate children. Again, the Court expects Member States to value modern societies. Due to the transformation of the concept of traditional family, Member States have to grant illegitimate children the same rights (ECtHR 13.6.1979, 6833/74, *Marckx/Belgium*). Otherwise, modern family life would not be respected. The state has a positive obligation to integrate children into the family by making them legally equal (ECtHR 13.6.1979, 6833/74, *Marckx/Belgium* Rz 31, 41.). The Court wants to protect new and alternative lifestyles and prevent any kind of discrimination.

Not only is it crucial to have a society that accepts and tolerates different lifestyles and treats them equally, but it must be supportive of change. Personal development does not end at a certain point—it is a lifelong process and therefore new ideas and values might emerge. New morals and principles might cause disruption or tension or shake up society, hence these

tendencies need protection. These aspects need to be considered when judges rule on privacy infringements or when legislators draft new legislation that might interfere with privacy.

c. Safeguards - Informational-Self-determination to fight discrimination

One of the main problems people face when they seek personal fulfilment or choose lifestyles that are not (yet) socially accepted is discrimination. Legal doctrine assumes that everyone has to be treated equal in the eyes of the law. If legislators want to put laws into force that differentiate between people, a justification has to be provided. Therefore, the legal definition of discrimination means, treating people differently without any lawful grounds (see ECtHR 13.12.2005, 55762/00 u 55974/00, *Timishev/Russia* Rz 58). However, it is important to note that calling for freedom, tolerance and equality is not enough to prevent discrimination. But effective tools are crucial.

One effective way to guard against discrimination is informational self-determination, as defined by the German Constitutional Court (BVerfGE 65,1; 15 December 1983, see also - *Schulz*, 2012). The German Court ruled that people have to be in control over how their personal information is handled (see also Grabenwarter/Pabel, EMRK5 § 22 Rz 1ff). The importance of tools that help to enhance privacy are critical due to the severe consequences of discrimination.

The Court is well aware of the devastating power of discrimination as it ruled that in order to protect pluralism, a system has to be developed that prohibits discrimination. Treating people differently because they are different would defeat pluralism (ECtHR 13.12.2005, 55762/00 u 55974/00, *Timishev/Russia* Rz 58.)³. The Court explained that (ethnic) discrimination is one of the most devastating human rights violations, reasoning that pluralism and diversity enrich society and must be protected (ECtHR 13.12.2005, 55762/00 u 55974/00, *Timishev/Russia* Rz 56.). Being discriminated against because one is different deters and inhibits self-fulfilment. It will prevent people from expressing themselves freely due to the fear of how others or society will react.

Corresponding views can be found in the case *Klass* where the Court assessed surveillance measures taken in the battle against terrorism. Being forced to disclose information poses a

³ The Court reached this conclusion in its judgment *Timishev*. A citizen of Chechen origin was refused to enter Russia due to its origin and his children's access to school was denied. Here, the Court emphasised the incompatibility of discrimination and democracy.

threat to self-fulfilment because it enables discrimination⁴. (ECtHR 6.9.1978, 5029/71, *Klass and Others/Germany* Rz 49). States run the risk of "destroying democracy on the ground of defending it." (ECtHR 6.9.1978, 5029/71, *Klass and Others/Germany* Rz 49). Thus it is clear that the loss of individual privacy (e.g. through surveillance) affects society as a whole because privacy is an essential element of democracy (see also ECtHR 26.3.1987, 9248/81, *Leander/Sweden*, and, ECtHR 2.8.1984, 8691/79, *Malone/the United Kingdom*). Informational self-determination (i.e. being in control of personal data) would help to mitigate that risk.

The Court emphasised the importance of privacy and informational self-determination, since data protection is at the heart of Art. 8 (CASE Z ECtHR 25.2.1997, 22009/93, *Z/Finland*). Even in the context of criminal investigations the Court acknowledged that being forced to disclose certain information that offers grounds for discrimination cannot be justified by an overriding interest in public safety. This is especially true for health data, and therefore sensitive information. Abuse and misuse can have disastrous consequences for social and professional life, since the disclosure of such data leads to discrimination, as the Court stated in its CASE Z⁵. (ECtHR 25.2.1997, 22009/93, *Z/Finland* Rz 95, 96.). Again, this shows that informational self-determination can guard against discrimination.

The main issue with discrimination is that people are inherently judgemental and have prejudices. These aspects are deeply embedded in human nature and the law is not capable of changing that. People will always judge others based on their religious or political beliefs, their gender, their sexual preferences and their life choices. Notwithstanding that society must work on strategies to increase tolerance, society cannot hope to change the mind set of human beings and force them to be more tolerant. Therefore, people need privacy and tools to enforce it in order to not be subjected to discrimination, especially considering how the Court describes the devastating power of discrimination for the individual and for society.

Applying this mindset, I argue that If people are free in their choice to share information (informational self-determination) with whomever they want, the likelihood of discrimination decreases. People will only share their views and beliefs with people they feel safe with. In

⁴ The Court acknowledges states' obligations to ensure peace and fight terrorism. Nevertheless, the Court ruled this aim cannot be pursued at every price, because surveillance poses the greatest threat to democracy

⁵ The police confiscated health data of the applicant to prove an HIV infection. The data was seized, although the applicant had objected. The police obtained the data to gather evidence for an alleged criminal offense. Although the Court acknowledged the public interest of criminal justice, it stated that health data is very sensitive and therefore its usage is not a priori vindicated due to a criminal investigation. Nevertheless, the Court held that due to the seriousness of the offense (rape and murder) the measure was appropriate

addition, effective legal remedies such as fines and damages as well as inadmissibility of evidence in trials are tools that have a preventive or repressive effect that help to increase privacy and subsequently prevent discrimination, and other risks such as public humiliation or self-imposed stigma. People need to be in control over the information, so they can develop and unfold their potential.

III. External privacy

This section introduces the concept of external privacy. The premise of this concept is that personal development (as shown in section II), is a precondition for the exercise of fundamental rights. A developed personality is required to express views and opinions. In addition, in order to enjoy certain fundamental human rights, some level of privacy has to be guaranteed to enable the free exercise of these rights.

a. Right to education

This section will explain the value of education for the individual. Education shapes personality and character, and promotes independence and self-fulfilment. Education also nurtures a democratic, pluralistic⁶ society because it enables diversity. Finally, forcing pupils and students to disclose why they (do not) want to study certain subjects can have a negative effect on the right to education.

According to the ECtHR teachers have a special responsibility in educating their students; they are to provide young people with democratic values (see ECtHR 26.9.1995 (GK), 17851/91, *Vogt/Germany* Rz 22, 64.). Further teachers should help students in their personal development and shape their character and their mental strength and raise them to personal independence (ECtHR 9.10.2007, 1448/04, *Hasan and Eylem Zengin/Turkey* Rz 54 ff.)

Due to the immense value of education for the individual and society, measures must be taken to ensure that this right can be freely exercised. The Court stated that some level of privacy is required in order to guarantee the free development of the personality through education. Only if a safe, secure and private environment is ensured, people can freely develop their abilities. This is the conclusion of the Court in its judgment *Folgerø and others* (ECtHR (GK) 29.6.2007, 15472/02, *Folgerø and Others/Norway*.) when it deemed the merger of two subjects as unlawful. In this case, the subjects “religious instruction for Christians” and

⁶ It is a prerequisite for democracy that education is diverse so students explore different viewpoints and form a bond and engage. Young people should be taught to respect and accept different opinions, and teachers should equip them with tolerance and openness towards different views (see EGMR 9.10.2007, 1448/04, *Hasan and Eylem Zengin/Turkey* Rz 48-55.).

“philosophy of life” were merged. Pupils were required to provide an explanation for their decision to opt-out. Here, the Court emphasised that disclosing such reasons violates privacy. The state, as a guarantor of pluralism, must not force anyone to disclose such information, because it offers grounds for discrimination. Again, the Court believes that some level of privacy is needed to ensure openness and tolerance in the context of education and self-development.

In sum, the ideal democrat has the right to pluralistic education which enables self-development. The ideal democrat is an independent, critical and tolerant person. However, being forced to disclose personal views is not compatible with the Convention as it makes people vulnerable to discrimination. Students have to be free to choose subjects without needing to justify their choices. Only if they can freely explore the different areas of interest without explaining themselves can they freely build their character. Hence informational self-determination is one avenue to battle discrimination.

b. Freedom of expression

The following section will show that privacy is connected with Art. 10 ECHR (freedom of expression, e.g. free press, expressing views, accessing information) and therefore forms an indispensable unit. First, I will explain the immense value of Art. 10 (see also Oppitz, 2009) to show why guaranteeing this human right is of such importance (e.g. for self-realisation, promoting democracy). Then, I will illustrate that the development of personality is required to express and hold views and I will explain that the free expression of these views calls for privacy (e.g. protecting journalistic sources, private conversations, unmonitored information seeking).

Art. 10 ECHR guarantees the freedom of expression. The scope is divided into several sections: the right to form and hold an opinion and to express it, freedom to access and impart information, freedom of the press (including mass media and broadcasting) as well as artistic, academic and scientific expression. (*Grabenwarter/Pabel*, EMRK⁵ § 23 Rz 1 ff.).

According to the jurisprudence of the ECtHR, freedom of expression is the most important right of the Convention. Freedom of expression in all its variations is the basis of democracy (ECtHR 7.12.1976, 5493/72, *Handyside/the United Kingdom* Rz 49.) The case *Handyside* is the benchmark for interpreting Art. 10. The Court stated in this judgment that freedom of expression provides the foundation for self-realisation and is also a prerequisite for the further development of society as a whole. Freedom of expression guarantees and enables pluralism, without which there is no democracy. The Court emphasised that not only popular, common

and pleasant opinions fall under this scope. The goal is to protect notions that "offend, shock or disturb" as well (ECtHR 7.12.1976, 5493/72, *Handyside/the United Kingdom* Rz 49.).

The scope includes the right to form and hold an **opinion and express** it. Art. 10 protects the dissemination of both "information and ideas". The focus of this right is an "open communication concept". This means that no opinion or view, regardless of the content, falls outside the scope (*Grabenwarter/Pabel*, EMRK⁵ § 23 Rz 5.).

Some level of privacy is required to ensure that people feel safe to form and hold their views, especially if they believe in controversial concepts. Having their views involuntarily exposed to the outside world makes them vulnerable to discrimination or victims of public humiliation. Even just knowing that certain information is in the hands of others can negatively influence how people feel about themselves (so called self-imposed stigma, Mittelstadt, 2014). The importance of confidential communication can be seen as Art. 8 also covers private conversations, which shows that the Member States of the Convention were aware that conversations require some level of confidentiality.

Similar to the right to hold an opinion, the right **to access information** (which can be seen as a precondition to form an opinion) (ECtHR 29.10.1992, 14234/88 u 14235/88, *Open Door and Dublin Well Woman/Ireland*) is connected to privacy. Being undisturbed and unmonitored whilst gathering information is necessary to freely exercise this human right, as controversial interests can cause discrimination (see PEN's survey, Chilling Effects: NSA Surveillance Drives Writers to Self-Censor, 2013, see also Penney, 2016).

Same counts true for the third element of Art. 10: **the free press**. The importance of the press in a free democracy is undisputed. Journalists contribute significantly to the democratic process (see ECtHR 26.4.1979, 6538/74, *The Sunday Times/the United Kingdom*, also, ECtHR 26.11.1991, 13585/88, *Observer and Guardian/the United Kingdom*). With the help of the mass media such as newspapers, radio or Internet, citizens receive information which then forms the basis for opinions and values of a society (see *Lehr*, 2012). Moreover, Art. 10 establishes the right or the duty of the press to inform the public and the right of citizens to receive this information (ECtHR 8.7.1986, 9815/82, *Lingens/Austria* Rz 41, 42.).

Freedom of the press protects both core journalistic work and related activities. Distribution of newspapers, notes of journalists as well as research activities are protected under Art. 10 ECHR. The most important tool to maintain free press is editorial secrecy. This privilege even

applies if journalists publish illegally provided information (*Grabenwarter/Pabel*, EMRK⁵ § 23 Rz 9.).

Another privilege of journalists is the protection of sources, an essential mechanism in order to be the "public watchdog". Since it is of public interest to guarantee and maintain free press, journalists must be able to guarantee confidentiality to their sources. Furthermore, the Court stresses that the lack of confidentiality causes the so-called "chilling effect". This means that informants fear the consequences and ramifications of passing on information to the press, resulting in matters of public interest no longer being openly discussed. For all these reasons, the Court only allows exceptions in limited cases and imposes high hurdles to pass the proportionality test (ECtHR 23.9.1994 (GK), 15890/89, *Jersild/Denmark*)⁷.

Privacy and confidentiality are vital components of the freedom of press. All three sides, the journalists, the sources and the readers need to be protected against monitoring and discrimination to insure the proper functioning of the public watchdog.

Similar things can be said for the final elements of Art. 10: **artistic and academic freedom**. Artistic freedom is expression of views in an artistic way. Art. is seen as an open concept (*Grabenwarter/Pabel*, EMRK⁵ § 23 Rz 11.); thus Art. 10 does not define what constitutes art. This approach is reasonable, because it would defeat the purpose of free art if the lawfulness of the presented artwork would depend on the judgement of others. This is especially true because art often seeks to inform or raise awareness. Hence artists often use unconventional means to achieve a dramatic effect which may encounter public resistance (see ECtHR 24.5.1988, 10737/84, *Müller and Others/Switzerland*). Art, whose nature it is to go beyond known limits, would have no protection if others may judge it in advance. The scope includes the artistic work, the relationship between artists and art viewers and any indirect artistic activities (e.g. with an art mediator) (*Grabenwarter/Pabel*, EMRK⁵ § 23 Rz 11.).

Academic freedom is freedom of expression in a scientific way. The scope of Art. 10 ECHR includes not only research but also publishing, teaching and presenting findings (*Grabenwarter/Pabel*, EMRK⁵ § 22 Rz 1ff.). Further, the right to education according to Art. 2 of the ECHR 1st P. guarantees everyone access to schools and universities (*Grabenwarter/Pabel*, EMRK⁵ § 22 Rz 87.). Both artists and academics will at some point

⁷ This was described in the case *Jersild*, when a journalist made a documentary about right-wing citizens. The report led to a scandal. Prosecutors wanted to take action against the neo-Nazis and therefore forced the journalist to reveal her sources. In this case the Court ruled that such measures were not compatible with the freedom of press, even though the public interest of prosecuting crimes was at stake (EGMR 23.9.1994 (GK), 15890/89, *Jersild/Denmark*; see also 11.7.2002 (GK), 28957/95). This clearly shows the immense value the Court assigns to confidentiality, if it cannot be trumped by criminal justice issues.

present their work to the outside world. However, during the preparatory stages (e.g. conducting research) it is crucial that privacy is maintained, because their careers depend on being amongst the first to publish papers or present artwork.

As this section has shown the elements of freedom of expression require some level of privacy. First a development of personality is the precondition for freedom of expression. Citizens need to develop their character first, then they can hold opinions, hence they need privacy. Further privacy is needed during education, as disclosing information can have a negative impact on the development of personality. Moreover, in order to form an opinion citizens must have free access to information. After considering all aspects, one can make an informed decision. If people are being monitored they cannot freely explore all relevant information. Further the right to express views is challenged if people fear ramifications. This is especially true if people hold controversial views or share information that includes sensitive data e.g. health data. Hence they must be given the power to determine if they want to share their views.

Privacy also plays an invaluable part in ensuring a free and independent press, as shown by the examples of editorial secrecy and the protection of sources. In addition, Art. 10 also protects citizen's right to receive information via the press. It is debateable if people can freely exercise their right if digital records are kept that show what newspapers are read. The same holds true for artists and academics, who must eventually expose their work to the public. However, the research and the preparation requires privacy. Further since students and art enthusiasts are also protected under Art. 10 it is worth noting that they also need privacy. Artistic or scientific views can be highly controversial and the freedom to explore these views might be hindered if digital records are being kept, e.g. of who attended an art show or an academic conference. Therefore, privacy can be seen "as a gateway for freedom of opinion and expression" (Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 2015. p 15ff.)

IV. Premium privacy

This section illustrates the concept of premium privacy. Similar to the external privacy section it also assumes personal development and some level of privacy are required to freely enjoy other human rights. Premium privacy differs insofar as it focuses on human rights (the freedom of thought, conscience and religion, the right to free elections, the right to assembly and associations) that inherently address sensitive information, such as political or religious opinions or information on ethnicity.

a. The freedom of thought, conscience and religion

Art. 9 ECHR plays an important role considering the historical background of the ECHR. The Court and the Convention are a reaction to what happened during the Second World War (*Marks*, 1995). Therefore, the Court ruled that freedom of thought, conscience and religion is one of the foundations of democracy (*Grabenwarter/Pabel*, EMRK⁵ § 22 Rz 80ff.). History has shown us what devastating consequences the exposure of religious beliefs can have. The Second World War acts as an example to demonstrate the need for privacy and self-determination in this regard.

The court believes that pluralism in religion is inseparable from democracy. Religious beliefs and freedom of conscience are amongst the most vibrant elements of democracy. The scope also includes atheists, agnostics, sceptics or people who do not deal explicitly hold religious beliefs (see ECtHR 5.4.2007, 18147/02, *Church of Scientology Moscow/Russia* Rz 71.). Religious pluralism must be protected and promoted, because it is an inherent characteristic of democracy (ECtHR 14.12.1999, 38178/97, *Serif/Greece* Rz 49.).

This shows that religion is an effective tool to promote pluralism. Diversity in religious concepts offers spiritual guidance to everyone who seeks it. However, it is unnecessary to state that religious convictions are often subject to discrimination. This proves that privacy also plays an important role in freely exercising this human right. Religious pluralism can only be preserved if one does not fear to be discriminated. Again, one way to guard against discrimination is informational self-determination. If people are not forced to disclose their beliefs and are able to share their views with whomever they want, discrimination is likely to decrease.

b. The right to free elections

Elections are also a form of expression of utmost importance directed at participation in the political process. The Court calls for basic principles of a right to free elections (Art. 3 1st P.), even though it does not favour a specific electoral system such as proportional or majoritarian. Whichever system is in place, free, equal, and secret elections are pivotal. The Member States have a positive obligation to create laws that ensure that the political will of the people is expressed. These principles apply to Parliaments and all law adopting institutions alike (ECtHR 2.3.1987, 9267/81, *Mathieu-Mohin and Clerfayt/Belgium* Rz 52-54.). The right to vote prevents dictatorship and abuse of power and ensures freedom and dignity (*Marks*, 1995).

Political views also offer grounds for discrimination. Information on political stances is considered sensitive information. This is one of the reasons why secret elections are essential in a democracy. Again it was illustrated that privacy plays an important role in exercising a fundamental human right.

c. The freedom of assembly and association

The freedom of assembly and association according to Art. 11 also constitutes one variation of freedom of expression. Art. 11 of the ECHR protects the right to form a political party (see ECtHR 13.2.2003 (GK), 41340/98, 41342/98, 41343/98 u 41344/98, *Refah Partisi (the Welfare Party) and Others/Turkey* Rz 96-99.). Political parties involve citizens in the democratic process. (see ECtHR 30.1.1998 (GK), 19392/92, *United Communist Party of Turkey and Others/Turkey* Rz 31.).

Art. 11 is a very effective tool to enhance and promote pluralism because it offers the basis for self-expression with other likeminded people. Assemblies, associations and unions help to manifest views and convince others of the importance of certain topics (see also ECtHR 21.6.1988, 10126/82, Plattform “Ärzte für das Leben“/Austria). This is the start of a public dialogue. Art. 11 is an invaluable tool to ensure solidarity.

Political parties, unions, demonstrations and protests often deal with political issues. Political views and opinions are always a very sensitive topic and therefore make people vulnerable to discrimination. Union or party membership, membership of clubs or associations that deal with ethnic or political topics as well as participation in a protest can be subject to discrimination. Furthermore, membership of clubs that are not politically motivated also fall within the scope and people may wish not to disclose their participation. Again, informational self-determination can offer an effective safeguard against discrimination. Further stricter laws that prohibit requests this information can be considered.

V. Privacy and technology

In addition to the aforementioned problems digital technologies are exacerbating these issues. This section explores how the discussed human rights (right to respect for private and family life the right to education, the freedom of thought, conscience and religion, the right to free elections, the right to assembly and associations) become affected when digital technologies come to play and show how effective privacy protection becomes even more important in the digital age (Stahl et al, 2016).

Internet technologies create digital traces that challenge or hinder the free enjoyment of human rights. Freely engaging with friends and family – elements of **Art. 8 (right to respect for private and family life)** - is challenged when digital technologies are used to interact with them, as records are being kept. Self-presentation and self-expression in private as well as in public are also elements of Art. 8. Since Facebook or Twitter are venues for self-presentation and tools for social interaction this seems troubling. It is important to note that technologies intrude privacy even if only metadata is stored. Case in point is location data which reveals whether a person is at home. The home is a sacred place where people should be able to retreat and thus it is protected by Art. 8 (similar ECtHR 24.11.1986, 9063/80, *Gillow/the United Kingdom* Rz 55). Further location data tracks our movements when we are in public, even though privacy in public is also an aspect guaranteed by Art. 8.

The right to privacy also protects the right to choose a profession and to forge business relationships. It is hard to maintain a successful and competitive business if trade or other professional secrets or business strategies are revealed, either through governmental surveillance, data breaches/leaks on side of the private sector or hacking attacks. This is especially worrying for professionals such as doctors, psychotherapists and lawyers because they can no longer fully guarantee confidentiality to their patients and clients (similar *Fox*, 2002, 527ff. on the risks of surveillance in general ECtHR 6.9.1978, 5029/71 *Klass and Others/Germany*). In the case of surveillance, cyber-attacks or weak security of platform providers, the government, hackers or unauthorised members of a company can have access to sensitive data that risk invasions of privacy, such as health data (on the risks of disclosing medical data see ECtHR 25.2.1997, 22009/93, *Z/Finland* Rz 95, 96.).

Similar, location data poses a threat to **freedom of thought, conscience and religion under Art. 9** of the ECHR. It is apparent if someone visits a cemetery, is going to mass, participates in pilgrimages or seeks religious guidance. Further, the work of priests or other spiritual guardians is compromised, if digital records reveal e-mail or telephone data that shows how often and how long someone has talked with their religious confidant. IP addresses disclose whether people have visited the home page of a religious institution or live-streamed the mass or the speech of the pope on the Internet (Bell, 2006). The freedom of religion is one of the most vivid elements of democracy (see ECtHR 5.4.2007, 18147/02, *Church of Scientology Moscow/Russia* Rz 71.), which is threatened by data storage and collection.

Technology threatens freedom of the press guaranteed under **Art. 10 (freedom of expression)** because it erodes source protection. The press's duty to be the "public watchdog" (Vgl

ECtHR 7.2.2012 (GK), 39954/08, *Axel Springer AG/Germany* Rz 79.) cannot be fulfilled. Location data reveals, if, when and where sources met with journalists, further e-mail and telephone data reveals when, and how long the journalists communicated with their informants. In the worst case scenario, the identity of the sources is revealed. The same holds true for research activities of journalists when investigating a story.

Looking at the passive side of human rights, other problems arise. IP addresses and cookies show which online newspapers are read. Internet technologies offer every user access to a variety of topics, so they can form their political views. Informing citizens is assumed to be the core task of the press (ECtHR 8.7.1986, 9815/82, *Lingens/Austria* Rz 42.), which cannot be fulfilled if the search and browsing history of users is stored. In addition, the freedom of information is also infringed, because IP addresses show which topics are of interest. This is especially relevant for pupils (**Art. 2 1st P Right to education**), students and scientists. Tracing down every move on the internet is likely to cause a chilling effect because people are too afraid to seek certain information which leads to a decrease in pluralism (see PEN's survey: *Chilling Effects: NSA Surveillance Drives Writers to Self-Censor*, 2013; *Big Brother Watch* study, 2015; see also, Penney, 2016).

Freedom of assembly and association under Art. 11 of the ECHR is also affected by data storage. For example, identifying union members is easy as location data shows if and how often users visit union premises. IP addresses illustrate whether citizens visit the club's websites and subscribe to their newsletters. Location data can disclose participation in protests or demonstrations. Moreover, IP addresses show whether people were part of an online assembly. The same applies to political party affiliation as location data unveils if users participated in party meetings or election parties. Again, Art. 11 is an important tool that enables pluralism but needs privacy in order to function.

The right to free election is also affected since the data shows if a person was at the polling station on election day. Further the IP addresses show if users visited homepages of political parties which indicates their voting behaviour. This information infringes free and secret election under **Art. 3 1st. P.** A human right that constitutes the most important kind of expression, because it manifests the will of the people (ECtHR 2.3.1987, 9267/81, *Mathieu-Mohin and Clerfayt/Belgium* Rz 47-54.).

Of course one can argue that people could refuse to use technology or leave their electronic devices at home to circumvent monitoring. However, I argue that freedom does not mean

being skilled at dodging surveillance. It means being able to enjoy technology without having to fear negative consequences.

VI. Privacy: *primus inter pares*

The above analysis leads to the conclusion that the notion of equality between human rights is untenable. Privacy must occupy an elevated position because it is the basis for personal development and fulfilment and due to its position as an underlying, enabling requirement for the realisation of other human rights. Notwithstanding that other human rights play an important role in our society, it is privacy that is needed to fully exercise many of them.

First, as my analysis shows Art. 8 aims at developing mental skills and individual, or internal, privacy. Further it protects the expression and development of personality (ECtHR 24.6.2004, 59320/00, *Von Hannover/Germany* Rz 50.). The environment that nurtures the development of personality (engaging with friends and family, leading private conversations, having a home to retreat to, finding a suitable profession), the facets of personality (e.g. reputation, gender or sexual-identity), and the possibilities for personal expression are all wide ranging (fashion style, self-presentation).

This alone shows that the private sphere is essential for personal development which already has intrinsic value. Art. 8 is not just about data protection, it is about personal fulfilment and self-realisation. Personal development is an ongoing and lifelong process, which is why the Court sees the Convention as a living instrument that must be interpreted according to present day conditions. Therefore, privacy must constantly be protected throughout life.

Further, since personal development is a process and not static, society must encourage and promote change, as shown in section II.b. with the example of public stances on homosexuals, transgender and illegitimate children. The importance of developing an independent mind was also stated in the jurisprudence regarding the right to education (section III. a.). Individual development and self-fulfilment are prerequisites for pluralism, which is itself a requirement for democracy (see Nieuwenhuis, 2007). Even though the digital age is challenging protection of privacy, it is important to keep in mind how essential privacy is for the individual's development. Public policy must not give in to the notion that privacy is 'no longer a social

norm'⁸, because Internet technologies are being widely integrated. Society is not 'over privacy', it is the essence of personal development and needed throughout life.

Second, the Court rules that the freedom of expression in all its variations is the foundation of democracy and personal fulfilment (as seen in 'external' and 'premium privacy'). Freedom of expression is a prerequisite for self-realisation and development of society and an effective tool to promote and maintain pluralism (ECtHR 7.12.1976, 5493/72, *Handyside/the United Kingdom* Rz 49.). In order to express oneself, one needs to first develop personality. People need to discover their personality and express it through opinions, religion, voting, protests or art. To achieve this, they need a safe and surveillance-free environment (David Lyon, 2002). This shows why privacy and all the above mentioned aspects of life that nurture personal development (friends, family, the home, the profession) are crucial to protect.

Third, every variation of freedom of expression (as seen in external and premium privacy; e.g. information seeking, free press, freedom of religion, free elections, etc.) requires some level of privacy. Hence, privacy is a necessary underlying component of these human rights. Privacy is a crucial guardian against discrimination. In addition, other consequences of having views involuntarily exposed to the outside world can cause public humiliation. Even just knowing that certain information is in the hands of others can negatively influence how people feel about themselves.

From a legal perspective much can be done to enhance privacy, which is essential as technologies amplify the aforementioned issues as shown in section V. The first step is to promote informational self-determination as shown in section II. c. as it can be an effective tool to control the usage of personal data. Solutions can be found in more customised privacy settings in digital devices or more adoptable terms and conditions for users, for example by making the user an equal partner in contracts and not forcing him to disclose all data or none. Further, even stricter laws that prohibit requests or receipt of certain information can be considered (see for example the Austrian Genetic Technology Code, § 67 Gentechnikgesetz GTG), because even refusal to provide information (e.g. about race, sexual orientation, health status, or gender) can lead to negative inferences.

⁸ Privacy no longer a social norm, says Facebook founder <https://www.theguardian.com/technology/2010/jan/11/facebook-privacy>

Second, preventive and repressive measures can be enacted to ensure data controllers comply with data protection law. Effective legal remedies such as damages and fines need to be at the disposal of the data subject to guard against privacy infringements.

Third, contingency plans to mitigate the personal consequences of privacy breaches, such as the inadmissibility in trial of illegally obtained data, injunctions or bans need to be considered. However, these measures are only effective if the authorities that enforce the law are fully aware of the damage caused by privacy infringements.

Fundamental values such as human dignity, freedom and self-realisation, which are at the heart of the ECHR must be protected (ECtHR 11.7.2002 (GK), 28957/95, *Christine Goodwin/the United Kingdom* Rz 90.) Legal human rights theory dictates that states have a positive obligation to guarantee these values (Grabenwarter & Pabel, 2012 § 19 Rz 1 ff). Therefore, it is important for legislators, judges, governments and supervisory authorities to be mindful of what privacy means, what it entails and what it aims to protect. In addition, it is important to realise what is at stake if privacy is infringed and acknowledge the elevated position of privacy in relation to certain other human rights. The European supervisory authorities will rule on privacy infringements, (e.g. impose fines on data controllers, issue adequacy decisions, approve and assess standard data protection clauses, binding corporate rules and codes of conducts) based on the GDPR. Fully grasping this hierarchy will help the supervisory authorities to make the right decision in cases where privacy collides with competing interests.

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