

# “Verticalised” cases before the European Court of Human Rights unravelled: An analysis of their characteristics and the Court’s approach to them

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**Claire Loven** 

Utrecht University, Utrecht, the Netherlands

## Abstract

Based on Article 34 European Convention on Human Rights, individual applications must be directed against one of the Convention States. Originally ‘horizontal’ cases therefore must be ‘verticalised’ in order to be admissible. This means that a private actor who had first brought a procedure against another private actor before the domestic courts, must complain about State (in)action in his application to the European Court of Human Rights. Recently, some scholars and judges have raised procedural issues that may arise in these cases, but generally, these ‘verticalised’ cases have remained underexplored. To unravel verticalised cases before the ECtHR and to better understand procedural issues that may arise from them, this article provides a deeper understanding of the origins of verticalised cases and the Court’s approach to them. It is explained that verticalised cases before the ECtHR can be very different in nature. These differences are rooted in the different types of horizontal conflicts that may arise on the domestic level, the different relations between private actors they may concern, and the different Convention rights that may be at stake. The wide variety of verticalized cases is also reflected in the Court’s approach to them, as is the second main topic that the present article explores.

## Keywords

European Convention on Human Rights, European Court of Human Rights, Procedure, Verticalised cases, Relations between private actors, Horizontal positive obligations

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## Corresponding author:

Claire Loven, Utrecht University, Newtonlaan 201, 3584 BH Utrecht, the Netherlands.

E-mail: [c.m.s.loven@uu.nl](mailto:c.m.s.loven@uu.nl)

## I. INTRODUCTION

The system established by the European Convention on Human Rights (ECHR or Convention) was designed in the years after the Second World War, which had provided horrific examples of how States can misuse their sovereign power and deeply violate individuals' autonomy, dignity and freedom. Against this background, it is easy to understand that the Convention system was introduced to protect individuals against fundamental rights violations by the State. In order to do so, the Convention imposes legal obligations on States. Illustrative in this regard is Article 1 of the Convention, which prescribes that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention'. The Convention system, moreover, provides a collective enforcement mechanism in which individuals have a right of individual petition. In other words, individuals can bring an application before the European Court of Human Rights (ECtHR or Court) in which they complain about a violation of a Convention right by one of the Convention States.<sup>1</sup>

The primary aim of the Convention is to protect individuals against fundamental rights violations by the State, but this does not mean that infringements of the values, rights and liberties enshrined in the Convention by private actors (i.e. individuals or companies) are completely ignored in the Convention system. To the contrary, over the years, the Court has increasingly offered substantive protection of Convention rights in relations between private actors. The Court does so by way of imposing horizontal positive obligations on the Convention States, which require them to take action to secure the rights and liberties guaranteed in the Convention in relations between private actors. These obligations originate from the Convention States' responsibility for their own acts and omissions in relation to the acts of private actors.<sup>2</sup>

It is a logical consequence of the Convention system that such protection of Convention rights in relations between private actors is offered by means of horizontal positive obligations. Article 34 ECHR provides that complaints have to be directed against one of the Convention States. Hence, complaints directed against private actors are incompatible *ratione personae* with the provisions of the Convention. The practical response to this is to 'verticalise' cases that originate from a horizontal conflict at the domestic level. This is, for example, the case when a private actor who had first brought a procedure against another private actor before the domestic courts, complains about State (in)action in relation to this case before the ECtHR, thus rendering it from a 'horizontal' case (between private actors) into a 'vertical' one (between a private actor and the State).

Although it has long been recognised that this 'verticalisation' exists,<sup>3</sup> only recently have some scholars and judges started to raise some procedural issues that may arise in verticalised cases

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1. See Article 34 ECHR. Article 34 ECHR states that the Court may receive applications from any person, non-governmental organisation or group of individuals. Due to the Court's broad interpretation of 'non-governmental organisation' legal entities are allowed to submit applications to the Court. The Court has, for example, accepted complaints of churches (e.g. "*Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy)*" v the former Yugoslav Republic of Macedonia App No 3532/07 (ECtHR, 16 November 2017)), television companies (e.g. *Centro Europa 7 S.R.L. and Di Stefano v Italy* App No 38433/09 (ECtHR (GC), 7 June 2012)) and private corporations (e.g. *S.A. Bio D'Ardennes v Belgium* App No 44457/11 (ECtHR, 12 November 2019)).
  2. See for example the Court's reasoning in *O'Keefe v Ireland* App No 35810/09 (ECtHR, 28 January 2014) para 168.
  3. See e.g. the work of Stijn Smet (Stijn Smet, *Resolving conflicts between human rights: a legal theoretical analysis in the context of the ECHR* (Ghent University 2014 (diss.)); Stijn Smet, *Resolving conflicts between human rights: the judge's dilemma* (Routledge 2017)). Furthermore, in the 2000s 'verticalisation' was criticised because of its contribution to an

before the ECtHR.<sup>4</sup> In particular, they have paid attention to the fact that one of the private actors involved in the original conflict is unable to defend his acts, interests and rights in the Court's proceedings, while this may be part of the Court's examination and, eventually, the private actor concerned may be affected by a judgment of the Court. Generally, however, these cases have remained underexplored.

To unravel verticalised cases before the ECtHR and to better understand procedural issues that may arise from them, this article provides a deeper understanding of the origins of verticalised cases and the Court's approach to them. In order to do so, this article starts with a short discussion of horizontal positive obligations, since they are strongly intertwined with verticalised cases (Section 2). Subsequently, on the basis of a case-law analysis of the Court's jurisprudence<sup>5</sup> the origins of verticalised cases, in other words the underlying conflicts and involved parties, are described (Section 3.1). On the basis of this case-law analysis, the Court's current approach to verticalised cases is then explored by discussing different approaches to verticalised cases (Section 3.2). Finally, after having provided a summary of the findings of the analysis, a first indication is given of the type of procedural issues that may arise in verticalised cases (Section 4).

## 2. HORIZONTAL POSITIVE OBLIGATIONS

Horizontal positive obligations are a specific type of positive obligations. They govern the relations between individuals, whereas vertical positive obligations govern the relations between the individual and the State.<sup>6</sup> They have in common that both horizontal and vertical positive obligations require States to take action. This makes them different from negative obligations which require States to abstain from interfering.<sup>7</sup> In relation to positive obligations, the *Belgian Linguistic case*<sup>8</sup> and the

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increasing influence of fundamental rights on private law ('constitutionalisation' of private law). For this, see e.g. Olha Cherednychenko, 'Towards the control of private acts by the European Court of Human Rights' (2006) 13 *Maastricht Journal of European and Comparative Law* 195; Richard Kay, 'The European Convention on Human Rights and the control of private law' (2005) 5 *European Human Rights Law Review* 466.

4. E.g. Nicole Bürli, *Third-party interventions before the European Court of Human Rights* (Intersentia 2017); Pere Pastor Vilanova (judge at the ECtHR in respect of Andorra), 'Third parties involved in international litigation proceedings. What are the challenges for the ECtHR?' in Paulo Pinto de Albuquerque and Krzysztof Wojtyczek (eds.) *Judicial power in a globalised world: liber amicorum Vincent De Gaetano* (Springer 2019); Claire Loven 'A and B v. Croatia and the concurring opinion of Judge Wojtyczek: the procedural status of the 'disappearing party' (*Strasbourg Observers*, 16 July 2019) <<https://strasbourgobservers.com/2019/07/16/a-and-b-v-croatia-and-the-concurring-opinion-of-judge-wojtyczek-the-procedural-status-of-the-disappearing-party/>> accessed 3 September 2020; Concurring Opinion of Judge Wojtyczek in *Bochan v Ukraine (No 2)* App No 22251/08 (ECtHR (GC), 5 February 2015); Judge Wojtyczek expressed similar criticism in his Concurring Opinion in *A and B v Croatia* App No 7144/15 (ECtHR, 20 June 2019) which originated from a criminal vertical case on (alleged) sexual abuse; Dissenting Opinion of Judge Koskelo in *Kosmas and Others v Greece* App No 20086/13 (ECtHR, 29 June 2017); Partly Dissenting Opinion of Judge Kjølbros in *Orlović and Others v Bosnia and Herzegovina* App No 16332/18 (ECtHR, 1 October 2019).
5. For a detailed description of the methodology see the introduction to Section 3.
6. For the distinction between horizontal and vertical positive obligations see further Laurens Lavrysen, *Human rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights* (Intersentia 2016) 78 ff.
7. On the difference between negative and positive obligations see e.g. Lavrysen (n 6); Malu Beijer, *The limits of fundamental rights protection by the EU: the scope for the development of positive obligations* (Intersentia 2017); Janneke Gerards, *General Principles of the European Convention on Human Rights* (CUP 2019).
8. *Belgian Linguistic case* App No 1474/62 (ECtHR, 23 July 1968).

cases of *Marckx*,<sup>9</sup> *Airey*,<sup>10</sup> and *X and Y*<sup>11</sup> are generally considered to be the four landmark cases in which the Court first laid down the relevant doctrines and standards.<sup>12</sup> Of these four cases, *X and Y* is the case in which the Court extended, for the first time, the concept of positive obligations to relations between private actors and thus introduced the concept of horizontal positive obligations.<sup>13</sup>

The case of *X and Y* was about a mentally disabled girl who lived in a privately-owned home for mentally disabled children. In this home, she had been sexually assaulted at the age of 16. According to the Dutch criminal code of that time, the girl was the only person who was legally entitled to lodge a criminal complaint as victims needed to do so personally. Yet, due to her mental condition, the girl was incapable of lodging a complaint herself. Thus, due to an omission in the Dutch criminal law existing at the time it was impossible to prosecute the perpetrator of the crime. Reasoning that this seriously affected the Convention rights of the applicant, the Court imposed a positive obligation on the Dutch State to amend the criminal law provisions in such a way that mentally disabled persons were given practical and effective protection of their right to private life in relations with other individuals.<sup>14</sup> The Court expressly acknowledged that positive obligations inherent in an effective respect for private or family life ‘may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves’.<sup>15</sup>

Over the years, the Court has applied this reasoning in a wide range of cases and in relation to nearly all Convention rights. In other words, the Court has required States to take measures to secure the rights and liberties guaranteed in the Convention in all sorts of relations between private actors. This is further illustrated below by way of a discussion of case-law examples relating to family relations (Section 2.1), one’s surroundings (Section 2.2), employer – employee relations (Section 2.3), and defamatory publications (Section 2.4). These categories of cases are included in this article for two reasons. First, because horizontal positive obligations are often imposed in verticalised cases and because the different categories represent prototypical situations that give rise to verticalised cases,<sup>16</sup> as is discussed in more detail in Section 3. Second, because knowledge of the increased substantive protection of Convention rights in relations between private actors is important in relation to verticalised cases, since this increased substantive protection may influence the scope of possible procedural issues arising from verticalised cases.<sup>17</sup>

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9. *Marckx v Belgium* App No 6833/74 (ECtHR, 13 June 1979).

10. *Airey v Ireland* App No 6289/73 (ECtHR, 9 October 1979).

11. *X and Y v the Netherlands* App No 8978/80 (ECtHR, 26 March 1985).

12. E.g. Lavrysen (n 6) 3ff; Beijer (n 7) 38-39.

13. See also Lavrysen (n 6) 4.

14. *X and Y v the Netherlands* (n 11) paras 23-30.

15. *ibid* para 23.

16. Consequently, some categories of horizontal positive obligations are not discussed. For example, horizontal positive obligations relating to the protection against violence by individuals are left out of the discussion (for a further explanation, see Section 3). For a discussion of such horizontal positive obligations is referred to the work of e.g. Liora Lazarus (e.g. Liora Lazarus, ‘Positive obligations and Criminal Justice: Duties to Protect or Coerce’ in Julian Roberts and Lucia Zedner (eds.), *Principled Approaches to Criminal Law and Criminal Justice: Essays in Honour of Professor Andrew Ashworth* (Oxford University Press 2012) and Laurens Lavrysen and Natasa Mavronicola (eds.), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing 2020).

17. Concurring Opinion Judge Wojtyczek in *Bochan v Ukraine (No 2)* (n 4) para 6.

## 2.1. PROTECTION OF CONVENTION RIGHTS IN FAMILY RELATIONS

A first example of horizontal positive obligations relates to the protection of Convention rights in relations between family members. The protection of Convention rights in this type of relation between individuals extends to the establishment of family ties and legal relationships and the enforcement of custody and access rights.<sup>18</sup> Regarding the former, the Court has held that respect for private life as enshrined in Article 8 of the Convention requires that everyone should be able to obtain details of their identity, such as information about the identity of one's parents or the circumstances in which one is born.<sup>19</sup> In practice, for example, this entails that when a child starts civil judicial proceedings to establish whether someone who denies paternity is his or her biological father, the alleged father may be obliged to provide a genetic sample.<sup>20</sup> Article 8 ECHR, moreover, requires States to take all necessary steps that could be reasonably demanded in the special circumstances of the case to facilitate reunion between a parent and a child.<sup>21</sup> This obligation may even apply to situations in which difficulties in arranging access of a parent to his or her child are in large measure due to animosity between the parents.<sup>22</sup>

## 2.2. PROTECTION OF ONE'S SURROUNDINGS

Horizontal positive obligations further have been imposed in relation to acts or omissions that make an impact on an individual's physical or non-physical surroundings.<sup>23</sup> This includes disturbance caused by airports,<sup>24</sup> industrial emissions,<sup>25</sup> noise pollution caused by bars or clubs,<sup>26</sup> or damage done to one's property by third parties<sup>27</sup>. To illustrate, the Court has held that Article 8 ECHR may apply when industrial, pollutant or dangerous activities are directly carried out by the State or when

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18. For a detailed study see e.g. Andrea Büchler and Helen Keller (eds.) *Family forms and parenthood: theory and practice of Article 8 ECHR in Europe* (Intersentia 2016); Nadia Ismaïli, *Who cares for the child?: regulating custody and access in family and migration law in the Netherlands, the European Union and the Council of Europe* (diss.) (VU Amsterdam 2018).
  19. E.g. *Odièvre v France* App No 42326/98 (ECtHR (GC), 13 February 2002) para 29; *Mikulić v Croatia* App No 53176/99 (ECtHR, 7 February 2002) paras 54, 65; *Mifsud v Malta* App No 62257/15 (ECtHR, 29 January 2019) para 56.
  20. *Mifsud v Malta* (n 19) paras 74, 77. It should be noted, however, that it is not compulsory for States to put in place a system that compels an alleged father to undergo a DNA test. In this regard, the Court has held that the protection of third persons may preclude their being compelled to make themselves available for medical testing of any kind, including DNA testing (e.g. *Mikulić v Croatia* (n 19) para 64).
  21. *Hokkanen v Finland* App No 19823/92 (ECtHR, 23 September 1994) para 58; *Ignaccolo-Zenide v Romania* App No 31679/96 (ECtHR, 25 January 2000) para 94; *Pisică v the Republic of Moldova* App No 23641/17 (ECtHR, 29 October 2019) para 63.
  22. E.g. *Hokkanen v Finland* (n 21) (animosity between a parent and grandparents); *Pisică v the Republic of Moldova* (n 21) (animosity between parents).
  23. For a detailed study of cases related to one's surroundings see e.g. Dirk Sanderink, *Het EVRM en het materiële omgevingsrecht* [The relationship between the ECHR and substantive environmental and planning law] (Kluwer 2015).
  24. E.g. *Powell and Rayner v the United Kingdom* App No 9310/81 (ECtHR, 21 February 1990); *Hatton and Others v the United Kingdom* App No 36022/97 (ECtHR (GC), 8 July 2003).
  25. E.g. *López Ostra v Spain* App No 16798/90 (ECtHR, 9 December 1994); *Guerra and Others v Italy* App No 14967/89 (ECtHR (GC), 19 February 1998); *Öneriyildiz v Turkey* App No 48939/99 (ECtHR (GC), 30 November 2004); *Taskin and Others v Turkey* App No 46117/99 (ECtHR, 10 November 2004); *Giacomelli v Italy* App No 59909/00 (ECtHR, 2 November 2006); *Băcilă v Romania* App No 19234/04 (ECtHR, 30 March 2010).
  26. E.g. *Moreno Gómez v Spain* App No 4143/02 (ECtHR, 16 November 2004); *Oluic v Croatia* App No 61260/08 (ECtHR, 20 May 2010); *Mileva and Others v Bulgaria* App Nos. 43449/02 and 21475/04 (ECtHR, 25 November 2010).
  27. E.g. *Surugiu v Romania* App No 48995/99 (ECtHR, 20 April 2004); *Zammit Maempel v Malta* App No 24202/10 (ECtHR, 22 November 2011).

State responsibility arises from the failure to regulate private-sector activities properly.<sup>28</sup> Hence, authorities may have to take reasonable and adequate action, even in cases where they are not directly responsible for the pollution caused by a factory.<sup>29</sup> This may include the obligation to take regulatory measures that govern the licensing, setting up, operation, security and supervision of the activity, and the obligation to make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives may be endangered by inherent risks.<sup>30</sup>

### 2.3. PROTECTION OF CONVENTION RIGHTS IN EMPLOYER – EMPLOYEE RELATIONS

Horizontal positive obligations have also been formulated in cases involving employer – employee relations.<sup>31</sup> The Court’s case law shows that different Convention rights may be at stake when it comes to this type of relation between private actors. The Court has imposed horizontal positive obligations in relation to slavery, servitude and forced labour (Article 4),<sup>32</sup> surveillance at the workplace (Article 8),<sup>33</sup> and dismissal on grounds of religion or political opinion or affiliation (Article 9 and 10)<sup>34</sup>. For example, States have an obligation to ensure that employers respect the freedom of religion of their employees. More specifically, when an employer interferes with the right to freedom of religion of its employees, domestic courts need to examine whether a fair balance was struck between the employee’s right to freedom of religion and the rights and interests of the employer.<sup>35</sup> Regarding surveillance at the workplace, the Court has held that States have a positive obligation to ensure that the monitoring by an employer of employees’ correspondence and other communication are accompanied by adequate and sufficient safeguards against abuse.<sup>36</sup>

### 2.4. POSITIVE OBLIGATIONS IN RELATION TO DEFAMATORY PUBLICATIONS

One last example of horizontal positive obligations to be discussed here are cases involving a conflict between the right to reputation and private life of one individual (Article 8 ECHR) and the right to freedom of expression of another (Article 10).<sup>37</sup> In these cases, the Court has interpreted

28. E.g. *Hatton and Others v the United Kingdom* (n 24) para 98; *Fadeyeva v Russia* App No 55723/00 (ECtHR, 9 June 2005) para 89.

29. This was for example the case in *Băcilă v Romania* (n 25).

30. E.g. *Tătar v Romania* App No 67021/01 (ECtHR, 27 January 2009) para 88; *Cordella and Others v Italy* App Nos 54414/13 and 54264/14 (ECtHR, 24 January 2019) para 159.

31. For an extensive analysis see Filip Dorssemont, Klaus Lörcher, Isabelle Schömann (eds.), *The European Convention on Human Rights and the Employment Relation* (Hart Publishing 2013).

32. E.g. *Siladin v France* App No 73316/01 (ECtHR, 26 July 2005); *Rantsev v Cyprus and Russia* App No 25965/04 (ECtHR, 7 January 2010); *C.N. v the United Kingdom* App No 4239/08 (ECtHR, 13 November 2012).

33. E.g. *Bărbulescu v Romania* App No 61496/08 (ECtHR (GC), 5 September 2017); *López Ribalda and Others v Spain* App Nos. 1874/13 and 8567/13 (ECtHR (GC), 17 October 2019).

34. E.g. *Redfearn v the United Kingdom* App No 47335/06 (ECtHR, 6 November 2012) (dismissal on grounds of political affiliation); *Eweida and Others v the United Kingdom* App No 48420/10 (ECtHR, 15 January 2013) (dismissal on grounds of religion).

35. *Eweida and Others v the United Kingdom* (n 34) paras 84 and 91. See also *Schüth v Germany* App No 1620/03 (ECtHR, 23 September 2010).

36. *Bărbulescu v Romania* (n 33) paras 119-120.

37. For a detailed study of this specific type of conflict between human rights see e.g. Stijn Smet, ‘Freedom of expression and the right to reputation: human rights in conflict’ (2010) 26. *American University International Law Review* 183-236 and Smet (n 3).

the ‘obligation to adopt measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves’ as one that requires Convention States to strike a fair balance between the right to reputation and private life and the right to freedom of expression. The Court has, moreover, identified and listed criteria that must be taken into account by the domestic courts when they engage in an exercise of balancing the rights and interests of the two private actors involved.<sup>38</sup>

## 2.5. CONCLUSION

The case-law examples discussed above clearly illustrate that the Court has imposed horizontal positive obligations in all sorts of relations between private actors. This includes relations between family members and employer – employee relations, or cases where the behaviour of one private actor impacts the rights or surroundings of another, as in cases concerning noise pollution or defamatory publications. In other words, the Court has, over the years, offered substantive protection of Convention rights in relation to a broad variety of relations between private actors and Convention rights. In addition, the case-law examples show that the Court has formulated different means by which this protection can be effected by the Convention States. In short, these different means are criminal law or other types of legislation, effective law enforcement, operational measures, or effective legal remedies.<sup>39</sup>

As mentioned above, the obligations discussed in this section have in common that they are often imposed in cases originating from a conflict between two private actors at the domestic level. In the next section these so-called ‘verticalised’ cases are examined in more detail.

## 3. VERTICALISED CASES BEFORE THE ECtHR: AN ANALYSIS

The previous section showed that the Court has offered substantive protection of Convention rights in relations between private actors through horizontal positive obligations. As was explained in the introduction, imposing horizontal positive obligations is the only means available to the Court to offer protection of Convention rights in relations between private actors. This is explained by the fact that Article 34 of the Convention provides that complaints have to be directed against one of the Convention States in order to be admissible *ratione personae* with the provisions of the Convention. It is thus inherent to the Convention system that the proceedings before the Court are of a vertical nature, that is, they involve a private actor and a State. Yet, this does not mean that these vertical proceedings cannot originate from a conflict between two private actors at the domestic level, as is illustrated by the examples provided in Section 2. For example, in cases concerning the right to reputation and respect for private life versus the right to freedom of expression, an individual may have brought proceedings to the domestic courts to prevent the (further) publication of photos of his or her private life by the publisher of a newspaper or magazine. Because of Article 34, and different from the domestic courts, the ECtHR cannot deal

38. The Court identified these criteria for the first time in *Von Hannover v Germany (No 2)* App Nos 40660/08 and 60641/08 (ECtHR (GC), 7 February 2012) paras 108-113 and *Axel Springer AG v Germany* App No 39954/08 (ECtHR (GC), 7 February 2012) paras 89-98. The criteria are: contribution to a debate of general interest; how well known is the person concerned; content, form and consequences of the publication; circumstances in which the photos were taken and severity of the sanction imposed.

39. Gerards (n 7) 147 ff.

directly with such behaviour of a publisher. However, the individual victim of a breach of reputation by a private actor can complain at the ECtHR about the lack of compliance by the State with its positive obligations to protect the individual's rights under Article 8 ECHR. Consequently, if the domestic courts decide not to grant an injunction against the publication of the photos, the individual can lodge an application at the ECtHR to complain about the domestic courts' decision. The originally horizontal case at the domestic level thus transforms into a vertical case before the ECtHR, making it a so-called 'verticalised' case.

The notion of verticalised cases applies to a myriad of cases before the ECtHR. They can originate from a wide range of horizontal conflicts and can, therefore, involve different issues and Convention rights. Illustrative in this regard are the different relations between private actors in which the Court has offered substantive protection of Convention rights through the concept of horizontal positive obligations. This is illustrated by the defamation example given above, but one can also think of a case between an employer and an employee about dismissal on the basis of the wearing of religious symbols at work.

The very fact that so many cases before the ECtHR are verticalised cases necessarily implies that these cases have many different characteristics. To provide a better insight into, and understanding of, the notion of verticalised cases before the ECtHR the differences between verticalised cases are discussed in this section. First, differences in the nature of, and the parties involved in, the conflict at the domestic level are discussed (Section 3.1). For example, it is explained that the private actors involved in verticalised cases have different characteristics and that, consequently, the power balance in these cases is not per definition the same. Second, differences in the Court's approach to verticalised cases are discussed (Section 3.2). It is demonstrated, for example, that in some verticalised cases the Court takes account of the interests of the private actor not involved in the Court's proceedings, while in other cases the Court focuses on the fair balance that has to be struck between the interests of the applicant and the community as a whole.

For the purposes of the present section, an analysis has been made of 70 judgments relating to the different areas in which the Court has offered substantive protection of Convention rights in relations between private actors through horizontal positive obligations.<sup>40</sup> These particular cases have been selected because they tend to originate from a horizontal conflict at the domestic level, and thus are good examples of verticalised cases. With regard to the sample of case-law studied it should, first, be mentioned that cases relating to the use of violence by individuals have been left out of the selection.<sup>41</sup> In the light of the objectives of the present article, including cases on the use of violence by individuals would have broadened the scope of the article too much. The reason for this is that these cases give rise to questions that are very different from questions that arise in cases relating to, for example, access and custody rights and employer – employee relations. This is explained by the very specific nature of such cases, in particular the victim – (alleged) perpetrator construction and the imposition of criminal sanctions.

Further, it should be noted that the sample of case-law studied for the present article comprised judgments that are considered to be part of the Court's standard case-law, that is, cases that are

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40. This sample consisted out of 22 cases relating to a conflict between the right to reputation and private life and the right to freedom of expression, 18 family life cases, 18 cases related to one's surroundings, and 12 employer – employee cases. A detailed list of the cases examined is on file with the author.

41. Examples of such cases are: *E. and Others v the United Kingdom* App No 33218/96 (ECtHR, 26 November 2002); *Opuz v Turkey* App No 33401/02 (ECtHR, 9 June 2009); *Karaahmed v Bulgaria* App No 30587/13 (ECtHR, 24 February 2015).

discussed in the literature and cases that are often referred to by the Court itself in its case-law. In order to select these cases, use has been made of the references made in literature (standard reference works, peer-reviewed articles, case comments), the Court's factsheets on topics relevant for this study, and reports on key cases issued by the Court. As this selection might not yet include the most recent case-law, newly published judgments were followed closely to detect new judgments relevant for this study.<sup>42</sup> Subsequently, the selected cases were analysed by looking at the underlying horizontal conflict, the different parties involved at the domestic level, and the Court's examination of the case. The results of this analysis are presented below.

### 3.1. THE ORIGINS OF VERTICALISED CASES: UNDERLYING CONFLICTS AND INVOLVED PARTIES

An examination of the characteristics of, and the private actors involved in the conflict at the domestic level, that is, the underlying horizontal conflict, is an important step to understanding the nature of verticalised cases. Among others, it provides insight into the private actor not involved in the proceedings before the ECtHR, which is important for understanding procedural issues that may arise from verticalised cases. This section therefore discusses these characteristics for cases related to one's surroundings, i.e. cases that are primarily about conflicts involving a shared responsibility (Section 3.1.1) and cases that are purely horizontal conflicts (Section 3.1.2).

#### 3.1.1. Conflicts involving a shared responsibility

At first glance, cases relating to the impact of the behaviour of private individuals on one's surroundings seem to be clear examples of cases that originate from a horizontal conflict at the domestic level. An example is the case of *Hatton and Others*<sup>43</sup> which concerned the noise disturbance caused by private flights operators at Heathrow Airport. In *Moreno Gómez*,<sup>44</sup> another case about noise disturbance, the noise disturbance complained of was caused by privately owned bars and discotheques. Yet, a closer examination of the proceedings at the domestic level shows that these cases are not always such clear examples of cases originating from a horizontal conflict. The reason for this is that the alleged harmful activity is caused by two connected sets of activities, that is both activities of a private actor and activities (or omissions) of the State. In cases such as noise disturbance caused by airplane operators or bars and clubs, industrial emissions, or damage done to one's property by third parties, these two connected sets of activities are, for example, the granting of a permit by domestic authorities and the activities of the private actor who received the permit. As a result, both the State and a private actor may be responsible for the alleged harm to an individual's rights. For example, in *Zammit Maempel*,<sup>45</sup> a case about yearly firework displays in a village which took place close to the applicants' residence, the Court reasoned that

the Government considered the case as one regarding positive obligations, in that the letting off fireworks was carried out by third parties, but it was the State which issued the relevant conditions, regulations and permits. Such measures regulated interference by third parties with a person's private

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42. More specifically, this means that of the sample of cases examined for each category, one or two judgments were issued in 2019 or 2020.

43. *Hatton and Others v the United Kingdom* (n 24).

44. *Moreno Gómez v Spain* (n 26).

45. *Zammit Maempel v Malta* (n 27).

rights, and required a balance to be reached between the religious and social expression of village communities and the interests of the applicants<sup>46</sup>

Such combined or shared responsibility of both the State and a private actor makes that the case at the domestic level about this activity may be of a vertical as much as of a horizontal nature. To illustrate, in *Oluic*,<sup>47</sup> a case about excessive noise coming from a bar, the Court noted that

the applicant [ . . . ] had a choice between, on the one hand, a civil action against the owner of the F. bar whereby she could have sought the removal of the source of the excessive noise, cease of all further exposure to excessive noise as well as damages in relation to the exposure of her flat to excessive noise and, on the other hand, the administrative remedies before the relevant administrative bodies<sup>48</sup>

In such cases, it thus may depend on the choice of the applicant whether the case before the ECtHR originates from a horizontal case or a vertical case at the domestic level. At the same time, the shared responsibility construction clearly shows that, regardless of the nature of the case at the domestic level, two private actors were involved in the conflict on the domestic level, one of which is no longer involved in the proceedings when the case comes before the ECtHR.

### 3.1.2. Purely horizontal conflicts

Different from cases related to one's surroundings, cases involving a conflict between the right to reputation and private life of one individual and the right of freedom of expression of another individual clearly originate from a horizontal conflict, that is, a conflict between private actors, at the domestic level. In the example given in the introduction to Section 3, an individual who suffered from the publication of photos of his or her private life by the press invoked the right to reputation and private life (Article 8) before the ECtHR after the domestic courts had refused to grant an injunction against the publication of the photos. In that case, the publishing company would not be involved in the procedure before the ECtHR. Conversely, had the injunction been granted, the journalist or media company responsible for the publication could have invoked its right to freedom of expression (Article 10) before the ECtHR, and that would have meant that the alleged victim would not have any formal position in the proceedings before the Court. For example, in *Axel Springer AG*,<sup>49</sup> a well-known actor had, at the domestic level, initiated proceedings against Axel Springer AG, a publishing company and owner of, *inter alia*, the German newspaper *Bild*. In these proceedings, the German courts had imposed an injunction against reporting on the arrest and conviction of the actor for a drug-related offence. The publishing company then brought a case before the ECtHR, stating that the injunction infringed its right to freedom of expression. In the case before the ECtHR, the well-known actor who allegedly suffered from the exercise of freedom of expression was no longer involved in the proceedings. By contrast, in cases before the ECtHR in which the right to reputation and private life is invoked, it will be the journalist or media company directly responsible for the alleged infringement who is no longer involved in the proceedings.<sup>50</sup>

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46. *ibid* para 51.

47. *Oluic v Croatia* (n 26).

48. *ibid* para 36.

49. *Axel Springer AG v Germany* (n 38).

50. E.g. *Von Hannover v Germany (No 2)* (n 38).

Such clear horizontal conflicts can also be seen in applications concerning relations between family members.<sup>51</sup> A distinction can be made in these applications between custody and access to a child cases, and cases about access to information about one's origin.<sup>52</sup> Custody and access to a child cases primarily arise out of a conflict between separated or divorced parents. At the domestic level, a (presumed) mother or father can initiate proceedings in order to receive custody or access rights. Depending on the outcome of the case at the domestic level, the mother, father or child can subsequently seek redress at the ECtHR claiming that the decision or approach of the domestic authorities violated his or her right to private and family life (Article 8 ECHR). For example, in *Ignaccolo-Zenide*,<sup>53</sup> after several civil custody and access proceedings at the domestic level, a mother of two children complained about the inadequacy of the measures taken by the domestic authorities to enforce court decisions ordering the return of her children. This illustrates that in such cases the other parent involved in the custody and access proceedings at the domestic level is not involved in the proceedings before the ECtHR.

In access to information about one's origin cases, applicants claim a right to information about their descent or about the circumstances surrounding their birth and early life.<sup>54</sup> This claim can interfere with the rights of another private actor in three ways.<sup>55</sup> First, access to such information may constitute an interference with the private lives of those who provided the information on the condition of confidentiality.<sup>56</sup> Second, it may constitute an interference with the private life of a mother who gave birth anonymously.<sup>57</sup> Third, it may constitute an interference with the right to bodily integrity of a presumed father who is unwilling to undergo a paternity test.<sup>58</sup> Of these three types of interferences, the third type of interference most likely results in a verticalised case before the ECtHR. To explain, when, for example, a mother gave birth anonymously, the child seeking information about his or her descent cannot initiate civil proceedings against the mother, but has to initiate proceedings against the institution, often a public one, where the baby was given up for adoption.<sup>59</sup> In that situation, verticalisation is not necessary for the case to be admissible. On the other hand, a case about an interference with the right to bodily integrity of a presumed father clearly arises from a horizontal conflict at the domestic level. For example, in *Mikulic*,<sup>60</sup> a child born out of unmarried parents had started civil judicial proceedings to establish whether a man, who denied paternity, was her biological father. Before the ECtHR, the child, subsequently,

51. Family life cases can, however, also result from a clearly vertical conflict at the domestic level, for example, when the State interferes with the right to family life by taking a child into public care (see for example *K. and T. v Finland* App No 25702/94 (ECtHR (GC), 12 July 2001).

52. Cases involving relations between family members are often about domestic violence as well. However, as was explained in the introduction to this section, such cases are not discussed here, because they are about the use of violence by individuals.

53. *Ignaccolo-Zenide v Romania* (n 21).

54. See further on this type of conflict: Samantha Besson, 'Enforcing the child's right to know her origins: contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) 21 *International Journal of Law, Policy and the Family*, 137, 146-148.

55. These three situations are distinguished by Ieven, see Aagje Ieven, 'Privacy rights in conflict: in search of the theoretical framework behind the European Court of Human Rights' balancing of private life against other rights' in Eva Brems (ed.) *Conflicts between fundamental rights* (Intersentia 2008) 44.

56. E.g. *Gaskin v the United Kingdom* App No 10454/83 (ECtHR, 7 July 1989).

57. E.g. *Odièvre v France* (n 19).

58. E.g. *Mikulic v Croatia* (n 19).

59. This was the situation in the case of *Odièvre v France* (n 19).

60. *Mikulic v Croatia* (n 19).

complained that the domestic courts had been inefficient in deciding her paternity claim and had therefore left her uncertain as to her identity. In a similar vein, in *Mifsud*,<sup>61</sup> a presumed father complained that the imposition of a mandatory order to undergo a DNA-test in paternity proceedings violated his right to private and family life. It follows from these two examples that, in cases in which the child complains before the ECtHR, the presumed father or mother is not involved in the Court's proceedings, whereas in cases in which the presumed father or mother complains before the ECtHR the child is not involved.

As a final example of purely horizontal conflicts, cases involving employer – employee relations can be mentioned. Such cases generally originate from civil cases at the domestic level in which employees challenge their dismissal or other sanctions taken by their employer. For example, in *Eweida and Others*,<sup>62</sup> Ms Eweida had started civil proceedings after her employer, the private company British Airways, had restricted the wearing of a cross visibly around the neck. After the employment tribunals had dismissed Ms Eweida's claim that the uniform code of British Airways was an example of indirect discrimination, Ms Eweida complained at the ECtHR that these judgments constituted a violation of her right to freedom of religion taken in conjunction with the right to non-discrimination. In *Schüth*,<sup>63</sup> a church employee had brought a case before the employment tribunals when his contract was terminated after his divorce and second marriage. Subsequently, Mr Schüth alleged before the ECtHR that the refusal by the employment tribunals to annul his dismissal by the Catholic Church had breached his right to private and family life. Finally, in *Bărbulescu*,<sup>64</sup> an employee had challenged his dismissal before the domestic courts on the ground that this decision was based on the monitoring of his correspondence by his employer. After the dismissal had been upheld by the domestic courts, the employee complained before the ECtHR that the domestic courts had failed in their obligation to ensure effective protection of his right to private life. In all three cases, it was the employee who brought a complaint before the ECtHR and, consequently, it was the employer who could not be a party to the proceedings before the ECtHR.

### 3.1.3. Conclusion

It can be derived from the examples discussed above that verticalised cases before the ECtHR can originate from different types of horizontal conflicts at the domestic level and, consequently, different types of private actors may be involved in these cases. Indeed, the cases discussed sometimes involved two individuals, for example two neighbours or two parents, but other cases were between individuals and companies, such as an individual and a publishing house, or an employee and a company. In yet other cases, the involvement of the State authorities was so strong that already on the domestic level, there was a shared or combined responsibility. This implies that the power balance in verticalised cases is not by definition the same. In custody cases, for example, the private actors involved (the parents) are assumingly more equal compared to cases between an employee and an employer, which usually involve an individual and a company and which are, moreover, in a (former) hierarchical relationship to each other. In cases where both a public authority and a private actor bear a degree of responsibility, the power balance may be even more

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61. *Mifsud v Malta* (n 19).

62. *Eweida and Others v the United Kingdom* (n 34).

63. *Schüth v Germany* (n 35).

64. *Bărbulescu v Romania* (n 33).

uneven, as also can be reflected in the nature of the proceedings on the domestic level (which can be more of an administrative law nature).

### 3.2. THE COURT'S EXAMINATION OF VERTICALISED CASES

The previous sections have shown that there is not just one type of verticalised cases. Instead, the notion of verticalised cases can be seen to refer to different types of cases which are rooted in different types of horizontal conflicts at the domestic level, are about different relations between private (and sometimes public) actors, and which concern different Convention rights. All these cases have in common, however, that one of the private actors who was involved in the horizontal conflict at the domestic level is not part of the ECtHR's proceedings. The differences between verticalised cases and their common feature evoke the question of how the Court approaches these cases. More specifically, the question arises as to whether the differences discussed in Section 3.1 are reflected in the Court's approach and how the Court deals with the interests and rights of the party not involved in the Court's proceedings. Hence, the current sub-section analyses the Court's approach to verticalised cases. In this regard, particular attention is paid to the rights and interests that are taken into account by the Court when it examines a verticalised case.

#### 3.2.1. Fair balance between the interests of the individual and of the community as a whole

In the previous section, it was explained that in cases relating to one's surroundings it is relatively easy to distinguish a harmful activity or omission to act by the State. In other words, although a private actor might be directly responsible for the alleged harmful activity, this activity often depends on, or is legitimised by, domestic regulation. This shared or combined responsibility may explain why, in cases related to one's surroundings, the Court usually examines whether a fair balance was struck between the competing interests of the individual and of the community as a whole, taking account of the margin of appreciation that must be granted to the States.<sup>65</sup> For example, in *Hatton and Others*, the Court examined whether a fair balance was struck between the competing interests of, on the one hand, the individuals affected by the noise of airplanes taking-off and landing during the night and, on the other hand, the community as a whole, in particular the economic interest of the country.<sup>66</sup> In *Moreno Gómez*, the Court examined whether the domestic authorities had struck a fair balance between the need to protect the applicant's Convention rights and the need to serve the general interest.<sup>67</sup> In both cases it was not the State, but private actors who were the direct source of the noise disturbances complained of. The activities and interests of these private actors as such did not, however, play a role in the Court's proceedings. Indeed, in *Hatton and Others*, one of the companies responsible for operating and controlling the aircrafts causing the noise disturbance (British Airways) even primarily referred to general interests instead of specific interests of its own in its third-party submissions. The company submitted that 'night flights at Heathrow play a vital role in the United Kingdom's transport

65. E.g. *Powell and Rayner v the United Kingdom* (n 24) para 41; *López Ostra v Spain* (n 25) para 51; *Hatton and Others v the United Kingdom* (n 24) para 98; *Moreno Gómez v Spain* (n 26) para 55; *Giacomelli v. Italy* (n 25) para 78; *Tătar v. Romania* (n 30) para 87; *Băcilă v. Romania* (n 25) para 60; *Oluic v. Croatia* (n 26) para 46; *Zammit Maempel v. Malta* (n 27) para 61.

66. *Hatton and Others v the United Kingdom* (n 24) para 119.

67. *Moreno Gómez v Spain* (n 26) para 55.

infrastructure, and contribute significantly to the productivity of the United Kingdom economy and the living standards of United Kingdom citizens'.<sup>68</sup> Hence, the airplane company argued that 'the loss of night flights would cause significant damage to the United Kingdom economy'.<sup>69</sup> By referring primarily to general or public interests, the submission by British Airways might suggest that British Airways already translated its own interests into a more general interest, allowing them to be acknowledged by the Court.

### 3.2.2. Fair balance between the rights and interests of two private actors

In addition to examining whether a fair balance was struck between the competing interests of one individual and of the community as a whole, the Court may approach verticalised cases by examining whether a fair balance was struck between the competing rights and interests of two private actors, that is, the applicant and the private actor involved in the conflict at the domestic level. The Court takes this approach in verticalised cases involving a conflict between the right to reputation and private life and the right to freedom of expression, in verticalised cases about access to information about one's origin, and in verticalised cases involving employer – employee relations.

For example, in Section 2.4, it was explained that, in cases involving a conflict between the right to reputation and private life and the right to freedom of expression, the Court has required Convention States to strike a fair balance between these two competing rights. In principle, this means that the Court examines whether the domestic courts balanced the right to reputation and private life and the right to freedom of expression in conformity with the standards laid down by the Court.<sup>70</sup> However, there are also cases in which the Court takes a more substantive approach by redoing the balancing exercise carried out by the domestic authorities, meaning that it takes an independent stance of its own as to where the balance should be struck.<sup>71</sup> This is important in relation to the notion of verticalised cases, because some of the standards identified and listed by the Court as relevant for the balancing exercise may relate directly to the acts and interests of the private actor involved in the conflict at the domestic level. For example, in cases in which Article 8 is invoked, the Court can pay attention to the question of whether the journalist, who, on the domestic level, violated someone's reputation, acted in good faith and properly verified the facts. To illustrate, in *Ageyevy*,<sup>72</sup> the Court held that

[e]ven though nothing in the case-file suggests that the journalists responsible for the material were not acting in 'good faith', they obviously failed to take the necessary steps to report the incident in an objective and rigorous manner, trying instead either to exaggerate or oversimplify the underlying reality.<sup>73</sup>

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68. *Hatton and Others v the United Kingdom* (n 24) para 115.

69. *ibid* para 115.

70. For the criteria see n 38.

71. E.g. *Ageyevy v Russia* App No 7075/10 (ECtHR, 18 April 2013); *Medžlis Islamske Zajednice Brčko and Others v Bosnia and Herzegovina* App No 17224/11 (ECtHR (GC), 27 June 2017).

72. *Ageyevy v Russia* (n 71).

73. *ibid* para 237. See also *White v Sweden* App No 42435/02 (ECtHR, 19 September 2006) paras 23-24; *Polanco Torres and Movilla Polanco v Spain* App No 34147/06 (ECtHR, 21 September 2010) para 49ff; *Rodina v Latvia* App Nos 48534/10 and 19532/15 (ECtHR, 14 May 2020) para 110 ff.

Similarly, in cases in which Article 10 is invoked the Court sometimes examines the impact of a publication on a person's private life.<sup>74</sup> Thus, if the Court itself examines where the balance should be struck between the right to reputation and private life and the right to freedom of expression, it may, on the basis of the standards it has laid down for the balancing exercise in its own precedents, scrutinise the acts of the private actor not involved in the Court's proceedings.<sup>75</sup>

In cases on access to information about one's origin and in employer – employee cases the Court may go a step further by expressly taking account of the interests of the private actor not involved in the Court's proceedings when examining whether the domestic courts struck a fair balance between the right and interests of two private actors. In cases on access to information about one's origin, the Court can examine whether the domestic courts struck a fair balance between the rights and the interests of the individual seeking information about his or her origin and the rights and interests of the (presumed) mother or father. In doing so, the Court clearly takes into account the rights and interests of the individual not involved in the Court's proceedings. For example, in *Mikulić* the Court acknowledged the vital interest of the applicant in receiving the information necessary to uncover the truth about an important aspect of her personal identity, but at the same time it held that '... it must be born in mind that the protection of third persons may preclude their being compelled to make themselves available for medical testing of any kind, including DNA testing'.<sup>76</sup> More generally, in access to information about one's origin cases the Court has held that

a putative father's interest in being protected from allegations concerning circumstances that date back many years cannot be denied [...] in addition [...] other interests may come into play, such as those of third parties – principally those of the putative father's family....<sup>77</sup>

It can be mentioned here that the Court takes quite a different approach in other type of cases involving family relations, namely custody and access to a child cases. This different approach may be explained by the particular nature of the underlying conflict, as has been explained in Section 3.1.2 above. In custody and access to a child cases, the Court examines whether the domestic authorities took all necessary steps to facilitate reunion that could be reasonably demanded in the special circumstances of the case and whether the domestic courts complied with their duty to strike a fair balance between the rights and interests of all persons concerned, whereby the interests of the child should prevail.<sup>78</sup> For the reason that these cases are about a child's interests, the Court's examination does not primarily focus on the conflict between the rights and interests of the parents as such, but on whether the interests of the child prevailed in the decision-

74. See for example *Axel Springer AG v Germany* (n 38).

75. See also *Stijn Smet* (n 3) who concluded that in cases on the right to reputation and private life versus freedom of expression the Court focuses on the possible damage done to the invoked Convention right, while disregarding possible damage for the other Convention right at stake; so-called 'preferential framing'.

76. *Mikulić v Croatia* (n 19) para 64. See also *Jäggi/Switzerland* App No 58757/00 (ECtHR, 13. July 2006) paras 38-39.

77. *Çapın v Turkey* App No 44690/09 (ECtHR, 15 October 2019) para 53.

78. E.g. *Hokkanen v Finland* (n 21) para 58; *Ignaccolo-Zenide v Romania* (n 21) para 94; *Mijuskovic v Montenegro* App No 49337/07 (ECtHR, 21 September 2010) para 82; *Petrov and X v Russia* App No 23608/16 (ECtHR, 23 October 2018) paras 98-100; *Milovanović v Serbia* App No 56065/10 (ECtHR, 8 October 2019) para 118. See also Ieven (n 55) 49; Nelleke Koffeman, *Morally sensitive issues and cross-border movement in the EU: the cases of reproductive matters and legal recognition of same-sex relationships* (Intersentia 2015) 22; Bernadette Rainey, Elizabeth Wicks, Clare Ovey, Jacobs, *White and Ovey: The European Convention on Human Rights* (OUP 2017) 376.

making process regarding the facilitating of reunion between a parent and a child. For example, in *Petrov and X*,<sup>79</sup> the Court held that it must

ascertain whether the domestic courts conducted an in-depth examination of the entire family situation [...] and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the child.<sup>80</sup>

Thus, when undertaking the balancing exercise, the Court considers the best interests of the child to be more important than the interests of the parent who is no longer involved in the proceedings.

In employer – employee cases the Court takes an approach that is similar to that in cases on access to information about one’s origin. For example, in *Eweida and Others*, the Court held in relation to Ms Eweida’s application that

[o]n the other side of the scale was the employer’s wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida’s cross was discreet and could not have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways’ brand or image.<sup>81</sup>

In *Schüth*, the Court reasoned that

a Church may require its employees to observe certain fundamental principles but this does not mean that the legal status of its employees is ‘clericalised’ or that the employment relationship based on civil law acquires a special ecclesiastical status which subsumes the employee and dominates his entire private life.<sup>82</sup>

Finally, in *Bărbulescu*, the Court acknowledged that

the employer has a legitimate interest in ensuring the smooth running of the company, and that this can be done by establishing mechanisms for checking that its employees are performing their professional duties adequately and with the necessary diligence.<sup>83</sup>

These examples show that the Court paid close attention to the interests of the employer, even though the employer was not itself involved in the proceedings before the Court. Moreover, the interests taken into account by the Court were primarily business-related interests, albeit they sometimes coincided with the right to property. This makes these cases slightly different from cases on access to information about one’s origin, since in the latter type case, it is more clearly rights of the individual not involved in the Court’s proceedings that are taken into account by the Court.

### 3.2.3. Conclusion

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79. *Petrov and X v Russia* (n 78).

80. *ibid* para 98.

81. *Eweida and Others v the United Kingdom* (n 34) para 94.

82. *Schüth v Germany* (n 35) para 70.

83. *Bărbulescu v Romania* (n 33) para 127.

It has been shown in the above that not only do verticalised cases have different characteristics, but the Court's approach to them differs as well. The Court approaches verticalised cases by examining whether a fair balance was struck between the individual interests and the interests of the community as a whole or between the rights and interests of two private actors. Furthermore, there are differences with regard to the extent to which the Court takes into account the rights and interests of the private actor that was involved in the conflict at the domestic level, but that does not play a formal role in the Court's proceedings. In some cases, the Court pays little attention to the interests of that private party (although it may scrutinise the acts of this private actor), whereas in other cases the Court clearly takes account of the rights and interests of the party that is not involved in the proceedings before it. Finally, if the Court clearly takes account of the rights and interests of the party not involved in the proceedings before it, differences exist with regard to what is actually taken into account by the Court. In some cases, rights of the individual not involved in the Court's proceedings are mainly taken into account, whereas in other cases it is primarily interests that are taken into account.

#### **4. CONCLUSION**

The system established by the ECHR has, over the years, received much scholarly attention. Yet, one particular aspect of this system, notably that of 'verticalised cases' has not. Therefore, this article has provided an analysis of verticalised cases before the ECtHR by looking at their origins, that is, the characteristics of, and the private actors involved in, the conflict at the domestic level, as well as the Court's approach to them.

For the purpose of this analysis, this article has made a qualification of a verticalised case, thereby determining that a case must originate from a horizontal conflict at the domestic level. This is, for example, the case when a private actor has brought a procedure against another private actor before the domestic courts, and, subsequently, one of these two private actors complains about State (in)action in relation to this case before the ECtHR. This situation can be seen in a broad range of cases, as can be derived from the case-law analysis presented in this article. Verticalised cases can be rooted in different horizontal conflicts at the domestic level, they can involve different relations between private actors, and they can relate to different Convention rights. Verticalised cases can, for example, involve a conflict between an individual and a journalist about the right to reputation and private life and the right to freedom of expression, or a conflict between a child and an alleged father about access to information about one's origin. Verticalised cases can also relate to a conflict between separated or divorced parents about custody and access rights, or a conflict between an employer and an employee about religion at the workplace. In yet other cases, the involvement of the State authorities can be so strong already that on the domestic level there was a shared or combined responsibility, resulting in a case involving both a Convention State and two private actors.

The wide variety of verticalised cases identified in this article is reflected in the approach the Court takes to assessing them. In some verticalised cases the Court examines whether a fair balance was struck between the interests of the individual and of the community as a whole, while in other cases the Court examines whether a fair balance was struck between competing rights and interests of two private actors, that is, the applicant and the private actor involved in the conflict at the domestic level. Within the latter group, two further approaches can be distinguished. In some cases the Court pays little attention to the rights and interests of the private actor who is not involved in the Court's proceedings (although it may scrutinise the acts of this private actor), while in other

cases, the Court clearly takes account of the interests of *both* private actors in its balancing-exercise.

Finally, it is clear from the analysis that an important aspect of verticalised cases is that one of the private actors involved in the conflict at the domestic level is not part of the proceedings before the ECtHR. This situation might result in challenges to the Convention system, as recently has been pointed out by both scholars and judges of the Court.<sup>84</sup> For example, with regard to the private actors who are not involved in the Court's proceedings, it has been argued that these actors are not able to defend their acts, interests and rights, while still being part of the Court's examination and a judgment of the Court may affect these private actors. This situation may, moreover, raise possible difficulties for Convention States as it may result in a situation in which Convention States are asked to defend the acts of private actors. Finally, questions may arise as to whether it is problematic for the Court that it is solely presented with the version of the facts and arguments presented by the applicant(s) and the Convention States, while it often examines whether a fair balance was struck between the rights and interests of two private actors. The present article has provided a basis for the further unravelling of such important questions.

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### **ORCID iD**

Claire Loven  <https://orcid.org/0000-0001-9561-3894>

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84. See n 4.