Article

PSC

Philosophy and Social Criticism
1–22

DOI: 10.1177/0191453718798424
journals.sagepub.com/home/psc
SAGE

Oikopolitics, regulation and privacy: An essay on the governmental nature of the right to private life

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Abstract

This essay focuses on the interrelationship of regulation and private life in human rights. It argues three main points. (1) Article 8 connects the question of protection of private lives and privacies with the question of their management. Thus, Article 8 orients regulatory practices to private lives and privacies. (2) Article 8's holders are autonomous to the extent that laws respect their private lives and privacies. They are not autonomous in a 'pre-political' sense, where we might expect legal rules to protect an already autonomous private life or privacy. (3) Article 8 does not simply prohibit or permit acts. In certain cases, it also 'enables' acts. Then, this essay introduces the idea of *oikopolitics*. This idea allows us to capture these three points in a useful manner. By this idea, this essay means the context (a) where the interpretation of privacy reaches out to broader social practices and norms and (b) where the status of rights-holders living their private lives makes them objects of attention.

Keywords

care, European human rights law, family life, feminist theory, governmentality, human rights, legitimacy, Michel Foucault, privacy, private life

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Introduction

Given the contribution of sociolegal literature, it has become hard to see the public and private aspects of modern lives in exclusionary terms, such as in terms of limits, boundaries, spheres and realms. For example, feminist contributions argue that an exclusionary attitude makes it difficult for an analyst to analyse the connections between the public and private aspects of lived experiences.[1] However, to the extent that certain influential feminist theorists of law view the discourse on private life from a conflict-oriented perspective (e.g. male power, gender interests and gendered ideology),[2] their emancipatory and critical aspects undermine their analytical value. By focusing on the issue of regulation, this essay argues that governing private lives remains a complex enterprise.[3] It argues that the idea of privacy and private life makes sense in relation to the efforts to regulate and capture it.[4] In line with the feminist contributions to sociolegal literature, this essay focuses on such regulatory efforts, as they function in local settings. In contrast to some influential strands in the aforementioned tradition, this essay argues that, when one generalizes, one cannot attribute a fixed content to such setups. In other words, one can interpret those setups in terms of other explanations, that is, domesticity, state power as patriarchy or patriarchy as state power. However, interpretation needs to succeed analysis, not to guide it.

This essay analyses private life and its regulation by looking at the framework that addresses the terms of their interrelation in normative terms: human rights. It proceeds by analysing the manner human rights require the public authorities to respect private life. It argues that the universal application of the right to respect for private and family life to all legal subjects determines the margin of governability of their specific social encounters. However, interferences into private lives and privacies do not lead to 'normalizing' processes. Instead, these interferences manage differences.

The essay proceeds in four steps. It begins by analysing how law interprets respect in the light of which the right to respect for private and family life works. It argues that this right functions in relation to a discourse on privacy and private life, legal codes, regulatory procedures and social practices. As such, while analysing this right's case law, we cannot understand private life and privacies simply in terms of what it is not (i.e. not-public; see 'On the body politic of Article 8: Reading *Halford* and *Brüggemann*' section). Later, the discussion focuses on the interrelation of this right with social practices and norms. It argues that without developing an equation between protection and management of our private life and privacies, the right to respect for private and family life cannot see them in terms of autonomy (see section 'Regulation and autonomy'). Then, the article brings the points discussed under one heading. It introduces the neologism of *oikopolitics* to pinpoint the context within which the right to respect for private and family life works (see section 'On *oikopolitics*, freedom and the structure of Article 8'). Finally, the essay ends with brief concluding remarks (see section 'Concluding remarks').

Given the fact that human rights are a vast domain, this essay selectively focuses on European human rights law. This selection is pragmatic because commentators have pinpointed the effectiveness of the human rights standards in Europe, especially when one views effectiveness in comparative terms.[5] Thus, a rich jurisprudence on human

rights has developed from the European Court of Human Rights (ECtHR). Consequently, our focus allows us to draw on and intervene into the scholarly literature that the rich ECtHR case law has produced.[6] Given the aims of this essay, our focus is Article 8 on the right to respect for private and family life of the European Convention on Human Rights (ECHR), as the ECtHR interprets it. Given the voluminous case law, this essay inevitably focuses on a small number of cases. However, the essay attempts to trace different 'lines of force' – to use an expression from Foucault[7] – that go on to assemble the analyses surrounding the ECtHR's case law. The aim is to draw of rough outline of the way Article 8 works in particular and human rights in general.

On the body politic of Article 8: Reading *Halford* and *Brüggemann*

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

ECHR Article 8: Right to respect for private and family life.

Social practices and Article 8's textual structure

In one sense, Article 8 is unique in ECHR. Unlike Article 2 on right to life or Article 10 on freedom of expression, for example, Article 8 does not give rights-holders a right to something, that is, to life and to freedom of expression. It rather refers to 'respect' for rights-holders' private and family life. Unlike Article 2 on the right to life, Article 8(1) does not mention what it protects in singular. As such, Article 8(1) is wide-ranging. It mentions private life, family life, home and correspondence. However, Article 8(1) does not state to what extent these different components overlap or whether there is something more to private and family life not covered by these components. Further, Article 8(2) clarifies that the public authorities bear the obligation to secure Article 8(1) rights through different measures in accordance with the law. Thus, the plural nature of both Articles 8(1) and 8(2) requires that law respect holders' private and family lives (e.g. intimacy, data protection, informational privacy) through legal rules, procedural standards and regulations. Thus, the connection between Articles 8(1) and 8(2) is logical. Further, the plural nature of both Articles 8(1) and 8(2) accounts for Article 8's flexibility. Consequently, in ECHR's framework, Article 8's role is crucial because the ECtHR has increasingly interpreted it in autonomy-related senses, for example, self-development and self-determination (*Ternovszky v. Hungary*, para 22; *Pretty*, para 62).[8]

Two things are important. First, Article 8 refers to respect for private and family life. However, it specifies circumstances when public authorities can interfere into holder's

private and family life without undermining its respect. Article 8(2) mentions various social objectives that define the manner authorities secure Article 8(1). The obligations owed by the public authorities, in the light of respect for private and family life, define the importance of interferences mentioned in Article 8(2). Thus, unlike the judicial decisions based on Article 2 on the right to life, the ECtHR conducts balancing exercises in the cases dealing with Article 8. Consequently, legal protection varies with the reach and scope of those social objectives. Second, even in the case of rights-holders themselves, legal protection refers to the idea of respect. Thus, when we look at the text of Article 8 itself, it is difficult to see whether my disrespect of my own private life qualifies for legal protection under Article 8.[9]

Social practices and legal protection of private and family life: Reading Halford *and* Brüggemann

In this subsection, we read two case laws. Our first example is a surveillance-related case. In it, the ECtHR found violation of Article 8 at workplace but not at home: *Halford v. the UK*. By reading *Halford*, we observe how Article 8's case law makes sense in the light of social practices. Our second example is an abortion-related case. In it, the former European Commission of Human Rights explored the principled scope of a pregnant woman's private life: *Brüggemann and Scheuten v. Germany*. By reading *Brüggemann*, we see (a) how law interprets the meaning of our private life and (b) how this interpretive act influences the idea of the legal respect of our private life. Overall, this section advances two arguments. First, Article 8 determines the way social practices are oriented to our private and family life in order to see (1) whether law respects it or not and (2) whether respect lies in interference or in non-interference. Second, a proper application of Article 8 orients social practices to our private and family life in a way that there are no 'normalizing' social effects, even in the case of a justifiable interference.

Halford v. the UK. We begin by reading *Halford*. In it, the applicant claimed that her department intercepted her home and office telephones, while she was working as a police officer. Given surveillance, the ECtHR found violation of Article 8 at the workplace but not at home. For political and social theorists identifying different 'spheres' (family, workplace and marketplace) with specific 'patterns of regularized conduct',[10] this judgment appears counter-intuitive. Instead of illuminating the judgment, such theorists would tell us that the things in *Halford* were themselves not in order. In order to make sense of *Halford*, we need to see how social practices and legal rules are oriented to a norm and how the protectable scope of that norm varies with those social practices and prior legal rules.

If the applicant served the police department in an official capacity and if her department provided her with those phones, can there be a violation of her privacy and private life in her office during the office timings while she was serving officially? Citing its precedents, the ECtHR replied affirmatively (*Halford*, para 44). However, how can one disassociate official life from private life, especially at a workplace like the police? In this case, at least, it was easy because the applicant had been given two telephones, out of which one was 'designated for her private use' (*Halford*, para 45).

As per the case law of the ECtHR, the respect that law accords to one's privacy depends on how norms protect social transformations of one's privacy and how norms manage regulations that specify interferences into one's privacy. In *Halford*, the then in place Act that allowed for monitoring under certain conditions did not apply to the internal communications systems maintained by the public authorities. Thus, this legal lacuna opened up the possibility of an act of surveillance outside the fold of law (*Halford*, para 51). However, the legal understanding of this case, that is, the ECtHR found violation of Article 8 in this instance only because of a lacuna in the national law, is correct but insufficient.

The idea of 'reasonable expectation of privacy' used by the ECtHR in *Halford* is important. Primarily, it connects norms (anticipation, privacy, respect) to facts (surrounding objects, societal objectives, legal-technological arrangements). Thus, it becomes possible to apply that norm to those facts that did not apply it before and to view a norm in terms of surrounding facts. In the first case, law sees whether an expectation itself is reasonable. In the second case, law sees whether something is reasonable for a rights-holder to expect. Importantly, in both cases, what judicial rules interpret as 'reasonable expectation' depends on the ensemble it deals with. In *Halford*, the idea of 'reasonable expectation' depends on objects (two phones, privacy as empirically identifiable), norms (the importance of privacy vis-à-vis mobility presupposed in modern labour markets), societal objectives (confidentiality, checks, workplace order), social practices (workplace rules, professional ethical codes like prohibition concerning use of official facilities for private gains) and legal-technological arrangements (networking systems, internal communications systems). Like probability, 'reasonable expectation' is compatible with both frequency of certain judicial outcomes and with their uncertainty. Unlike probability, 'reasonable expectation' is an intermediary concept; it is neither a logic of effects nor a principle of causality.

Meanwhile, the ECtHR opined that there was no violation of Article 8 at home. To the extent that the applicant's privacy became a matter of interest in an official setup, it was up to the applicant to justify that her privacy remained of an equal interest for the concerned officials in a private setup. Therefore, in order to establish likelihood of interception of her home telephones, the burden of proof fell on the applicant (*Halford*, paras 55, 59). Further, domestic law covered interception for those home telephones connected to the public communication system. In this instance, law already respected her privacy, even when it specified rules concerning interception of her private communications. Albeit one may intuitively find 'reasonable expectation of privacy' as well founded when she was in her home, the specific interrelationship of law and facts remained consistent in finding no violation of Article 8 in this instance.

Two points are important. First, the case law of Article 8 makes sense in the light of broader social practices and the objects used. In fact, technology both extends exercises of our privacy and increases its vulnerability to interference. Both these dimensions involve law. Largely, the medium itself has a certain agency that forges one's private life and redefines what is to be understood by one's privacy in a particular case. Second, the idea of 'reasonable expectation' is neither solely legal nor solely normative. If seen in legal terms alone, we cannot understand changes in law in the light of changing definitions of private and family life. If seen in normative terms alone, we cannot understand

those Article 8 case laws where 'reasonable expectation' exceeds 'reality'. In the first case, the governmental aspect of Article 8 tailors social practices in the light of Article 8's normative scope. In the second case, the idea of 'reasonable expectation' uses judicial interpretation to reorient expectations and conduct in line with the changes in rules, facts and habits. Therefore, the respect, compatible with the possibility of interference, accorded to our privacy depends on the way social practices are normatively oriented to our privacy.

Brüggemann and Scheuten v. Germany. One can object that generally one's Article 8 claims as rights-holders are not primarily dependent on such an interpretative scheme, when those claims touch people's own life trajectories or their own bodies. Is there anything more securely shielded, Arendt believes, 'against the visibility and audibility of the public realm than what goes on within the confines of the body'?[11] In this subsection, we explore a case law concerning abortion. It is an appeal submitted to the former Commission: *Brüggemann*. The idea underlying the reasoning of the Commission that pregnancy and abortion are not 'solely a matter of the private life of the mother' (para 61) is important. While reading *Brüggemann*, we see how law interprets the meaning of private life and what this means for Article 8 claims.

In *Brüggemann*, the applicants challenged the decision of the Constitutional Court of Germany that put a blanket ban on abortion. The Constitutional Court reasoned that this prohibition protected the right to life of foetus. Thus, the Court believed that another life grew in the womb of a pregnant woman that was an 'independent property protected by the law' (*Brüggemann*, p. 107). The applicants held that this violated their rights under Article 8 because law interfered with their sexuality and forced them to do something 'against their will' (*Brüggemann*, p. 105). The Commission agreed with the reasoning that body of pregnant woman imposed certain imperatives on her in a 'wholesome' manner because her body was a gestational carrier of another life. Thus, it opined that pregnancy and its induced termination were not 'solely a matter of the private life of the mother' (*Brüggemann*, 3 EHRR 244). True, *Brüggemann* remains dated; the Commission in fact decided it in 1977. True, changes in European law have seen such bans removed.[12] However, we shall argue that the rationale guiding this judgment – that is, pregnant women cannot decide matters of abortion on their own because it involves something more than their private or family lives or their Article 8 claims – is still valid.

Normally, we understand abortion as a clash between life of foetus and bodily integrity of mother, existence versus privacy. However, this understanding is not of much help in analysing different cases concerning abortion.[13] Let us look at the 1976 Fifteenth Criminal Law Amendment Act that came into effect because of the Constitutional Court's decision appealed against by the applicants. In some situations, the Act itself approached abortion differently and permitted it under certain conditions. First, where serious health issues rose for the mother in the continuation of pregnancy, abortion was allowable.[14] Here, abortion took place as per section 218a para 1 without invoking the autonomous choice of the pregnant woman. Second, in those cases of pregnancy where a foetus was gravelly damaged – either physically or mentally – the meaning attached to this inchoate life became different. Among others, scientific understandings of a liveable life and bodily normality are important here. This rationale is connected both to the

understandings of a liveable life and the normality of bodies. Here, abortion took place as per section 218a para 2 without attaching an unconditional weight to the question of foetal life, no matter how viable that life physiologically speaking is. Third, certain indicators altered what law defined as protectable. These included cases where the conception of foetus took place after a criminal act of rape or incest, or where there were indications of psychological complexities pointing to a decreasing mental soundness of a pregnant woman. Here, abortion took place as per section 218a para 3 without relying on the aforementioned clash narrative.

Two points are important. First, feminist contributions to sociolegal studies rightly tell us that we cannot discern the meaning of private and family by looking at private and family life in a reflexive manner. Thus, as we can see in *Brüggemann*, bodies indeed receive their meaning from the discourses that study them (e.g. reproduction) and the objects they come into contact with (e.g. technologies). However, we cannot find in *Brüggemann* a unique ideological motivation underpinning different governmental notions relating to health, safety and hygiene. Additionally, rights-holders participate in the way law should manage privacies: narrating their sexual pleasures (*Brüggemann*, pp. 105, 114), pregnancy possibilities (pp. 106, 113–14), future identities as mothers or girlfriends (pp. 106, 109), financial concerns (p. 114) and marriage difficulties (pp. 109, 114). Second, the fact that even a law that put blanket ban on abortion made room for certain exceptional situations points to the fact that privacy law remains sensitive to the meanings we attach to private lives. Thus, law attempts to manage conduct in line with the dynamics that inhere in those meanings. In certain cases, respect lies in interference. In other cases, respect lies in non-interference.

In order to look at the formulation that abortion is 'not solely the matter of private life' of a pregnant woman, let us now read the amended German Criminal Code that permits abortion. The functional medical norm of the first trimester as a determinative threshold where the foetus becomes viable is important. Section 219 para 1(3) permits abortion within the first trimester. Further rules involving psychological counselling and therapy attached to abortion even in the first trimester are relaxed 'if according to medical opinion an unlawful act has been committed'. After the lapse of normal trimester period, section 219 para 2 permits abortion when it is 'medically necessary to avert a danger' to the life or health of mother. How judicial standards interpret what merits respect as far as one's privacy is concerned depends on the interrelation of variables that give meaning to one's privacy. As such, these variables influence how judicial rules interpret a rights-holder's capacities of choice and deliberation. Importantly, the reason that management of privacies through Article 8 remains sensitive to the differential meaning accorded to privacies does not produce – in Foucault's sense of the term – 'normalizing' social effects. Thus, the variability associated with medico-biological and social notions (before trimester, before trimester in exceptional form, after trimester, after trimester in exceptional form) influences Article 8. As such, the claims of rights-holders remain variable (in abortion: with claim, with an unconditional claim, with no claim, with conditioned claim). Consequently, Article 8 governs these subjects as rights-holders through difference (respecting free private choice, respecting free choice when one was coerced into doing something, respecting the right to life, respecting an exceptional situation). The rationale of the former Commission's judgment remains pertinent, when

we look at the degree to which legal protection in cases of abortion is something that neither law nor a pregnant woman can decide on their own.

A note on the case law of Article 8

Two related points are notable. First is the obvious point that Article 8 claims do not make sense when we read them in strict abstraction from social practices, objects used and legal tools. The strength of Article 8 lies in the way it orients these variables to its normative framework. Thus, the idea of 'reasonable expectation of one's privacy' is probably not because of being subjective but because of the way one's privacy is connected with the variables that influence one but that one herself does not control. Thus, when political theorists understand private and family life in terms of what it is not (public = not-private, private = not-public), their analytical narratives cannot illuminate Article 8's case law. For example, the question of privacy-related data management relates to an interface between user-technology-law-regulations that is constitutive of privacy. Things do not simply enter into one's private life (*Rotaru v. Romania*, para 43; *P.G. and J.H. v. the UK*, para 59; c.f. *Hewitt and Harman v. the UK* and *Peck v. the UK*). Thus, as in *Halford* and *Brüggemann*, conceptualizing the case law does not require us to disentangle the public and private aspects of modern lives.

Second, Article 8 operates by legally regulating a broader field of social practices. Consider adequate national laws concerning interception of communication, access to ultrasound facilities and technologies. It also means that when legal rules regulate these social practices, they consequently manage one's private and family life, that is, regulate interferences and non-interferences. Thus, Article 8 governs conduct by allowing law to determine the meaning of specific privacies and their subsequent legal respect. Consequently, those legal systems whose privacy regulations and laws respect rights-holder's subject positions are the ones whose interferences with the rights under Article 8(1) are generally justifiable. In sum, a priori knowledge (e.g. spatial, corporeal, psychological) does not underpin a society's idea of private life; the way a society governs specific expressions of privacies structures its idea of private and family life.

However, the interrelation of the public and private aspects of modern lives in Article 8's case law neither creates a union set nor simply collapses the one into another. In the first case, we cannot discern any prior normative structure shaping our social understanding, for example, the welfare state. Even in *Brüggemann*, the ideas of safety, bodily normativity or healthiness worked differently in different instances. In the second case, we cannot talk of any social determination of private and family life. Article 8(2) mentions social objectives justifying interferences with one's rights under Article 8(1). However, when the ECtHR balances rights under Article 8 with the social objectives, it assumes ineliminability of both notions. Indeed, these social objectives pinpoint what it means for one to hold Article 8 rights. Thus, presuming a society promoting autonomy (e.g. economically advanced society), judiciary later interprets these rights in an autonomy-related sense. Importantly, despite understanding autonomy contextually, the evolving interpretation of Article 8's case law has proceeded in a different direction than a 'communitarian' one. For example, it is unimaginable from the perspective of Article 8 for the ECtHR to even consider a complaint from a single middle-aged aunt that

law prevent her unmarried pregnant niece from undergoing abortion, because she believes that her niece's possible abortion in the light of her niece's autonomy nevertheless violates her own rights under Article 8(1).[15]

It means that when one talks about Article 8, one talks about those regulatory frameworks with which one's privacies are bound. Broadly, this means two things. First, one has human rights because there are governmental practices structuring one's conduct. For example, abortion law permits a woman to distance herself from the discourse of motherhood that an anti-abortion law imposes on her. However, abortion law situates a pregnant woman's decisional autonomy with respect to the particular interpretation of the ideas concerning liveable lives, foetal viability or psychological health and safety.[16] Second, governmental practices are oriented to one's life and conduct because a holder has Article 8 rights. The next section explores the second proposition.

Regulation and autonomy

This section argues two points. (1) The 'respect' accorded to privacy and private life works between the poles of non-interference and interference. As such, Article 8 considers neither total non-interference nor thorough interference ideal. Thus, the value of privacy and private life as a social good depends on how law structures respect accorded to its specific expressions. (2) When law interprets respect accorded to privacy from the perspective of autonomy, Article 8's case law equates the idea of protection with that of management. Consequently, Article 8's holders are autonomous to the extent that laws respect their privacies. They are not autonomous in a 'pre-political' sense. That is, where we might expect legal rules to protect an already autonomous privacy. Thus, the case law of Article 8 does not simply prohibit or permit acts. In fact, in certain important senses, it 'enables' acts. The argument offered in this section focuses on the case law concerning care orders, access and custody.

Care, access and custody proceedings deal with children. Children's status as rights-holders is interesting in both political and legal senses. A strong current in liberal political theory – with its emphasis on consent, rationality, responsibility and full-consciousness – considers children as limit-figures.[17] On the other hand, albeit the ECHR assumes that everyone holds human rights, when it refers to children, it rather mentions them in exceptional terms.[18] For example, Article 5(1) both guarantees liberty and security and makes provision for the detention of minors. Similarly, Article 6(1) both guarantees fair and public trial and makes exceptions in cases of juveniles. Therefore, looking at the care proceedings would help us explore how law approaches children as subjects and what it means for their status as Article 8 rights-holders. By looking at care proceedings, we only remain interested in understanding the way Article 8 interrelates with social practices and norms. We cannot appreciate this aspect, when we approach the question of care proceedings from abstract theoretical or textual perspectives.

Care orders involve local authorities, welfare services, children and child's parents or other family members. In care proceedings, Article 8 rights of the parties refer to practices through which a society rationalizes health and hygiene, neglect, behavioural irregularities, educational markers, anxiety or emotional stability, among others (e.g. *K and T v. Finland*, paras 154–155, 160, 169, 182; *Scozzari and Giunta v. Italy*, paras. 151,

169, 175, 201–216; *Margareta and Roger Andersson v. Sweden*, paras. 9, 14, 45, 86, 94, 96). Thus, albeit local authorities have decision-making power, the involvement of relevant expert and professional bodies in care proceedings entails that local authorities do not decide detachedly.[19] Establishing factual circumstances is at least as important as the application of relevant law. Consequently, a genuine dispute between experts has legal consequences, as it increases legal indeterminacy. Further, decisions concerning care revolve around parental compliance and capacity, desirability of changing guardianship or parties' needs and vulnerability (e.g. *K and T v. Finland*, paras. 10, 67, 101, 169; *Scozzari and Giunta v. Italy*, paras. 30, 58, 150, 175; *Margareta and Roger Andersson v. Sweden*, paras. 69, 79). Conceptualizing specific aspects related to parties' private and family life defines the content of their legal claims according to Article 8. Consequently, Article 8 manages privacies and private lives in the light of practices and rationalities, that is, understanding norms with reference to facts. Therefore, it influences factual circumstances in the light of norms, that is, tailoring facts with reference to norms: for example, openness between parents and agencies, confidentiality between relevant parties and the public.

Therefore, the scope of parenthood that Article 8 guarantees depends on how social practices and norms construct the discourse of parenthood; it is not the grounds of their 'jurisdiction' on their children as parents.[20] More, in care proceedings, the powers of local and legal authorities indeed work with reference to the duties, wishes and rights of parents. However, authorities' powers are not limited to these variables because it involves respecting rights and interests of all in a family life setup. Thus, in care proceedings, authorities can deny biological parents custody, override parents' wishes, redefine their responsibilities and evaluate their competence. Consequently, procedural protections do not allow parents to sue officials, care professionals and experts either for making decisions unacceptable/unfavourable to them or for professional negligence (*M.B. and G.B. v. the United Kingdom*, 'The Court's Assessment'). In sum, legal rules guide social practices, norms and regulatory standards that structure family life. Consequently, it is with reference to these then that judicial bodies conceptualize the value of privacy in a family life context.

Further, the idea that Article 8's rights-holders are legal persons and that the relationships they enter into are status-like relationships enables law to interpret 'respect' accorded to their privacy and their private life from the perspective of autonomy. Let us look at custody proceedings to observe this point. In custody or access, legal decisions rely on variables like passage of time and contact, emotional bond, impact of actions on child's psychology, child's overall well-being including health and development, among others (e.g. *M and M v. Croatia*, paras 23, 25, 34, 65; *Hokkanen v. Finland*, paras 56, 58; *Johansen v. Norway*, paras 65, 77, 78, 80). Thus, ideals relating to proper upbringing, apt socialization, sound childhood, self-identification, emotional proximity and psychological health guide legal ideas concerning custody. Consequently, law understands the capacities of children (personhood, self-development, deliberation) with reference to the broader social context and ideals. These practices rationalize children's capacities in the double sense, that is, conceptualizing what those capacities are and rationally nurturing them. Unsurprisingly, in Article 8's case law, the idea of child's 'best interests' works as an important interpretive prism through which the ECtHR conceptualizes

children's rights.[21] Thus, it becomes possible to speak of the applicability of different norms on children, even when they themselves can neither appreciate them nor articulate them. As such, the reconstruction of children as subjects allows legal norms to respect the claims of privacy of children in those cases that deal with them.

Importantly, the reason that Article 8 refers to right to respect for family and private life and not to right to family and private life enables law to apply rules concerning privacy even to those who may lack the reflective capacity to either isolate their private selves or make a distinction between public and private aspects of their lives. Consider babies and minors (e.g. *M and M v. Croati*, *Scozzari and Giunta v. Italy*), mentally ill (e.g. *X and Y v. Netherlands*), patients with extreme senile dementia or those suffering from psychological disorders (e.g. *Storck v. Germany*, *Martin v. the UK*), dead bodies (e.g. *Sabanchiyeva and Others v. Russia*, *Girard v. France*) or even comatose and gravely handicapped or diseased. Then, as law primarily approaches the rights of children from the perspective of their interests, it respects their Article 8 rights. However, it also limits our general understanding concerning their status as rights-holders. For example, the case law on free speech simply appears inapplicable, while dealing with children or understanding their status as rights-holders or handling claims on their behalf. As such, this process arguably has certain 'tutelary' effects.[22]

When law interprets Article 8(1) from the perspective of autonomy, it imposes certain obligations on the public authorities. States owe these obligations – and to develop governmental practices accordingly – because subjects hold human rights. Thus, in care or access matters, the positive obligations imposed on the public authorities require them to create supervisory mechanisms, strengthen welfare agencies, require relevant bodies to base their decisions on expert feedback concerning parental visits, prevent individual and systemic abuse and introduce empowering mechanisms that compensate the effect of separation shock on a child's psychology. As such, the 'enabling' aspect of privacy law constructs autonomous subjects. Importantly, what we see here is autonomy that may not necessarily stem from free choices of the concerned subjects.[23] In this sense, care matters deal with parents as subjects in a twofold manner. On the one hand, law relies on diagnostic and prognostic markers rationalizing parents' conduct: individual conduct, availability of time, financial situation, past and present behaviour vis-à-vis other family members, commitment and attachment with other parties. On the other hand, law assumes their self-restraint (e.g. absence of abuse and violence) and self-management (e.g. constant self-improvement). This fact of structuration and self-management allows law to govern private life 'at a distance'.[24] Thus, the case law of Article 8 stands in between the extremes of interference and non-interference. As such, it primarily revolves around analysing the justifiability of interfering measures.

Therefore, to believe family law in general activates itself only in the cases of failure of relationships is equivalent to believing that family law presumes those relationships as being vulnerable.[25] Rather, family law structures relationships and expectations; guides the terms of interaction with a view to rights, duties, interests, and conditions; and backs norms and practices – concerning hygiene, proper intra-family conduct and the sound development of the children – with the force of law. In this sense, Article 8 both protects and respects privacy by relating the case law to practices that manage privacy-related concerns. For instance, custody proceedings that involve disabled parents work

differently. In such proceedings, legal rules rely on practices concerning apt support services and professional representation in order to conceptualize parents' privacy and to apply the case law of Article 8 accordingly.

Without reference to any practice or norm, legal rules cannot protect family life because they would then remain unable to conceptualize autonomy in the context of family life in the first place. In sum, the idea of respect as per Article 8(1) presumes certain content of privacies and formulates legitimate ways through which private life works as an object of attention.

On *oikopolitics*, freedom and the structure of Article 8

This section frames our discussion. It introduces the idea of *oikopolitics* in order to bring the points discussed under one rubric. By *oikopolitics*, it pinpoints the prior context where practices are already oriented to people's private and family lives (see section 'Private and family life in their broader context'). It then argues that we can usefully explore the idea of *oikopolitics* in the context of human rights along two dimensions. First is legitimacy. Law needs to interpret the Article 8 claims of individuals with respect to the way practices elaborate the meaning and value of specific expression of private and family life. We call this aspect *oikolegitimacy* (see section '*Oikolegitimacy* and freedom'). Second is its logic. The logic structuring *oikopolitics* depends on the complex of practices. Thus, the idea of protection varies with the specific expression of private and family life. There is no unique ideological base underlying all expression of private and family life. In other words, no single practice determines the structure within which Article 8 works. We call this aspect as *oikology* (see section 'On the logics of regulation').

Private and family life in their broader context

We have seen how the formal infrastructure of Article 8 draws on practices and norms that are already oriented towards private and family life. When we perform a 'regressive analysis', it becomes obvious that the characteristic form of legal protection with respect to Article 8 is neither permission nor prohibition. Rather, these binary codes are one among many elements in the process of legal regulation. They are primarily the points of reference for judicial decision-making. In fact, law backs social practices that structure and enable private and family life. We can think of the structure of expectations in *Halford*; the idea of difference in *Brüggemann*; importance of education and psychological stability in care proceedings; and health, well-being and safety in custody matters. In other words, to the extent that law operates via such social practices, law's authority appears both 'rational' and 'good'. To the extent that this interconnection of law and governmentality circumscribes a role for the moral ideas of 'good', legal rules can absorb an idea of moral good without affecting law's overall quality of 'rationality' and 'goodness'.

True, these practices and norms are not reductively concerned with private and family life. True, diverse set of institutions utilize them, for example, networking systems, medical and hygienic institutions, schools and foster homes. However, Article 8 claims

concretize the legal base of subjects' privacy claims by identifying the way those practices elaborate the meaning and value of private and family life. Thus, albeit Article 8 itself may not directly address those social setups, our talk of Article 8 presumes those social setups that approach private and family as an object to make it 'autonomous', for example, consensual, non-violent, non-abusive, respectful of bodily integrity.

Two points are important. First, private and family life do not represent a single point of reference, for example, spatial as in *Halford*, bodily as in *Brüggemann*. Second, the respect accorded to privacy (or, private and family life) in the light of Article 8(1) functions as the point of reference for interventions guided by the logics of calculation and administration. To the extent that these interventions align themselves with the variability of meaning and value associated with private and family life, law prevents private aspect of lives from collapsing into the public aspects of lives.

Consequently, on the one hand, the idea of private and family life is not external to the domain of practices and history. We cannot understand Article 8's case law either with reference to law alone or by referring back those claims intuitively to private and family life. On the other hand, the attention given to private and family life in the light of its 'own' dynamics reveals private and family as manageable to an increasing degree. In a number of important judgments, the ECtHR has acknowledged the fact that the exercise of freedom in private life takes place within certain social conditions and among certain social relations. Therefore, an effective guarantee of freedom legally requires from the public authorities to regulate those conditions and relationships in order to enhance autonomy (*X and Y v. Netherlands*, para 23; *Plattform Ärzte für das Leben v. Austria*, para 32). Thus, we can discern a prior context that is already oriented to private and family life, that is, *oikopolitics*.[26] Thus, the interpretation of private and family life operates within such a context.

Oikolegitimacy *and freedom*

In the context of Article 8, interferences into private and family life are justifiable to the extent that they refer to the objectives that the aforementioned context presupposes. Thus, in the context of human rights, states cannot justify interference with holders' rights by invoking, for example, their sovereign right. No wonder in human rights societies an entire problematic related to privacies operates. For example, balanced regulation, undesirability of complete non-involvement, dangers of too much interferences, development of privacy laws in the light of new practices and technology or introduction of legal rules that both respect privacies and prescribe criteria concerning justifiable interferences. In such societies, the idea of privacy becomes an independent normative signifier. Thus, business models respect it, surveillance strategists analyse it, law streamlines authorized access to privacy data sets and regulations develop procedural safeguards concerning use and storage of private information.

Two points are important. Both these points stand for what we term as *oikolegitimacy*. First, justifiable interferences occur only in a legal system that refers its regulation to corresponding social practices and norms.[27] Second, laws interpret Article 8 claims with respect to the meaning and value of specific expressions of private and family life. Consequently, legal rules prevent those social mechanisms that reduce Article 8 to a

nominal status by determining privacy as if from above (see Article 8's preparatory notes). In the first sense, the legal requirement that Article 8 imposes on public authorities is that their acts of interferences remain non-arbitrary from a legal perspective. In the second sense, the question of privacy remains a certain problematic, where legal rules presume involvement of individuals. Thus, the scandal is always 'too much government' that, even when it may be 'efficient', denies, prevents or hinders individuals' autonomy.

Consequently, the risks and costs associated with this normative stance emerge from the respect that a human rights compliant legal system accords to privacy. For example, in totalitarian societies, an individual Mr A cannot give harsh opinions in his private life against political leaders without facing possible legal consequences of a harsh sort. However, societies respecting human rights do not legally problematize private opinions that may be contrary to their own normative ideals (e.g. discriminatory in the sense of being racist or xenophobic) because of individuals' freedom. Similarly, in certain cases, freedom granted to rights-holders may lead to systemic failures (e.g. in foster homes) or misuses (e.g. confinement of a child in home for the purpose of a long-term incestuous contact). However, these failures neither affect Article 8's overall normative role in a society nor lead to a fundamental re-evaluation of both legal rules and governmental regulations that would decisively pre-empt such instances.

On the logics of regulation

While analysing the question of respect as per Article 8(1), we have already seen how law operates with reference to specific rationalities and norms. Thus, to use Wittgenstein's phrase (i.e. *Lebensform*, 'form of life'),[28] the issue of respect of a specific Article 8 case law depends on the 'form' of the specific expression of privacy. In other words, the abstract matter of privacy itself is less important than the shape its understanding assumes in a certain context. Thus, the question of respect of private life in the light of harm to bodily integrity works differently for a pregnant woman than a cadet undergoing military training. Legitimate application of Article 8 relies on such a justifiable discrimination with respect to rights-holders' private lives based on the corresponding 'form' of their private lives. Thus, the logic structuring *oikopolitics* relies on a complex of practices.

Consequently, the logics of regulation correspond to the form of a specific expression of privacy, and the discourse on privacy articulates respect with a view to those logics. For example, by looking at the concept of 'respect' and its role in the structure of Article 8, it appears that the directive duties imposed on the rights-holders of Article 8 rather have greater normative significance than holding the right as a 'privilege'. We saw how Article 8 imposes certain duties relating to self-management on the rights-holders. As such, the degree to which Article 8(1) protects my 'disrespect' of my own private and family life and the degree to which the public authorities have no legal powers in preventing any such related 'disrespect' is equivocal. For example, as mentioned (in *Laskey, Jaggard, and Brown v. the United Kingdom*), in trouble cases, where there is an incidence of violence or grievous harm to bodily integrity, the consent of the respective parties loses much of the decisiveness that one generally attributes to it. It is because in such cases harm to bodily integrity, abuse, injury, mistreatment or occurrence of harmful

domination will become lawful. Think of bestiality, necrophilia, extreme forms of sado-masochism or consensual cannibalism.

Given the complexity, we cannot attribute a fixed content to this logic. For example, in abortion matters, the idea of difference does not see pregnant woman as a pregnant female body tout court. Instead, it conceptualizes both her pregnancy (before trimester, before trimester in exceptional form, after trimester, after trimester in exceptional form) and feminine agency (sexuality without procreation, coerced sexuality, impregnated with a healthy baby, impregnated with an abnormal baby). Similarly, in care proceedings, reports concerning psychological bond, emotional stability and behavioural impact on child do not approach their subjects primarily as men or women. Instead, they focus on the way they fulfil roles, duties and responsibilities with respect to the discourse of parenthood. Certainly, judicial decisions may frequently fall in favour of one gender.[29] However, this effect is tangential to the logics of interventions; it is not something that exists as a matter of principle. Alternatively, to the extent that experts, authorities and professionals see themselves as primarily men or women (which, of course, remains a possibility), the discourse itself problematizes their 'subjective' knowledge and expertise. Crucially, the involvement of free individuals themselves in exercising their Article 8 rights assumes their self-regulation and internalization of norms.[30] Projects concerning health and hygiene in a family setup rely on endorsement of and compliance from parents, for example.[31] This is not simply a matter of 'false consciousness'. Rather, from the perspective of the family members, it is a matter of doing the best.[32] To argue that the logics of intervention in the case law of Article 8 follow a binary (e.g. 'gendered') understanding through which we can conceptualize these logics rather renders one's analytical lens blunt.

Concluding remarks

Political theorists pinpoint that our understanding of the meaning of family and private life works as an effect of a complex social discourse.[33] This discourse primarily distinguishes itself by articulating what it is not. Thus, the other remains of greater normative and conceptual significance.[34] Given our discussion, we can now see that such an analytical framework cannot illuminate Article 8's case law. As such, it ends up either falling into that of extreme normativity (essence, increase and decrease of private and family life) or that of comparison (comparative analysis of social dynamics relating to private and public aspects of lives through time).[35] Sociologists of law rightly pinpoint the difficulty of relying on such exclusionary models because management of private and family life refers to social variables without that referral undermining its respect as per Article 8(1) or contradicting a society's normative self-understanding of the way the protection of privacies works. However, to the degree that sociologists of law find macro-sociological factors at work here (e.g. the interventionist welfare state, the 'social' domain),[36] their sociological perspective comments on the macro-level dynamics of private and family life (e.g. clients of welfare agencies, risk-averse individuals) without providing an analysis of the 'respect' that Article 8's case law accords to private and family life.

Further, from our discussion, we can now see that what we understand as 'welfare state' or 'the social domain' is a sum-total of different social practices that in themselves do not work uniformly. This does not mean that the label 'welfare state' does not tell us anything. It only means that such macro-sociological labels are not self-explanatory, in the sense of allowing us to understand the workings of different local practices with reference to the label.[37] Thus, this essay reads Article 8's case law by focusing on the local and contingent practices through which we attach a meaning to private and family and determine its legal respect. In contrast to political theorists' observations, we saw that there is no a priori knowledge (i.e. bodily, spatial, psychological) underpinning private and family life. In contrast to the work of sociologists of law focusing on macro-level factors, we saw that the way specific social practices and norms elaborate the meaning and value of specific expressions of private and family life remains important in order to understand Article 8's case law systematically.

If Article 8 operates in a normative context that functions by linking itself to concrete practices and truths, this is important in terms of theorizing the normative status of Article 8. It means that Article 8 is not to be construed as a 'natural' right, where we see freedom as an individual property or as a capacity subsequently protected by law. Rather, as a rights-holder, we are free to the extent that laws respect our private and family life. This includes legitimate legal interferences into our privacies, structuration of conduct and enabling certain conduct through social practices backed by laws. Consequently, Article 8 does not allow legal rules to evaluate wills and preferences of rights-holders with reference to a fixed normative lens. Similarly, the ECtHR's use of constructivist tools such as margin of appreciation or discretion, proportionality and balancing entails an absence of 'natural' law assumption – thus, even when two situations are equally valid, the choice between them and the inevitable compromise involved does not follow from a natural law model – because of which we find non-approximation, decidability and regulation as reconcilable.

If Article 8 operates with reference to specific rationalities and norms, it entails that its regulatory arm connects private and family life with those frameworks. Thus, the question of 'form' of specific expression of privacy (structure, value and meaning) remains important for legal scholarship exploring Article 8's case law. Further, this essay saw that social practices articulate what lawyers call, following Aristotle (*Politics*, 1213a), a 'legal intuition' (Gustav Radbruch's 'Rechtsgefühl'). Thus, without grounding those 'legal intuitions' within those social setups, Article 8's case law would remain anything but coherent. Additionally, this entails that rights' talk, with its peculiar functions and working, attempts to configure governmental relations differently and does not abolish it.

By mentioning *oikopolitics*, we analysed how we cannot dissociate Article 8 from a social context that problematizes our conduct. If the dream of totalitarian societies is the complete regulation of privacies,[38] it is because of this social dynamic that already approaches privacies as an object of governmental attention. This led us to consider the importance of legitimacy and logics. By *oikology*, we pinpointed there is a certain ethic of regulation and interferences. By *oikolegitimacy*, we meant that justifiable interferences with Article 8(1) rights work in a contextual manner. Thus, Article 8(1) rights trump those interferences that solely work in the light of transcendental references.

Although the description offered here does not completely exhaust what there is to the legal protection of private and family life, any serious theorization of the issue in focus cannot choose to ignore the regulatory logics of autonomy and their justifiability.

Acknowledgements

The author presented earlier versions of this essay in the Examenskolloquium of Prof. Michael Haus at Ruprecht-Karls University Heidelberg and in the Doktorandenkolloquium of Prof. Sandra Seubert at Goethe University Frankfurt. The feedback from the participants stimulated the author to revisit his main points. Importantly, the anonymous reviewers of the manuscript assigned by this journal provided constructive feedback that improved the final version considerably. The author thanks all of them; the usual disclaimer applies.

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Notes

1. See, for example, Iris Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), p. 25. Carol Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (Cambridge: Polity Press, 1989), p. 118.
2. See, for example, Frances Olsen, "Myth of State Intervention in the Family," *University of Michigan Journal of Law* 18 (1985): 835–64 (842–44, 862). Catherine Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987), pp. 46, 48, 489 and her *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989), pp. 3–4, 112, 114, 170, 219. Deborah Rhode, *Justice and Gender* (Cambridge, MA: Harvard University Press, 1991), p. 306. Katherine O' Donavan, *Sexual Divisions in Law* (London, UK: Weidenfeld & Nicolson, 1985), p. 11.
3. Nikolas Rose, "Beyond the Public/Private Division: Law, Power and the Family," *Journal of Law and Society* 14 (1987): 61–76 (75).
4. Bal Sokhi-Bulley, "Governing (Through) Rights: Statistics as Technologies of Governmentality," *Social and Legal Studies* 20 (2011): 139–55. Ben Golder, *Foucault and the Politics of Rights* (Stanford, CA: Stanford University Press, 2015). Muhammad Ali Nasir, "Between the Metropole and the Postcolony: On the Dynamics of Rights' Machinery from the Northwestern Tribal Belt to the "Mainland" Pakistan," *Environment and Planning D: Society and Space* 33 (2015): 1003–1021. Muhammad Ali Nasir, "Governing (through) Religion: Reflections on Religion as Governmentality," *Philosophy and Social Criticism* 42 (2015): 873–96. Muhammad Ali Nasir, "Weighing Words: On the Governmentality of Free Speech," *Social and Legal Studies* 25 (2016): 69–92. Muhammad Ali Nasir, "Biopolitics, Thanatopolitics and the Right to Life," *Theory, Culture and Society* 34 (2017): 1–21.
5. See, for example, Peter Danchin and Lisa Forman, "The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities," in Peter Danchin and Elizabeth Cole (eds) *Protecting the Human Rights of Religious Minorities in Eastern Europe* (New York, NY: Columbia University Press, 2002), pp. 192–221. Göran Therborn, "Europe's Breaks with Itself. The History, Modernity, and the World Future of Europe," in F Cerutti and E Rudolph (eds) *A Soul For Europe: On the Cultural and Political Identity of the Europeans* (Leuven, Belgium: Peeters Publishers, 2001), pp. 73–94.

6. See, for example, Alistair Mowbray, "The Creativity of the European Court of Human Rights," *Human Rights Law Review* 5 (2005): 57–79. Alec Stone-Sweet and Helen Keller, *The Reception of the ECHR in the Member States* (Oxford, UK: Oxford University Press, 2008). Shazia Choudhry and Jonathan Herring, eds., *European Human Rights and Family Law* (Oxford, UK: Hart, 2010). Nicole Moreham, "The Right to Respect for Private Life in the European Convention on Human Rights: A Reexamination," *European Human Rights Law Review* 1 (2008): 44–79. Caroline Forder, "Legal Protection Under Article 8 ECHR: Marckx and Beyond," *Netherlands International Law Review* 37 (1990): 162–81.
7. Michel Foucault, *Security, Territory, Population: Lectures at the College de France 1977-1978* (Hampshire, UK: Palgrave Macmillan, 2007), p. 108.
8. Albeit the right to freedom of expression or the right to freedom of association are likewise important in the ECtHR's case law (in fact, all rights are there because they are important!), it is the interpretation of Article 8 in terms of autonomy by the ECtHR that visibly stands out in its case law. For example, in the landmark *Dudgeon v. the United Kingdom*, the applicant successfully challenged the criminalization of male homosexual acts in Northern Ireland on Article 8 grounds. Take another example. Article 12 of the Convention: right to marry. Article 12's texts explicitly refer to marriage as involving 'men and women of marriageable age'. The plaintiffs now challenging the heterosexual ideas underlying Article 12 increasingly draw on the Court's elaboration of the right to respect for private and family life.
9. In *Laskey, Jaggard and Brown v. the United Kingdom*, the British police obtained, in the course of routine investigation, a number of video films which were made during sadomasochistic encounters involving the applicants. All the applicants were sane adult males. Among others, the acts they were involved in included maltreatment of genitalia, ritualistic beatings and branding. The British courts convicted the applicants for assault and for occasioning bodily harm. The British House of Lords additionally clarified that 'the infliction of actual or more serious bodily harm is an unlawful activity to which consent is no answer . . . [and] that no consent can render that innocent which is in fact dangerous' (para 21). The applicants appealed to the ECtHR. The ECtHR found no violation of Article 8 because of two major reasons. (1) States can regulate activities involving infliction of physical harm through criminal law. The room that laws make for consent is in view of public health considerations, the deterrent effect of law and the concerns for autonomy (para 44). (2) States can regulate harmful activities that cause injury or wounding with a view to both the real and potential harms. The excuse that the harm did not actually occur is no excuse (paras 45–46).
10. John Martin, "What Is Field Theory?," *American Journal of Sociology* 109 (2003): 1–49 (40). Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1984), p. 7. Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford, CA: Stanford University Press, 2010), p. 132.
11. Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998), p.112. Compare John Mill, *On Liberty* (Oxford, UK: Oxford University Press, 1991), p. 13.
12. In a 2010 judgment, the ECtHR notes that 'there is indeed a consensus amongst a substantial majority of the Contracting states of the Council of Europe towards allowing abortion on broader grounds' (*A, B and C v. Ireland*, para 235).
13. True, the ECtHR itself does not take this line of reasoning. Indeed, it first sees whether an issue falls under Article 8(1). If it does, it then sees the extent to which the interferences with the exercise of Article 8(1) remain justifiable. This ECtHR stance also remains sensitive to the

margin of appreciation that the ECHR gives to the national authorities. However, national laws, for example, the German in *Brüggemann* or the Irish in *A, B and C*, do mention the importance of foetal life in limiting abortion rights. When the ECtHR analyses the compatibility of particular national laws, it is involved in dealing with this question, even when it deals it with reference to Article 8(2). I am grateful to the second anonymous reviewer of this article for forcing me to think about this point.

14. Relaxing conditions related to abortions in the light of medical exceptions are a general European trend. Even those legal systems that presently do not take a very permissive view of abortion make room for an exception to a general ban on abortion on medical grounds. Let us take a relatively recent (i.e. 2007) example dealing with a different European jurisdiction (i.e. Poland): *Tysiąc v. Poland*. The applicant, a mother of two, suffered from severe myopia. Three ophthalmologists concluded that delivery of her third pregnancy constituted a risk to her eyesight. The gynaecologist assigned to her by the public authorities believed that the applicant should give birth by Caesarean section. Shortly after delivery, her eyesight deteriorated badly. She was declared disabled. The applicant appealed unsuccessfully against the gynaecologists in the Polish courts. She later appealed to the ECtHR. The issue in *Tysiąc* was about the presence of proper procedural mechanism that would effectively handle the clash of expert opinions and the implementation of proper institutional mechanism that would give access to lawful abortions. The law itself that allowed the termination of pregnancy based on medical exceptions governed the issue; it was not in itself an issue.
15. In fact, in an international conference when an audience member asked him what he thought of abortion, Alasdair Macintyre remarked that 'abortion fails to understand the importance of aunts' (see, Chris Tollefsen, "Euthanasia and the culture of life", 13). Available at: https://www.princeton.edu/∼prolife/articles/tollefsen.pdf (accessed July 6, 2017).
16. Article 8's normative structure protects private and family life by managing it. What reasons a society considers valid concerning the legal protection of private and family life interrelate with the way a society manages private and family life. Consequently, a change in the managerial dimension influences what and how law protects private and family life. For example, abortion law presumes technological advancement because of which – to roughly mention the basic ones – medical institutions can analyse foetuses and terminate pregnancies. To put it banally, a society that does not possess such a technological infrastructure lacks resources with which to guarantee women such rights. Likewise, any further technological advance that radically separates coital sex from gestational motherhood may affect the idea autonomy as it underlies abortion law. Think of a technology that enables doctors to transfer foetuses to artificial womb-like carriers for development. Such a possibility would *both* respect women's decisional autonomy and preserve the foetus. In simple terms, a woman would get rid of her pregnancy without aborting the foetus. In such a case, the idea of liveable lives would gain further institutional importance. Whereas such a technological advance alone will not affect the idea of foetal viability, other related ideas like psychological health of the pregnant woman and her safety would lose much of their interpretive force. Three dynamics need unpacking here. First, law respects abortion by seeing the social field that structures the possibilities of abortion. Thus, by transforming underlying variables informing abortion law, such a hypothetical technological change unsettles the rationale of abortion law that negotiates such variables. Second, law permits abortion contextually, for example, health, safety and liveability. Thus, there are narratives of autonomy and practices of autonomy. Whereas

narratives of autonomy (e.g. decisional autonomy) refer to the practices (e.g. one does not kill the foetus, the procedure is safe, the foetus was not liveable), the latter, as conditions rationalizing autonomy, do not refer to the former. Third, law enables abortion, that is, positioning it aptly, by regulating governmental practices, for example, access to abortion facilities, expert involvement or insurance coverage. Thus, by transforming the possibility of abortion, such a hypothetical technological change gives birth to a new set of social questions and governmental problems, for example, child coverage and rearing costs, adoption issues, identity questions, state and motherhood (quite literally). For example, if a woman conceives the foetus after a criminal act of rape, shall laws imprison the rapist and transfer the conceived foetus to an artificial womb? If a woman uses artificial insemination to conceive a foetus, but later, after the foetus becomes viable, changes her mind as to motherhood, would law both cover her costs to transfer the foetus to the artificial womb and protect her choice? In other words, whereas such a technological change introduces certain new governmental problems, the idea that governmental attention correlates the protection of private and family life with its management remains intact.

17. Take few examples. Hayek, 'With regard to children, the important fact is that they are not responsible individuals to whom the argument of freedom completely applies' (Friedrich Hayek, *The Constitution of Liberty* (Chicago, IL: University of Chicago Press, 2011)), p. 499. Mill, '[Liberty applies] only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood' (John Mill, *On Liberty*, 14). Kant, '[Parents] have the right to [*manage* and develop the child] until the time of [child's] emancipation (*emancipatio*)' (Immanuel Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1991)), p. 65. Griffin, 'We should see children as acquiring rights in stages – the stages in which they acquire agency' (James Griffin, *On human rights* (New York: Oxford University Press, 2008)), p. 95; compare 165. Those theorists who do not deal with children nevertheless do not mention in what sense the idea of freedom applies to children without presuming any kind of tutelage.
18. Muhammad Ali Nasir, "Negative Governmentality Through Fundamental Rights: The Far Side of the European Convention on Human Rights," *European Law Journal* (2018): 1–24 (9–13). Available at: https://doi.org/10.1111/eulj.12242.
19. Thus, the ECtHR noted in *Olsson v. Sweden (no. 1)*: 'The circumstances in which it may be necessary to take a child into public care and in which a care decision may fall to be implemented are so variable that it would scarcely be possible to formulate a law to cover every eventuality' (para 62, cf. *Amanalachioai v. Romania*, paras 76–77).
20. We can find the influence of this social transformation on the philosophical discourse concerning conjugal society as early as Locke's accounts. In the *First Treatise*, Locke finds the basis of parents' 'natural' jurisdiction on their children in the fact that they have begotten them (John Locke, *Two Treatise of Government* (Cambridge: Cambridge University Press, [1689] 1988)), p. 186. However, Locke argues that the scope of parents' jurisdiction varies with their 'unnatural' carelessness (p. 214). In the *Second Treatise*, Locke goes even further. He argues that the obligation on children to honour their parents – in particular, the father – corresponds with 'care, cost, and kindness' invested in their upbringing by parents (p. 312). In other words, parental authority deserves as much respect as it respects obligations imposed on it by parenthood.

21. Helen Keller and Corina Heri, "Protecting the Best Interest of the Child: International Child Abduction and the European Court of Human Rights," *Nordic Journal of International Law* 84 (2015): 270–96 (273).
22. With its focus on practices, interests and agency, this 'tutelary' form of relationship is however different from the sovereignty-oriented idea of *parens patriae*. The Court of Chancery defined *parens patriae* as the Crown's guardianship of those of its subjects that were unable to look after themselves (see, John Seymour, "Parens Patriae and Wardship Powers: Their Nature and Origins," *Oxford Journal of Legal Studies* 14 (1994): 159–88, and Lawrence Custer, "The Origins of the Doctrine of Parens Patriae," *Emory Law Journal* 27 (1978): 195–208). However, the case law of ECHR Article 8 imposes obligations on authorities in the light of subjects' rights-holding capacity, with reference to their interests, with attention to the broader social practices and with respect to their 'agency' that does not make them simple objects of political power or properties of the state.
23. Take compulsory schooling as an example. In *Costello-Roberts v. the United Kingdom*, the ECtHR noted that compulsory schooling indeed constitutes interference with a child's private life. However, not every interference that adversely affects physical or moral integrity of subjects violates Article 8(1) rights. Thus, in certain cases, absence of subjects' consent remains compatible with, in view of their autonomous agency, upholding the 'respect' of their private lives (para 36).
24. Nikolas Rose and Peter Miller, "Political Power Beyond the State: Problematics of Government," *The British Journal of Sociology* 43 (1992): 173–205 (172, 181). Michel Foucault, *Security, Territory, and Population*, 46.
25. See, for example, Jeremy Waldron, *Liberal Rights: Collected Papers* (New York: Cambridge University Press, 1993), p. 382.
26. Reviewing Classical Greece's use of the term *oikos*, Liddell and Scott (1966) identify three major senses of the term: house (*oikia*), household goods and domestic relations (Henry Liddell and Robert Scott, *A Greek-English Lexicon* (Oxford, UK: Clarendon)). In his *Politics*, Aristotle describes *oikos* as a 'natural association for everyday purposes' (1252b, 12–14). He defines relationships in *oikos* as that involving husband, wife, children and slaves (1253b, 4–7). Thus, Aristotle defines *oikos* as the smallest unit of polis (1254a). My use of the term of *oikopolitics* does not mean that presently the affairs of the city (*politika*) primarily entail the management of *oikos* nor that *oikos* does not have any normative standing apart from broader general affairs. By speaking of *oikopolitics*, this essay intends to pinpoint the conditions that allow a society to address private life and privacy issues in a manner that law structures actions without being oppressive, governs conduct without eliminating freedoms and guarantees freedoms without being equating them with license, among others.
27. To insist simply on the form of legal system without identifying the way it refers to social practices and norms collapses the distinction between despotism and constitutional democracy. Kelsen argues: (My translation) 'It is completely meaningless to opine that in despotism there exists no order of law, [and that: author] only the capricious will of the despot reigns. The despotically governed state also represents an order of human behavior. This order is the order of law. What is interpreted as the capricious will is only the legal possibility that an autocrat has, to take every decision onto himself, to determine unconditionally the activities of subordinate organs, to repeal or alter legal norms any time in general or specific instances. Such a

condition is a condition of law, even when it is felt as disadvantageous' (*Allgemeine Staatslehre* (Springer: Berlin, 1925), pp. 326–26).

28. Ludwig Wittgenstein, *Philosophical Investigations* (Oxford, UK: Wiley-Blackwell, 2009), xlv, liii, ccxi.
29. Jacques Donzelot notes that at least from late 19th century to the mid-20th century, the discourse on family life consciously oriented itself to the question of freeing 'women and children from patriarchal tutelage . . . on behalf of greater public control over reproduction and a pre-eminence of the mother' (*The Policing of Families* (New York: Pantheon, 1979), p. 181). Thus, Elster argues that in the 20th century 'the maternal preference rule gradually emerged as the dominant doctrine in most Western countries' (Elster, 1987, 8). Jon Elster, "*Solomonic* Judgments: Against the Best Interest of the Child," *The University of Chicago Law Review* 54 (1987): 1–45 (8).
30. Donzelot, *The Policing of Families*, pp. 23, 58.
31. Rose, "Beyond the Public/Private Division," 73. Donzelot, *The Policing of Families*, xxii.
32. Donzelot, *The Policing of Families*, pp. 189–91.
33. Arendt, *The Human Condition*, 38–57. Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, MA: The MIT Press, 1989), p. 164. Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 2013).
34. Influential secondary literature in political and sociological theory, relying on this understanding, attempts to understand whether 'authenticity' lies in the public sphere or in the private sphere.
35. Zygmunt Bauman, *Liquid Modernity* (Cambridge: Polity Press, 2000), pp. 35–39. Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernity* (New York: Routledge, 1992), p. 112. Manuel Castells, *The Internet Galaxy* (Oxford, UK: Oxford University Press, 2001), pp. 168–87. Helen Nissenbaum, *Privacy in Context*, p. 231.
36. Lawrence Friedman, *Total Justice* (New York: Sage, 1994), pp. 45–79. Ulrich Preuss, *Die Internalisierung des Subjekts* (Frankfurt, Germany: Suhrkamp, 1979), pp. 27, 94, 107, 118, 193. Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1993), pp. 47–73, 165–72.
37. Weber himself cautioned against a 'metaphysical' attitude that explains unique phenomena by reference to general laws. Otherwise, he believed, one would impose certain meanings on historical actors, within which they move, that would remain different from the way those actors understood themselves and interpreted their actions (Max Weber, *Gesammelte Aufsätze zur Sozial- und Wirtschaftsgeschichte* (Tübingen, Germany: Mohr, 1924), p. 517; compare Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Cambridge University Press, 1992), pp. 56–58).
38. Hannah Arendt, *The Origins of Totalitarianism* (London, UK: Harcourt Brace and Company, 1973), pp. 473–78. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996), p. 369.