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# Corporate reputation under the European Convention on Human Rights

David J Acheson\*

## ABSTRACT

This paper examines whether corporations could claim a right to reputation under the European Convention on Human Rights. The existence of such a right could have significant implications for English defamation law as it relates to corporate claimants. The analysis in this paper focuses on Article 8 and Article 1 of Protocol 1, because the European Court of Human Rights has left open the applicability of each of these Articles to the corporate interest in reputation. While the Court's case law in both of these areas is unclear, the argument advanced here is that there is no good justification for extending a right to reputation to corporations under either Article. However, given the often-haphazard approach the Court takes to developing its interpretation of Convention rights, there is a risk that it will uncritically extend a Convention right to reputation to companies in the future.

**Keywords:** European Convention on Human Rights; Article 8; Article 1, Protocol 1; Defamation; Reputation; Companies; Corporations.

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## Introduction

During the debates leading to the Defamation Act 2013, the fact that corporations were entitled to sue for libel or slander to protect their reputations was a controversial issue, and ‘preventing corporates from suing [was] a primary goal of some libel reformers.’<sup>1</sup> In 2005, the Australian uniform defamation reforms had removed the right to sue from companies with ten or more employees;<sup>2</sup> there was significant support for the idea that English law should follow the Australian lead, and that some or all corporations should be barred from suing in defamation.<sup>3</sup> But the options available to Parliament for reform were limited, compared to those available to Australian legislators, by the standards to which the UK must adhere as a signatory to the European Convention on Human Rights (‘the Convention’; ‘the ECHR’). Some limited attention was paid to the Convention-compliance of corporate defamation reform prior to 2013: the Joint Committee on the Draft Defamation Bill heard evidence that removing the right to sue from companies might be incompatible with the Convention.<sup>4</sup> Parliament decided against this option, instead requiring for-profit corporate claimants to show that statements have caused or are likely to cause ‘serious harm’ to reputation, and ‘serious financial loss’, before defendants can be held liable for publishing them.<sup>5</sup>

Since then, the European Court of Human Rights (‘the Court’; ‘the ECtHR’) has left open the possibility that corporations could claim a Convention right to reputation, under either

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<sup>1</sup> Alastair Mullis and Andrew Scott, ‘The Swing of the Pendulum: Reputation, Expression and the Re-Centring of English Libel Law’ (2012) 63(1) NILQ 27, 54.

<sup>2</sup> Defamation Act 2005 (NSW, Qld, Vic, WA, SA, Tas) s 9; Defamation Act 2006 (NT) s 9; Civil Law (Wrongs) Act 2002 (ACT) s 121.

<sup>3</sup> Ministry of Justice, Draft Defamation Bill: Summary of Responses to Consultation (CP(R) 3/11, 2011) para 15.

<sup>4</sup> Joint Committee on the Draft Defamation Bill, Oral and Associated Written Evidence Volume II (2010-12, HL 203, HC 930-II) 18-19 (Lord Lester), 381-86 (Lord McNally).

<sup>5</sup> Defamation Act 2013, s 1.

the Article 8 right to private life, or the Article 1, Protocol 1 ('A1P1') right to property.<sup>6</sup> The main aim of this article is to consider whether companies have a Convention right to reputation on the basis of the current ECtHR jurisprudence, or whether the Court would have convincing reasons for extending such a right to companies in the future. My discussion of English law focuses on the defamation torts, because those torts are the proper vehicles for the direct protection of a claimant's reputation.<sup>7</sup>

Given the lack of clarity in the Court's jurisprudence, I also give some thoughts on whether companies ought to have a Convention right to reputation. My answers to all of these questions are the same: corporations do not presently have a right to reputation under Art 8 or A1P1; nor are there convincing reasons in the Court's jurisprudence for extending that right to companies; nor are there convincing arguments that doing so would be theoretically coherent or otherwise desirable. Nevertheless, the article ends with a note of caution, acknowledging the possibility that the Court will at some point find a Convention right to corporate reputation to exist, despite the absence of any good justification for doing so.

## **Corporate human rights**

An initial objection might be raised to protecting corporations under a treaty on human rights. In practice, though, the ECtHR 'has never doubted' companies' capacity to be beneficiaries of Convention rights,<sup>8</sup> and there is no reason in principle to object to the existence of corporate rights in the Convention. Corporations are by definition 'rights

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<sup>6</sup> See text to notes 14-22.

<sup>7</sup> *Spring v Guardian Assurance Plc* [1995] 2 AC 296 (HL) 323 (Lord Goff), citing with approval *Foaminal Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393, 399 (Hallett J): 'a claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action'.

<sup>8</sup> Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (OUP 2006) 4.

bearing legal entities’;<sup>9</sup> without enforceable rights they would be unable to pursue their objects. The existence of corporate rights under a supranational treaty such as the ECHR has the benefits of promoting some uniformity across jurisdictions, and of protecting those rights against the arbitrary use of state power.<sup>10</sup> It might also be pointed out that some of the Court’s most important jurisprudence on freedom of expression has resulted from claims brought by for-profit media companies.<sup>11</sup> But the rights of companies need not be precisely the same as those available to human beings,<sup>12</sup> so the protection of individuals’ reputations under the Convention<sup>13</sup> does not necessarily entail that companies will be entitled to the same protection.

### **Legal uncertainty**

The most important ECtHR decision for the purposes of this paper is *Firma EDV Für Sie, EfS Elektronische Datenverarbeitung Dienstleistungs GmbH v Germany* (‘EDV’).<sup>14</sup> The applicant, a ‘legal person founded exclusively for business purposes’,<sup>15</sup> argued that its rights under Art 8 and A1P1 had been violated by the German courts’ failure to protect it against statements made by another private party that had ‘tarnished [its] reputation and ruined its economic foundation.’<sup>16</sup>

The Court decided to ‘leave open the question whether the reputation of a company falls under the notion of private life under Article 8’ and to proceed ‘on the assumption that

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<sup>9</sup> John Douglas Bishop, ‘The Limits of Corporate Rights Obligations and the Rights of For-Profit Corporations’ (2012) 22(1) *Business Ethics Quarterly* 119, 128.

<sup>10</sup> The facts of the *Yukos* case demonstrate the potential importance of this protection: *OAO Neftyanaya Kompaniya Yukos v Russia* [2014] ECHR 906.

<sup>11</sup> Among many possible examples: *Sunday Times v UK (No 2)* [1991] ECHR 50; *Autronic AG v Switzerland* [1990] ECHR 12; *Bladet Tromsø v Norway* [1999] ECHR 29.

<sup>12</sup> eg John Armour, ‘Companies and Other Associations’ in Andrew Burrows (ed), *English Private Law* (3<sup>rd</sup> edn, OUP 2013) paras 3.17-3.18.

<sup>13</sup> See text to notes 70-88.

<sup>14</sup> App no 32783/08 (ECtHR, 2 September 2014) (‘EDV’).

<sup>15</sup> *Ibid*, para 31.

<sup>16</sup> *Ibid*, para 18.

Article 8 applies'.<sup>17</sup> The application was declared inadmissible because the Court considered that the domestic courts had balanced the competing interests under Arts 8 and 10 reasonably, acting within their margin of appreciation.<sup>18</sup>

The Court also left open the question 'whether a company's reputation and goodwill constitute "possessions"' under A1P1, thereby attracting the protection of that Article, on the grounds that the applicant's complaint under A1P1 raised no separate issues from its complaint under Art 8.<sup>19</sup>

More recently, the Court has assumed that Art 8 protects corporate reputation in two decisions on the Art 10 right to freedom of expression. In the first, *Magyar Tartalomszolgáltatók Egyesülete v Hungary*, the applicants complained that their Art 10 rights had been violated by the imposition of liability for their publication of defamatory statements about a company.<sup>20</sup> The Court stated again that 'it is not necessary to decide whether the plaintiff company could justifiably rely on its right to reputation, seen from the perspective of Article 8', and proceeded on the assumption that it could.<sup>21</sup>

In the second of these cases, *Ärztammer für Wien v Austria*, the Court did not even acknowledge that Art 8 might not protect the reputation of a corporation. It simply noted that the applicant had 'made a public statement which affected the reputation of [a] company', and that the right to reputation 'is a right which is protected by Article 8', before assessing whether the Austrian courts had appropriately balanced the competing interests under Arts 8 and 10.<sup>22</sup>

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<sup>17</sup> *Ibid*, para 23.

<sup>18</sup> *Ibid*, para 29.

<sup>19</sup> *Ibid*, para 34.

<sup>20</sup> *Magyar Tartalomszolgáltatók Egyesülete v Hungary* [2016] ECHR 135 ('MTE').

<sup>21</sup> *Ibid*, para 67.

<sup>22</sup> *Ärztammer für Wien v Austria* [2016] ECHR 179, para 62.

## English courts

English courts have not interpreted Art 8 as protecting corporate reputation.<sup>23</sup> In *Euromoney Institutional Investor Plc v Aviation News Ltd*, Tugendhat J stated plainly that ‘in the context of a defamation claim, a corporate claimant does not have relevant rights under ECHR Art 8.’<sup>24</sup> Alastair Mullis and Andrew Scott consider this point to be ‘uncontroversial’, stating that it is ‘a commonplace that corporations do not possess Article 8 rights of this type.’<sup>25</sup> It is typical for corporate defamation claimants to accept that Art 8 does not protect their reputations.<sup>26</sup>

The position under A1P1 is less clear. Tugendhat J suggested in *Thornton v Telegraph Media Group Ltd* that defamatory imputations relating to claimants’ ‘professional attributes’ would, compared to those relating to personal characteristics, be ‘less likely to engage their rights under Art 8, but may engage only their commercial or property rights (which are Convention rights, if at all, under [A1P1]).’<sup>27</sup> In his analysis, defamation claims brought by companies will always fall into the category of ‘business defamation’,<sup>28</sup> so may engage A1P1, but not Art 8. A similar observation – that A1P1 ‘might apply’ – was made in *Building Register Ltd v Weston* with respect to a corporate claimant.<sup>29</sup> However, in the context of a malicious falsehood claim, the existence of an A1P1 right to reputation has been considered ‘doubtful’ by the Court of Appeal.<sup>30</sup>

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<sup>23</sup> Richard Parkes and others, *Gatley on Libel and Slander* (12<sup>th</sup> edn, Sweet & Maxwell 2013) para 2.3.

<sup>24</sup> [2013] EWHC 1505 (QB) [20]. See also *Hays plc v Hartley* [2010] EWHC (QB) 1068 [25]; *Ronaldo v Telegraph Media Group Ltd* [2010] EWHC 2710 (QB) [58].

<sup>25</sup> Mullis and Scott (n 1) 46.

<sup>26</sup> *Hays* (n 24) [25]; *Building Register Ltd v Weston* [2014] EWHC 784 (QB) [19]; *Global Torch Ltd v Apex Global Management Ltd* [2013] EWHC 223 (Ch) [73]-[75]. Cf the defendant’s submission, not commented upon by Eady J, in *Metropolitan International Schools Ltd v Designtecnica Corp* [2009] EWHC 1765 (QB) [46].

<sup>27</sup> *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB) [38].

<sup>28</sup> *Ibid.*, [34].

<sup>29</sup> *Building Register Ltd* (n 26) [19] (Dingemans J) (emphasis added).

<sup>30</sup> *Ajinomoto Sweeteners Europe SAS v Asda Stores Limited* [2010] EWCA Civ 609 [29] (Sedley LJ).

If the ECtHR were to decide that corporate reputation does fall within the scope of either right, though, the approach of the English courts would be likely to change to reflect that decision. While s 2 of the Human Rights Act 1998 only requires judges to ‘take into account’, rather than to follow, relevant Strasbourg decisions, in practice English courts are likely to follow the ECtHR’s interpretation of the Convention.<sup>31</sup>

Given the ECtHR’s decision in *EDV*, this article focuses on the possible existence of a right to corporate reputation under Art 8 or A1P1.<sup>32</sup> But first I discuss the relevance of corporate reputation to Article 10, Paragraph 2 (‘Art 10(2)’) of the Convention.

## **Article 10(2)**

Art 10(2) sets out the permissible justifications a member state can offer for restricting the right to freedom of expression guaranteed by Art 10(1). One such justification is ‘for the protection of the reputation ... of others’. This is the only explicit reference to reputation in the Convention. As such, the ECtHR has historically treated reputation as relevant to the Convention only in the context of Art 10(2).<sup>33</sup>

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<sup>31</sup> *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [121].

<sup>32</sup> Lord Lester’s evidence to the Joint Committee on the Draft Defamation Bill also argued that preventing companies from suing in defamation ‘would be a breach of Article 6 read with Article 14’ (Joint Committee, Evidence (n 4) 19). Lord Lester’s argument was that the Art 6 right to a fair trial guarantees effective access to the courts for the determination of applicants’ ‘civil rights and obligations’ (*Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para 36) and that failing to allow companies the right to sue in defamation would constitute discrimination in the protection of that right of access, contrary to Art 14. However, Art 6 only guarantees a right of access to the courts in respect of existing domestic ‘civil rights’: it does not guarantee the existence of any particular substantive right in domestic law: *Roche v United Kingdom* App no 32555/96 (ECtHR, 19 October 2005) paras 117-119; *Matthews v Ministry of Defence* [2003] 1 AC 1163 (HL) [3]. The Court has previously suggested that whether Art 6 is engaged by a restriction on the right to sue in defamation depends on whether that restriction is ‘substantive’ or ‘procedural’. If a restriction is substantive (ie ‘delimit[ing] the very content of the applicants’ right to a good reputation’) then it does not engage Art 6: *Fayed v UK* App no 17101/90 (ECtHR, 21 September 1990) paras 66-67. It follows that the complete removal of the corporate right to sue in defamation would not engage Art 6. If Art 6 is not engaged, then Art 14 is irrelevant because it only has effect in circumstances where another Convention right is engaged: *EB v France* App no 43546/02 (ECtHR, 22 January 2008) para 47. As such, this aspect of Lord Lester’s argument will not be considered any further here.

<sup>33</sup> eg *Lingens v Austria* [1986] ECHR 7; Stijn Smet, ‘Freedom of Expression and the Right to Reputation: Human Rights in Conflict (2010) 26(1) *Am U Int’l L Rev* 183, 192.



The Court has unambiguously held that the protection of corporate as well as individual reputation can be a legitimate reason to restrict freedom of expression under Art 10(2). The clearest of these statements was made in *Steel v UK*,<sup>34</sup> the culmination of the ‘McLibel’ litigation involving a defamation suit brought by the McDonald’s corporation against two environmental activists.<sup>35</sup> The Court found that ‘the English law of defamation, and its application in this particular case, pursued the legitimate aim of “the protection of the reputation or rights of others”’,<sup>36</sup> although in that case the effect on the applicants’ Art 10 rights had been disproportionate.

So corporate reputation is relevant to the Convention in at least one respect: member states are permitted under Art 10(2) to restrict freedom of expression in order to protect the reputation of a company. But permitting restrictions on the Convention rights of others to protect a particular interest is not the same as guaranteeing that interest substantive Convention protection in its own right.<sup>37</sup> Whether corporate reputation could attract such protection therefore remains important.

## **Importance**

Whether corporate reputation is protected by a Convention right, rather than being merely a permissible justification for restricting expression, is important for three main reasons. Firstly, the answer to that question will affect the protection of corporate reputation in domestic defamation law. Secondly, if companies have a Convention right to reputation, states would be subject to obligations to protect that right. Thirdly, the existence of a

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<sup>34</sup> [2005] ECHR 103.

<sup>35</sup> *McDonald’s Corp v Steel* (No 1) [1995] 3 All ER 615. See Anthony Hudson, ‘Free Speech and Equality of Arms – The Decision in *Steel & Morris v United Kingdom*’ (2005) 3 EHRLR 301.

<sup>36</sup> *Steel* (n 34) para 86. See also *Uj v Hungary* App no 23954/10 (ECtHR, 19 July 2011) para 22; *Kuliš and Różycki v Poland* App no 27209/03 (ECtHR, 6 October 2009) para 35; *Markt Intern Verlag GmbH v Germany* (1990) 12 EHRR 161, paras 34-35.

<sup>37</sup> See text to notes 105-112.

Convention right to corporate reputation would entail that companies could apply to the ECtHR alleging a violation of that right by a member state.

### **Effect on domestic protection**

The level of protection given to a corporate claimant's reputation in a domestic defamation case would be higher if that interest falls within the scope of a Convention right than if it does not.

If no Convention right protects corporate reputation, then the reputational interests in a company's defamation claim will be relevant only as a justification for restricting the defendant's expression under Art 10(2). To comply with the terms of Art 10(2) a restriction on expression must be 'necessary in a democratic society', which entails that it addresses a 'pressing social need', and is 'proportionate to the legitimate aim pursued'.<sup>38</sup> The necessity of a restriction on expression 'must be convincingly established' by the state if it is challenged in Strasbourg.<sup>39</sup> Where defamatory statements relate to matters of public interest, as they often will do in corporate defamation claims,<sup>40</sup> the ECtHR will subject restrictions on expression to the 'most careful scrutiny';<sup>41</sup> the Court has declared that Art 10(2) provides 'little scope ... for restrictions on debate on questions of public interest'.<sup>42</sup> Further, if the protection of reputation is treated solely as a justification for restricting the defendant's Art 10 rights, then the human rights analysis will start from the presumption that those rights have priority.<sup>43</sup>

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<sup>38</sup> Sunday Times (n 11) para 50.

<sup>39</sup> Ibid.

<sup>40</sup> See eg *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44, [158]; Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015) 157.

<sup>41</sup> *Bladet Tromsø* (n 11) para 64.

<sup>42</sup> *Heinisch v Germany* [2011] ECHR 1175, para 66.

<sup>43</sup> Jan Oster, 'The Criticism of Trading Corporations and their Right to Sue for Defamation' (2011) 2 JETL 255, 263; Mullis and Scott (n 1) 34.

In contrast, if the reputational interests in a corporate defamation claim fall within the scope of Art 8, then the claim would need to be resolved using the very different approach described by Lord Steyn in *Re S (a child)*.<sup>44</sup> The court must engage in a balancing exercise, assessing the relative importance of the parties' rights in the circumstances of the case, from an initial position of presumptive parity between those rights.<sup>45</sup>

The enhanced protection offered to reputation as part of the Art 8 right to private life was acknowledged (and endorsed) in Judge Loucaides' concurring opinion in *Lindon v France*, one of the earliest cases asserting the link between Art 8 and individual reputation:

Accepting that respect for reputation is an autonomous human right, which derives its source from the Convention itself, leads inevitably to a more effective protection of the reputation of individuals vis-à-vis freedom of expression.<sup>46</sup>

If a Convention right to corporate reputation exists, then it too would be entitled to this 'more effective protection' from the Strasbourg court, and in English defamation law – and, as such, the law would provide less effective protection to critical speech about corporations and their activities.<sup>47</sup>

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<sup>44</sup> [2004] UKHL 47.

<sup>45</sup> *Ibid*, [17].

<sup>46</sup> *Lindon v France* [2007] ECHR 836, p 40.

<sup>47</sup> This consequence will also result to some extent from the protection of individual reputation under the Convention, insofar as individuals who are closely connected to particular companies, for example managers or directors, benefit from that protection in respect of injuries to their personal reputations caused by allegations against the companies with which they are associated. It seems that an individual's professional reputation can in principle be protected under Art 8 (eg *Oleksandr Volkov v Ukraine* [2013] ECHR 288, paras 165-167). The effect of lawsuits brought in these circumstances on the right to criticise corporate activities is a subject of legitimate concern (eg Culture, Media and Sport Committee, *Press Standards, Privacy and Libel* (HC 2009-10, 362-I) para 175). However, this point will not be addressed further here, because the relevance of Art 8 to individuals' professional reputations, and the effect of the subject matter of this kind of speech on the balance between Arts 8 and 10, are distinct issues from the Convention's applicability to corporate reputation. For discussion of this subject, see eg David Howarth, 'Libel: Its Purpose and Reform' (2011) 74(6) MLR 845, 872-73.

There is less case law on the appropriate approach to conflicts between rights under Art 10 and A1P1. However, in common with Art 8, the permissibility of an interference with A1P1 depends in part on its proportionality,<sup>48</sup> and the ECtHR has spoken of ‘balancing the rights in issue’ when the right to property comes into conflict with Art 10.<sup>49</sup> It may be that protection for property rights is less extensive than for other fundamental rights,<sup>50</sup> and restrictions on A1P1 rights ‘attract a particularly wide margin of appreciation’.<sup>51</sup> But corporate reputation would likely be entitled to greater protection if it falls within the scope of A1P1 than if it is not protected by any Convention right.

There are, admittedly, also some reasons to think that a Convention right to corporate reputation might not, in practice, have a huge impact on how that interest is protected in domestic defamation cases.

Helen Fenwick and Gavin Phillipson note that whether Art 8 is engaged by an interest is a separate issue from how much weight it should be accorded, either when it is balanced against a competing Convention right, or when assessing whether an interference with it is permissible under Art 8(2).<sup>52</sup> The ECtHR has accepted that the applicability of a Convention right to companies does not necessarily guarantee them the same level of protection as would be offered to individuals.<sup>53</sup> For example, in its decision to extend the Art 8 protection of the ‘home’ to corporate premises, it held that a state’s ‘entitlement to

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<sup>48</sup> *Pressos Compania Naviera SA v Belgium* [1995] ECHR 471, para 38.

<sup>49</sup> *Appleby v UK* [2003] ECHR 222, para 49.

<sup>50</sup> Eric Barendt, *Freedom of Speech* (2<sup>nd</sup> edn, OUP 2005) 254. See also *Ashdown v Telegraph Group Ltd* [2002] Ch 149 (CA) 161, where the conflict between speech and property (in copyright) seems to be treated under Art 10(2).

<sup>51</sup> Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 147. See also *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [129].

<sup>52</sup> Fenwick and Phillipson (n 51) 1100.

<sup>53</sup> *Emberland* (n 8) 139.

interfere [under Art 8(2)] may be more far-reaching where the business premises of a juristic person are concerned'.<sup>54</sup>

In *Global Torch Ltd v Apex Global Management Ltd*,<sup>55</sup> in the context of the open justice principle, the Court of Appeal held that it was not necessarily inconsistent with the *Re S* approach for one of the competing rights to be more likely to prevail than the other. Maurice Kay LJ explained that 'the competing rights do not exist within a presumptive legal hierarchy but that does not mean that in given situations – for example, open justice versus reputational damage – one will not generally trump the other.'<sup>56</sup> Even if corporate reputation is protected under a substantive Convention right, in individual cases the likelihood that the statements complained of would be on a matter of public interest and the 'very different characteristics of individuals and companies' would be relevant to the balance between Arts 8 and 10.<sup>57</sup> It is possible, then, that granting companies a Convention right to reputation would in practice have only a minimal impact on the outcomes of corporate defamation claims.

However, the existence of such a right would clearly have implications for the substantive law applicable to defamation claims brought by companies,<sup>58</sup> and there is no guarantee that the consequent effect on the outcomes of such claims would in fact be minimal.

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<sup>54</sup> *Société Colas Est v France* [2002] ECHR 418 ('Colas'), para 49.

<sup>55</sup> [2013] EWCA Civ 819.

<sup>56</sup> *Ibid*, [25] (emphasis in original). Cf Jelena Gligorijević, 'Publication Restrictions on Judgments and Judicial Proceedings: Problems with the Presumptive Equivalence of Rights' (2017) 9(2) *JML* 1, arguing that the presumptive equivalence of rights under Arts 8 and 10 operates differently depending on whether or not the original substantive claim is based on privacy. If Gligorijević's analysis is correct, then the *Global Torch* approach may not be applicable in corporate defamation cases.

<sup>57</sup> Hugh Tomlinson, 'Case Law, Strasbourg: Firma EDV für Sie v Germany, Article 8, Companies and the Right to Reputation' (Inform, 9 October 2014) at <<https://inform.wordpress.com/2014/10/09/case-law-strasbourg-firma-edv-fur-sie-v-germany-article-8-companies-and-the-right-to-reputation-hugh-tomlinson-qc/>>. See *MTE* (n 20) para 84; *Arztammer* (n 22) para 65.

<sup>58</sup> See eg *Yeo v Times Newspapers Ltd* [2015] EWHC 3375 (QB) [140]: Warby J considered it to be 'clear' that the applicability of Art 8 to a defamation claim 'does make a difference in principle to the approach that should be taken.' However, in the circumstances of that case, it would not have affected his finding on liability: [148].

Changes to the substantive law that are favourable to corporate claimants might also have important consequences outside the courts; that is, they risk aggravating the law's chilling effect on speech about corporations.

### **Convention obligations**

Another important consequence of the existence of a Convention right to corporate reputation would be the imposition on member states of obligations with respect to its protection.

If corporate reputation is not a Convention right in itself, it cannot give rise to any Convention duties. As such, its protection in domestic law would be permissible but not required.<sup>59</sup> This can be seen in the ECtHR's judgment in *Steel*. Holding that a member state 'enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation',<sup>60</sup> the Court said: 'If... a State decides to provide such a remedy to a corporate body', then defendants' Art 10 rights require 'a measure of procedural fairness' in the operation of that remedy.<sup>61</sup> Based on the word 'if' in this passage, Lord McNally suggested to the Joint Committee on the Draft Defamation Bill that the Court could be interpreted as having ruled that the state's margin of appreciation 'extends as far as deciding to offer no remedy'.<sup>62</sup> This interpretation must be correct. Article 1 of the Convention imposes an obligation on member states to 'secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention'; there is no obligation on states to protect interests that do not fall within the scope of a Convention right.

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<sup>59</sup> Howarth (n 47) 874; Oster (n 43) 264.

<sup>60</sup> *Steel* (n 34) para 94.

<sup>61</sup> *Ibid*, para 95 (emphasis added).

<sup>62</sup> Joint Committee, Evidence (n 4) 385.

If, however, corporate reputation does fall within the scope of a Convention right, then it will give rise to obligations under Art 1. These may include positive obligations, requiring states to ensure protection for the right in the relationships between private individuals (ie in private law contexts such as defamation claims).<sup>63</sup> ‘Negative’ obligations require states to refrain from taking actions that violate Convention rights; ‘positive’ obligations are those that require them to take actions to ensure the enjoyment of Convention rights.<sup>64</sup> If the UK is under a positive obligation to protect corporate reputation, an Australian-style removal of the corporate right to sue in defamation may be incompatible with the Convention.<sup>65</sup>

### **Right to apply to the European Court of Human Rights**

Finally, the existence of a Convention right to corporate reputation would allow companies to apply to the ECtHR alleging a violation of that right.<sup>66</sup> Corporations, including for-profit companies, are considered to be ‘nongovernmental organisations’ under Art 34 of the Convention, and therefore have standing to apply to the Court claiming to be victim to a rights violation.<sup>67</sup> The discovery of a right to individual reputation under Art 8 of the Convention ‘permit[ted] disgruntled libel claimants to apply to the Strasbourg court to contest the perceived failure of domestic laws to ensure respect for the right to reputation.’<sup>68</sup> The same would be true of a Convention right to corporate reputation.

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<sup>63</sup> Von Hannover v Germany (No 1) [2004] ECHR 294; Oster (n 43) 264.

<sup>64</sup> Gul v Switzerland [1996] ECHR 5, Dissenting Opinion of Judge Martens, para 7.

<sup>65</sup> On Art 8: Joint Committee on the Draft Defamation Bill, Report (2010-12, HL 203, HC 930-I) para 112. On AIP1: Oster (n 43) 264-65. The Australian provisions are cited at note 2.

<sup>66</sup> Eric Barendt and others, *Media Law: Text, Cases and Materials* (Pearson 2014) 366; Gavin Millar, ‘Whither the Spirit of Lingens?’ (2009) 3 EHRLR 277, 282.

<sup>67</sup> Emberland (n 8) 4.

<sup>68</sup> Mullis and Scott (n 1) 34.

## **Summary**

Whether companies can claim a Convention right to reputation has important implications for the ongoing application, and any future reform, of English defamation law. It may be that the view that removing the right to sue from companies ‘would be at risk of being incompatible’ with the Convention<sup>69</sup> prevented that option from being taken in the 2013 Act, or at least prevented it from being seriously considered. As such, it is important to clarify the possible existence of a Convention right to corporate reputation. The following sections attempt to do so, addressing first Art 8 and then A1P1.

## **Article 8**

### **Individual reputation under Article 8**

Art 8(1) of the Convention does not explicitly include a right to reputation:

Everyone has the right to respect for his private and family life, his home and his correspondence.

In fact, the explicit reference to ‘honour and reputation’ in Article 12 of the Universal Declaration of Human Rights, on which Art 8 of the ECHR was based, ‘was deliberately omitted from Article 8’.<sup>70</sup> Notwithstanding the drafting history, however, the ECtHR has decided that the right to reputation falls within the scope of Art 8.

The Court first asserted that Art 8 protects reputation in *Radio France v France*, in 2004, stating that: ‘the right to protection of one’s reputation is of course one of the rights guaranteed by Article 8 of the Convention, as one element of the right to respect for

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<sup>69</sup> Joint Committee, Report (n 65) para 112.

<sup>70</sup> J Velu, ‘The European Convention on Human Rights and the Right to Respect for Private Life, the Home and Communications’ in Arthur Henry Rebertson (ed), *Privacy and Human Rights: Reports and Communications Presented at the Third International Colloquy about the European Convention on Human Rights* (Manchester University Press 1973) 42.



private life.’<sup>71</sup> As Gavin Millar points out, ‘No authority was offered for this proposition’,<sup>72</sup> nor any explanation of the Court’s reasoning. Following *Radio France* the Court repeated its assertion, again without explanation, in a series of other Art 10 cases.<sup>73</sup>

In all of these cases, the right to reputation was referred to as an ‘aspect’, ‘part’, or ‘element’ of the right to private life protected by Art 8, with no explanation as to why that was suddenly the case.<sup>74</sup> The first attempt to explain, rather than simply assert, the protection of reputation under Art 8 was made in Judge Loucaides’ concurring opinion in *Lindon v France*.<sup>75</sup> The majority made no reference to Art 8, instead discussing the reputational interests in the case only in relation to Art 10(2).<sup>76</sup> Judge Loucaides, in contrast, argued that the ‘right to reputation should always have been considered as safeguarded by Article 8 of the Convention, as part and parcel of the right to respect for one’s private life.’<sup>77</sup> He linked the protection of reputation with the value of human dignity, and emphasised the importance of the latter to the fundamental aims of the Convention as a whole.<sup>78</sup>

The Court first found a violation of Art 8 in respect of reputational harm in *Pfeifer v Austria*.<sup>79</sup> The majority explained its decision by stating that Art 8 protects ‘a person’s physical and psychological integrity’, and is intended to ‘ensure the development ... of the personality of each individual in his relations with other human beings.’<sup>80</sup> The Court

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<sup>71</sup> *Radio France v France* [2004] ECHR 127, para 31.

<sup>72</sup> Millar (n 66) 281.

<sup>73</sup> *Chauvy v France* [2004] ECHR 295, para 70; *Abeberry v France* App no 58729/00 (ECtHR, 21 September 2004); *Cumpănă v Romania* [2004] ECHR 692, para 91; *White v Sweden* [2006] ECHR 793, para 19; *Leempoel & SA ED Ciné Revue v Belgium* App no 64772/01 (ECtHR, 9 November 2006) para 67.

<sup>74</sup> The two exceptions are *White v Sweden* (n 73) in which the Court asserted that reputation was ‘within the scope’ of Art 8 with no further comment; and *Sidabras v Lithuania* [2004] ECHR 395, in which reputational harm was one element of more wide-ranging infringements of the applicants’ private lives.

<sup>75</sup> *Lindon* (n 46).

<sup>76</sup> *Ibid*, paras 40-70.

<sup>77</sup> *Ibid*, p 39.

<sup>78</sup> *Ibid*, pp 39-40.

<sup>79</sup> [2007] ECHR 935.

<sup>80</sup> *Ibid*, para 33.

reiterated the assertion it had made in *Von Hannover v Germany (No 1)* that the scope of ‘private life’ in Art 8 extends to ‘a zone of interaction of a person with others, even in a public context’.<sup>81</sup> After relying additionally on the Art 10 cases in which it had found that reputation fell within the scope of Art 8, the Court concluded that ‘a person’s reputation ... forms part of his or her personal identity and psychological integrity and therefore ... falls within the scope of his or her “private life”’.<sup>82</sup>

In subsequent cases, the Court narrowed the scope of Art 8’s protection of reputation. Rather than viewing reputational harm as necessarily engaging Art 8, the Court began imposing a ‘seriousness’ threshold: to engage Art 8, an ‘attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life’.<sup>83</sup>

The Court appeared to roll back the protection of reputation under Art 8 still further in *Karakó v Hungary*.<sup>84</sup> It emphasised that the interests in reputation and privacy are ‘conceptually distinct’, because ‘personal integrity rights falling within the ambit of Article 8 are unrelated to the external evaluation of the individual, whereas in matters of reputation, that evaluation is decisive’.<sup>85</sup> It suggested that defamatory imputations would only engage Art 8 if ‘their publication had an inevitable direct effect on the applicant’s private life’.<sup>86</sup> However, the Court does not seem to have followed *Karakó* in subsequent cases,<sup>87</sup> instead reverting to a standard similar to that laid down in *A v Norway*; that is,

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<sup>81</sup> *Ibid*, citing *Von Hannover* (n 63) para 50.

<sup>82</sup> *Ibid*, para 35.

<sup>83</sup> *A v Norway* [2009] ECHR 580, para 64.

<sup>84</sup> [2009] ECHR 712.

<sup>85</sup> *Ibid*, para 23.

<sup>86</sup> *Ibid*.

<sup>87</sup> Tanya Aplin and Jason Bosland, ‘The Uncertain Landscape of Article 8 of the ECHR: The Protection of Reputation as a Fundamental Human Right?’ in Andrew Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press 2016) 281-82.

reputation is protected under Art 8 as ‘part of’ the applicant’s private life, subject to the attack on reputation reaching a ‘certain level of seriousness’.<sup>88</sup>

The Court has rarely attempted to explain its protection of reputation under Art 8, and there is a lack of clarity and consistency in the explanations it has offered.<sup>89</sup> This is problematic, because without a clear justification for the protection of individual reputation under Art 8, it is more difficult to determine whether it would be doctrinally coherent to offer the same protection to corporate entities.

Tanya Aplin and Jason Bosland identify ‘three possible interpretations of the relationship between reputation and the right to private life’: firstly, that reputation is in itself ‘part of’ an applicant’s private life; secondly, that a reputational injury may coincide with a distinct infringement of private life; and, thirdly, that a reputational injury may cause a distinct infringement of private life.<sup>90</sup> They reject the second interpretation primarily because it fits with only some of the Strasbourg case law;<sup>91</sup> and the first because it is theoretically incoherent (ignoring the ‘undoubtedly correct’ distinction drawn in *Karakó* between reputation and private life<sup>92</sup>) and would render the seriousness threshold favoured in some of the Court’s decisions ‘nonsensical’.<sup>93</sup> Aplin and Bosland argue that the third, ‘causal’, explanation is ‘the most doctrinally coherent and conceptually sound.’<sup>94</sup> If this causal interpretation is accepted, then there is no real protection of reputation under Art 8:<sup>95</sup> the interests protected are discrete privacy interests, with the protection of reputation operating essentially as a presumption that a sufficiently serious attack on reputation will

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<sup>88</sup> See eg *Arnarson v Iceland* [2017] ECHR 530, para 34. Aplin and Bosland (*ibid*, 281) note that the Court does not always mention, or engage with, the seriousness threshold in Art 8 cases involving applicants’ reputational interests.

<sup>89</sup> See eg Aplin and Bosland (n 87) 267; Oster (n 43) 149-50; Smet (n 33) 235.

<sup>90</sup> Aplin and Bosland (n 87) 281-83.

<sup>91</sup> *Ibid*, 282-83.

<sup>92</sup> *Ibid*, 282.

<sup>93</sup> *Ibid*.

<sup>94</sup> *Ibid*, 283.

<sup>95</sup> *Ibid*.

have caused a consequential privacy harm. However, Aplin and Bosland note that this interpretation does not explain the mechanism by which reputational harm might cause such an infringement of private life.

When discussing the protection of reputation under Art 8, the Court employs several stock phrases to explain its link with the concept of private life. It may, for example, note that ‘private life’ under Art 8 extends to interests in ‘personal identity’,<sup>96</sup> or ‘psychological integrity’,<sup>97</sup> or ‘the right to establish and develop relationships with other human beings’.<sup>98</sup> Various theoretical justifications for these links have been proposed. Mullis and Scott use the ‘looking-glass self’ theory found in sociological literature to argue that harm to a person’s reputation may be reflected in harm to their self-worth, and therefore their ‘psychological integrity’.<sup>99</sup> The ‘sociality’ theory proposed by David Howarth highlights the importance of a person’s reputation to their social relationships.<sup>100</sup> In turn, the importance of social relationships to Art 8 has been explained by the Court in terms of the underlying value of personal autonomy.<sup>101</sup> But the lack of clarity and consistency in the Court’s jurisprudence means that these theories only partially fit the case law, and the precise link (or links) between the interest in reputation and the rights protected under Art 8 remains unclear.

### **Corporate reputation under Article 8**

Art 8 rights are normally considered to be applicable primarily to individuals, rather than companies. Nevertheless, the ECtHR has held that the protection of ‘home’ in Art 8

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<sup>96</sup> *Ion Cârstea v Romania* [2014] ECHR 1161, para 29.

<sup>97</sup> *Axel Springer AG v Germany* [2012] ECHR 227, para 83; *Putistin v Ukraine* [2013] ECHR 1286, para 32.

<sup>98</sup> *Kyriakides v Cyprus* [2008] ECHR 1087, para 49, citing *Niemietz v Germany* [1992] ECHR 80, para 29.

<sup>99</sup> Mullis and Scott (n 1) 41, citing Charles Cooley, *Human Nature and the Social Order* (Scribner 1902).

<sup>100</sup> Howarth (n 47).

<sup>101</sup> *Pretty v UK* [2002] ECHR 427, para 61.

extends to companies' business premises,<sup>102</sup> and the protection of 'correspondence' also applies to corporate applicants.<sup>103</sup> As such, it is at least possible that in the future the Court will interpret Art 8 as protecting corporate reputation. However, as noted in Gatley on Libel and Slander, 'bringing corporate reputation within art.8 would amount to a significant, as yet not clearly justified, extension of art.8's ambit.'<sup>104</sup> I argue in this section that no sufficient justification exists.

#### Relevance elsewhere in the Convention

One argument for protecting corporate reputation under Art 8 can be swiftly rejected: the argument that such a right must, or should, exist under Art 8 as a corollary of the Court's recognition that the Art 10 right to freedom of expression can permissibly be restricted to protect corporate reputation.<sup>105</sup> Peter Oliver, for example, relies on the Court's decisions in *Comingersoll SA v Portugal*,<sup>106</sup> *Steel*,<sup>107</sup> and *Uj v Hungary*,<sup>108</sup> suggesting that they 'strongly indicate that Article 8 ECHR protects the reputation of all economic actors.'<sup>109</sup> Oliver's argument is that in these cases 'the ECtHR has acknowledged the importance of a company's reputation in relation to other articles of the Convention':<sup>110</sup> in *Comingersoll* by awarding a company non-pecuniary compensation under Art 41 for reputational injury,<sup>111</sup> and in *Steel* and *Uj* by holding that, in principle, Art 10(2) permits speech to be restricted for the purpose of protecting corporate reputation. But acknowledging the

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<sup>102</sup> *Colas* (n 54) para 41.

<sup>103</sup> *Association for European Integration and Human Rights v Bulgaria* App no 62540/00 (ECtHR, 28 June 2007) para 60 ('AEIHR'); *Wieser and Bicos Beteiligungen GmbH v Austria* [2007] ECHR 815, para 45.

<sup>104</sup> Gatley (n 23) para 2.3.

<sup>105</sup> eg *Velu* (n 70) 19.

<sup>106</sup> [2000] ECHR 159.

<sup>107</sup> *Steel* (n 34).

<sup>108</sup> *Uj* (n 36).

<sup>109</sup> Peter Oliver, 'Privacy and Data Protection: Rights of Economic Actors' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart 2015) 314.

<sup>110</sup> *Ibid*, 313.

<sup>111</sup> *Comingersoll* (n 106) para 35, and the concurring opinion of Judge Rozakis at pp 9-10 (placing greater emphasis on reputation).

importance of corporate reputation in these contexts is not the same as declaring that it falls within the scope of Art 8. The permissibility of a restriction under Art 10(2) and the existence of a substantive right elsewhere in the Convention are separate questions. It may be worth noting that the Court mentioned its case law on corporate reputation under Art 10(2) in EDV.<sup>112</sup> Although it is not clear whether that case law contributed to the Court's assumption that Art 8 protects corporate reputation, to the extent that it did this reasoning is obviously incoherent.

### Positive and negative obligations

It has been argued that there cannot be an Art 8 right to corporate reputation (relevant to defamation law) because, under that Article, corporate applicants can only be victims of a member state's failure to fulfil its negative obligations, and the protection of a claimant's Art 8 rights in domestic defamation proceedings is an aspect of the state's positive obligations.<sup>113</sup>

Insofar as this argument points out that the Court has, to date, only granted the protection of Art 8 to corporate applicants in cases involving breaches of a state's negative obligations, it is accurate. In this sense, the argument has some weight: it suggests that the extension of the Art 8 right to reputation to companies in a defamation context would be a more significant step for the Court to take than it might otherwise seem. The Court has held that Art 8 will only give rise to positive obligations in 'exceptional cases where the State's failure to adopt measures interferes with [the applicant's] right to personal development and his or her right to establish and maintain relations with other human

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<sup>112</sup> EDV (n 14) para 21.

<sup>113</sup> B van der Sloot, 'Do Privacy and Data Protection Rules Apply to Legal Persons and Should They? A Proposal for a Two-Tiered System' (2015) 31 CLS Rev 26, 30-33.

beings and the outside world.’<sup>114</sup> This seems to be a high – possibly insurmountable – bar to the Court finding that states are under a positive obligation to protect corporate reputation.

However, the Court has also held that the ‘boundaries between the State’s positive and negative obligations under Article 8 do not lend themselves to precise definition’.<sup>115</sup> Moreover, in determining whether the Convention imposes a particular obligation, ‘the applicable principles are ... similar’ regardless of whether the purported obligation is positive or negative.<sup>116</sup> The fact that the interest in corporate reputation is more likely to be infringed by a state’s failure to act than by a state’s positive action seems unlikely to be an absolute bar to the existence of a Convention right, even if the Court has not yet imposed positive obligations on states to respect any of the Art 8 rights it has extended to companies. In *EDV*, the applicant claimed that the state had breached its positive obligations; the Court did not seem to consider this a barrier to the applicability of Art 8.<sup>117</sup>

The argument also conflates two conceptually distinct issues: the scope of the interests protected under a particular Convention right, and the nature of the obligations imposed on member states with respect to those interests.<sup>118</sup> Whether corporate reputation falls within the scope of Art 8 relates to the first of these issues; whether any Art 8 right to corporate reputation imposes positive obligations on member states is a distinct question. If no relevant interest under Art 8 is engaged by an injury to corporate reputation, the

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<sup>114</sup> *Šečić v Croatia* App no 40116/02 (ECtHR, 15 June 2006).

<sup>115</sup> *SH and others v Austria* [2011] ECHR 1878, para 87.

<sup>116</sup> *Ibid.*

<sup>117</sup> *EDV* (n 14) para 24.

<sup>118</sup> Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2<sup>nd</sup> edn, Princeton University Press 1996) 52-53, cited in Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Bloomsbury 2004) 222-24.

question whether a state is under a positive obligation with respect to that injury is nonsensical. And if the Court found that Art 8 protects corporate reputation in a case involving a state's negative obligations, it would seem illogical to deny the possibility that the interest in corporate reputation, now within the scope of Art 8, could also give rise to positive obligations in appropriate cases.

### Private life

Jan Oster argues that the right to reputation under Art 8 does not extend to corporate applicants, partly because, of the four categories of interest protected by Art 8 ('private life', 'family life', 'home', and 'correspondence'), only the latter two have thus far been held to protect legal persons by the ECtHR. Reputation, in contrast, is protected under the 'private life' arm of Art 8, which has not yet been applied to a company.<sup>119</sup> In fact, in one of the Court's decisions on the applicability of the 'correspondence' limb of Art 8 to a legal person, it suggested that 'it may be open to doubt whether, being such a person, [the applicant] can have a "private life" within the meaning of that provision'.<sup>120</sup>

However, the Court has consistently stated that 'Private life is a broad term, not susceptible to exhaustive definition',<sup>121</sup> and that it 'must not be interpreted restrictively'.<sup>122</sup> While the fact that it has not yet been extended to corporations indicates that the right to reputation subsumed within it should not be so extended, it cannot determine the question once and for all. The same argument was made with respect to the protection of 'home' under Art 8<sup>123</sup> before the Court decided that it applied to corporate

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<sup>119</sup> Oster (n 43) 261-62; Eileen Weinert, 'Firma EDV v Germany – Do Companies Have Feelings Too?' (2015) 26(2) Ent LR 50.

<sup>120</sup> AEIHR (n 103) para 60.

<sup>121</sup> Peck v UK [2003] ECHR 44, para 57.

<sup>122</sup> Von Vondel v The Netherlands [2008] ECHR 1884, para 48.

<sup>123</sup> See Emberland (n 8) 114-16.



business premises.<sup>124</sup> In fact, the Court's decision in EDV to proceed on the basis that corporate reputation falls within the scope of Art 8 implies that the 'private life' limb of Art 8 can apply to companies. In the passage of its judgment in which the Court assumes that 'the reputation of a company falls under the notion of private life',<sup>125</sup> there is no suggestion that the 'notion of private life' might itself be inapplicable to corporate applicants. In EDV there was also a complaint under Art 9 (freedom of thought, conscience and religion), which the Court declared inadmissible as being 'incompatible *ratione personae* with the provisions of the Convention'<sup>126</sup> because the applicant was 'a legal person founded exclusively for business purposes'.<sup>127</sup> The fact that this reasoning was employed in relation to the applicant's Art 9 claim, but not its Art 8 claim, suggests that, in the Court's view, the corporate, for-profit nature of an applicant will not necessarily mean that it cannot claim a right to respect for its 'private life' under Art 8.

#### Theoretical coherence

Oster's argument is not simply that the Court has not yet extended the protection of the 'private life' arm of Art 8 to corporate applicants. It is that, in principle, the 'concept of "private life" is intrinsically tied to individuals', and is therefore inapplicable to corporations; and that the ECtHR's justifications for protecting individual reputation under Art 8 are similarly inapplicable to companies.<sup>128</sup>

On the basis of the 'looking-glass self' interpretation of the ECtHR's jurisprudence, which links reputation to private life through the concept of 'psychological integrity',<sup>129</sup>

Mullis and Scott suggest that 'non-human legal individuals ... are able to rely on Article

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<sup>124</sup> Colas (n 54).

<sup>125</sup> EDV (n 14) para 23.

<sup>126</sup> Ibid, para 33.

<sup>127</sup> Ibid, para 31.

<sup>128</sup> Oster (n 43) 262.

<sup>129</sup> See text to note 99.

10(2) arguments only’ when seeking to protect their reputations.<sup>130</sup> Similarly, the ‘sociality’ justification, whereby reputation is protected because of its contribution to social relationships, is inapplicable to corporate reputation.<sup>131</sup> These rationales for protecting reputation under Art 8 have also been supported by English courts,<sup>132</sup> which may explain the tendency of those courts to regard Art 8 as inapplicable to corporate defamation claims.<sup>133</sup>

Nor do corporations have dignitary interests of the kind highlighted by Judge Loucaides in *London*.<sup>134</sup> The Court recognised this in the Art 10 case *Uj*:

...there is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status. Whereas the latter might have repercussions on one’s dignity, ... interests of commercial reputation are devoid of that moral dimension.<sup>135</sup>

The Court’s interpretation of Art 8 is influenced to some extent by the concept of ‘personality rights’ deriving from Continental civil law traditions.<sup>136</sup> This may be a further reason to doubt the applicability of Art 8 to corporate reputation, given that the personality rights to which corporations are entitled in these jurisdictions are less extensive than those available to natural persons.<sup>137</sup>

Whichever of the ECtHR’s vague justifications for protecting reputation under Art 8 is preferred, it is inapplicable to corporations on a conceptual level: companies have no

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<sup>130</sup> *Mullis and Scott* (n 1) 45-46. See also *Tomlinson* (n 57).

<sup>131</sup> *Howarth* (n 47) 874.

<sup>132</sup> eg *Re Guardian News and Media Ltd* [2010] UKSC 1, [42]; *Yeo* (n 57) [144]-[145]

<sup>133</sup> See text to notes 23-26.

<sup>134</sup> See text to notes 75-78.

<sup>135</sup> *Uj* (n 36) para 22. See also *MTE* (n 20) para 84; *Kharlamov v Russia* [2015] ECHR 860, para 29.

<sup>136</sup> See eg *Delfi AS v Estonia* (2016) 62 EHRR 6, Concurring Opinion of Judge Zupančič. Thanks to the anonymous reviewer for bringing this to my attention.

<sup>137</sup> Gert Brüggemeier, Aurelia Colombi Ciacchi and Patrick O’Callaghan (eds), *Personality Rights in European Tort Law* (Cambridge University Press 2010) 575; *Oster* (n 43) 257-58.

‘personal identity’, no ‘psychological integrity’, no ‘relationships with other human beings’, no dignity, and no personal autonomy.<sup>138</sup> As such, there is no good theoretical reason for the Court to extend the protection of reputation under Art 8 to corporate applicants.

As noted above, the cases in which the Court has extended other Art 8 rights to companies have all involved a state’s breach of its negative obligations.<sup>139</sup> In these cases, the Court’s reasons for imposing obligations tend to focus on the importance of maintaining the rule of law and preventing the arbitrary use of government power: for example, Marius Emberland notes that rule of law arguments were ‘essential’ to the Court’s decision to extend the Art 8 protection of ‘home’ to a corporate applicant in *Société Colas Est v France*.<sup>140</sup> As such, the rationales behind the Court’s extension to corporations of Art 8 rights other than reputation are also inapplicable to the interest in corporate reputation in the context of defamation law.<sup>141</sup>

Unfortunately, in the cases in which the Court has entertained the possibility that corporate reputation might fall within the scope of Art 8, it has relied on similarly vague reasoning to that which it employed in its earliest cases on the protection of individual reputation. The Court has simply asserted that the concept of ‘private life’ in Art 8 ‘encompasses’ reputation,<sup>142</sup> or that the right to reputation is ‘part of the right to respect for private life’.<sup>143</sup> These assertions, when employed in those early cases, were deficient

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<sup>138</sup> See eg Joint Committee on Human Rights, *Legislative Scrutiny: Defamation Bill (2012-13, HL 84, HC 810)* para 55.

<sup>139</sup> Text to note 113.

<sup>140</sup> Emberland (n 8) 46. See also Winfried H A M van den Muijsenbergh and Sam Rezai, ‘Corporations and the European Convention on Human Rights’ (2012) 25(1) *Global Business and Development Law Journal* 43, 56; van der Sloot (n 113) 30-32.

<sup>141</sup> van der Sloot (n 113) 30.

<sup>142</sup> EDV (n 14) para 21.

<sup>143</sup> MTE (n 20) para 57.

in explaining the link between reputation and private life. They remain so in the context of the interest in corporate reputation.

#### Other arguments in favour of Article 8 protection

Eileen Weinert, although not in support of the Court's decision in *EDV*, suggests that 'respect for the right to reputation appears to have crept in to art 8 through the back door and if that state of affairs is accepted, it is no great stretch to afford the protection to companies who are, after all, entitled to protect their goodwill.'<sup>144</sup> Hugh Tomlinson, similarly, considers it 'perhaps unsurprising' that the Court would find a corporate right to reputation to exist under Art 8, given its previous case law on corporate privacy rights.<sup>145</sup> This may be correct.<sup>146</sup> But whether such a finding would be surprising has no bearing on whether it would be legally or conceptually appropriate.

The second strand of Weinert's statement – that companies are 'entitled to protect their goodwill' – seems to presume that a company's interest in its goodwill might somehow be relevant to Art 8. Oliver makes a similar argument: noting the protection of personal reputation under Art 8, he suggests that 'Logically, the same should apply to businesses, since if their reputation is tarnished, they can be ruined.'<sup>147</sup> It is obviously plausible to argue that a business might be ruined by reputational harm, but that does not mean that this harm is relevant to the Art 8 right to private life. As Mullis and Scott argue:

The dimension of reputation that is appropriately conceived as a property interest is not unimportant, but there must be real concerns over affording it protection

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<sup>144</sup> Weinert (n 119) 52.

<sup>145</sup> Tomlinson (n 57).

<sup>146</sup> See text to notes 201-210.

<sup>147</sup> Oliver (n 109) 313.

under Article 8 when it is inherently an extrinsic, perhaps a financial, form of harm.<sup>148</sup>

One final argument, also put forward by Tomlinson, is that ‘The extension of the right would mean that defamation cases brought by both companies and individuals could be considered within the same analytical framework.’<sup>149</sup> It is not clear why Tomlinson thinks this would result in an ‘improvement in analytical clarity’,<sup>150</sup> given that individual and corporate claimants are already subject to different rules in English defamation law. Tomlinson also suggests that the balancing exercise between Arts 8 and 10 would operate differently in cases involving corporate claimants, reflecting the different nature of their reputational interests.<sup>151</sup> If taking those different characteristics into account at the balancing stage would not result in a lack of ‘analytical clarity’, then it is difficult to see why taking them into account at a previous stage – when determining which, if any, Convention rights are engaged – would be problematic.

## **Summary**

I have argued in this section that there is no good justification in the ECtHR jurisprudence on the protection of individual reputation under Art 8 for the Court to extend that protection to corporations, and that it would be conceptually inappropriate for it to do so. In the next section, I consider the potential applicability of A1P1 to corporate reputation, as an alternative to Art 8.

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<sup>148</sup> Mullis and Scott (n 1) 40-41.

<sup>149</sup> Tomlinson (n 57).

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

## **Article 1, Protocol 1**

In addition to leaving open the applicability of Art 8 to corporate reputation, the ECtHR in EDV left open the applicability of A1P1,<sup>152</sup> the right to property, which reads as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

As legal persons are explicitly referred to as beneficiaries of A1P1 rights, the key question here is whether corporate reputation can be considered a ‘possession’, thereby falling within the scope of A1P1. I argue in this section that corporate reputation is not a possession for this purpose, and should not be protected by A1P1.

### **Goodwill**

The concept of ‘possessions’ in A1P1 is not limited to physical things: ‘certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions”’.<sup>153</sup> Since corporate reputation is often described as an intangible asset in its own right,<sup>154</sup> or an element of the intangible asset ‘goodwill’,<sup>155</sup> there is at least a plausible argument that it might constitute a ‘possession’ for the purposes of A1P1.

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<sup>152</sup> EDV (n 14) para 34.

<sup>153</sup> *Anheuser-Busch Inc v Portugal* App no 73049/01 (ECtHR, 11 January 2007) para 63.

<sup>154</sup> *Jameel* (n 40) [91].

<sup>155</sup> *Trego v Hunt* [1896] AC 7 (HL) 24 (Lord Macnaghten): goodwill ‘is the whole advantage, whatever it may be, of the reputation and connection of the firm’.

The Court has ruled in several cases that the goodwill of a professional practice,<sup>156</sup> or of a ‘business engaged in commerce’,<sup>157</sup> can be a possession. Oster suggests that the interest in corporate reputation ‘neatly fits’ with these cases, and could therefore be protected under A1P1.<sup>158</sup> Similarly, Alastair Mowbray argues that the case of *Tre Traktörer v Sweden* (in which the Court found that A1P1 was engaged by the withdrawal from a restaurant of its licence to serve alcohol, because of the ‘adverse effects on the goodwill and value of the restaurant’ caused by that withdrawal<sup>159</sup>) indicates that A1P1 can protect ‘non-material commercial interests such as the goodwill (ie the financial value of a company’s reputation) of established businesses.’<sup>160</sup> However, I argue that this line of cases does not support the view that corporate reputation itself constitutes a ‘possession’.

In the first case on the protection of goodwill under A1P1, *Van Marle v The Netherlands*, the applicants complained of a state action that they alleged had caused a diminution in ‘the value of the goodwill of their accountancy practices’.<sup>161</sup> The Court held that the ‘right to goodwill’ claimed by the applicants ‘may be likened to the right of property’ in A1P1, because ‘by dint of their own work, the applicants had built up a clientele; this had in many respects the nature of a private right and constituted an asset and, hence, a possession’.<sup>162</sup> It is unfortunate that the Court’s reasoning here is so opaque. This has not been helped by its subsequent decisions: for example, in *Wendenburg v Germany*, the Court’s description of the applicants’ law practices, and the clientele of those practices, as ‘entities of a certain worth that have in many respects the nature of a private right and

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<sup>156</sup> *Van Marle v The Netherlands* [1986] ECHR 6.

<sup>157</sup> *Malik v UK* [2012] ECHR 438, para 93; *Denimark Ltd v UK* (2000) 30 EHRR CD144, 150.

<sup>158</sup> Oster (n 43) 263. See also Gary K Y Chan, ‘Corporate Defamation: Reputation, Rights and Remedies’ (2013) 33(2) LS 264, 269.

<sup>159</sup> *Tre Traktörer Aktiebolag v Sweden* [1989] ECHR 15, para 53.

<sup>160</sup> Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights* (2<sup>nd</sup> edn, OUP 2007) 906 (the 3<sup>rd</sup> edn does not cover A1P1).

<sup>161</sup> *Van Marle* (n 156) para 39.

<sup>162</sup> *Ibid*, para 41.

thus constitute assets and therefore possessions'<sup>163</sup> is so unclear as to be almost meaningless.

The Court's jurisprudence identifying goodwill as a possession also seems to conflict with a related line of cases in which it has held that a loss of future income will not engage A1P1, because that Article 'does not ... guarantee the right to acquire property'.<sup>164</sup> For example, in *Ian Edgar (Liverpool) Ltd v UK*, the Court ruled that the applicant's claim to property in goodwill 'based upon the profits generated by the business' was in substance a complaint of a 'loss of future income', and therefore fell outside the scope of A1P1.<sup>165</sup> This apparent conflict has caused problems for English courts attempting to interpret this strand of the ECtHR's case law.<sup>166</sup>

### Marketability

The interpretation that has been preferred by the English courts is that goodwill only constitutes a possession in its own right if it is capable of being sold by the applicant.<sup>167</sup> The issue arose in the Court of Appeal in *R (Malik) v Waltham Forest NHS Primary Care Trust*,<sup>168</sup> which involved the suspension of the claimant doctor from a list of persons entitled to perform services for the NHS, and the resulting loss of goodwill, including reputation, alleged to have been suffered by the claimant's practice. The claimant was precluded by law from selling the goodwill in his practice.<sup>169</sup>

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<sup>163</sup> *Wendenburg v Germany* App no 71630/01 (ECtHR, 6 February 2003).

<sup>164</sup> *JA Pye (Oxford) Ltd v UK* [2007] ECHR 700, para 61.

<sup>165</sup> *Ian Edgar (Liverpool) Ltd v UK* [2000] ECHR 700. See also *Denimark (n 157) 150*; *Levänen v Finland* App no 34600/03 (ECtHR, 11 April 2006).

<sup>166</sup> Anish Bhasin, 'Future Income Versus Goodwill under A1P1 – A Distinction without a Difference?' (2012) 17(3) JR 226.

<sup>167</sup> *Nicholds v Security Industry Authority* [2006] EWHC 1792 (Admin) [73].

<sup>168</sup> [2007] EWCA Civ 265.

<sup>169</sup> *Ibid*, [23].



Auld LJ endorsed the ‘marketability’ standard for determining whether goodwill constitutes a possession under A1P1.<sup>170</sup> Under this approach, corporate reputation should not be considered a possession. As Moses LJ observed, the reputation element of goodwill, although it may be of significant value, is not marketable.<sup>171</sup> A company cannot sell its reputation, because the reputation cannot be separated from the company itself.<sup>172</sup>

#### Future income

The argument that marketability is required for goodwill to fall within the scope of A1P1 was doubted by Rix LJ, partly on the basis that the ECtHR jurisprudence focuses on the ‘goodwill ... of professionals with respect to their clientele ... [and] such goodwill is not readily marketable’.<sup>173</sup>

However, it is not necessary to accept the marketability interpretation to reach the conclusion that the financial value of a company’s reputation lies in its effect on future earnings,<sup>174</sup> and therefore that it should not be considered a ‘possession’ under A1P1. In Moses LJ’s judgment, the lack of A1P1 protection for future income precluded reputation from falling within the article’s scope:

[Reputation] has no economic value other than being that which a professional man may exploit in order to earn or increase his earnings for the future. If the principle that the ability to earn future income is not a possession within [A1P1] is to be maintained, it must follow that if the element of goodwill which has [been]

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<sup>170</sup> Ibid, [40].

<sup>171</sup> Ibid, [85].

<sup>172</sup> David Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate 2008) 21; Kenneth H Craik, *Reputation: A Network Interpretation* (OUP 2009) xvii; *ConAgra Inc v McCain Foods (Aust) Pty Ltd* (1992) 33 FCR 302, 340.

<sup>173</sup> *R (Malik)* (n 168) [65]. See also *Malik v UK* (n 157) para 99.

<sup>174</sup> Meiring De Villiers, ‘Quantitative Proof of Reputational Harm’ (2010) 15 *Fordham Journal of Corporate and Financial Law* 567, 579.

or may be damaged is reputation, or the loyalty of past clients, that element is not to be identified as a possession.<sup>175</sup>

Regardless of whether the ECtHR jurisprudence establishes a ‘marketability’ standard for the protection of goodwill as a possession, then, the reputation component of a company’s goodwill will not, in its own right, fall within the scope of A1P1, because its financial value is solely attributable to its effect on the company’s future financial performance, and expectations of future income are not ‘possessions’.<sup>176</sup> Even where a company can demonstrate that a reputational injury has caused a fall in revenue, A1P1 will not be engaged because there is no interference with an existing possession: as put by Baroness Hale, there is ‘no Convention right to continue to enjoy a particular level of trade.’<sup>177</sup>

### Ownership

Even if the preceding argument fails, and a company’s reputation does constitute an element of its goodwill that has an identifiable current value distinct from its contribution to the company’s future income, there is a further reason that it should not be protected under A1P1. On one interpretation of its goodwill jurisprudence, the ECtHR has not been protecting goodwill per se as a possession, but the contribution it makes to the value of a distinct asset. If this interpretation is correct, it is doubtful whether a company could be considered to ‘own’ any relevant possession that might be affected by a reputational injury.

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<sup>175</sup> *Ibid*, [86].

<sup>176</sup> *Marckx v Belgium* [1979] ECHR 2, para 50.

<sup>177</sup> *Countryside Alliance* (n 51) [128].

The Court's treatment of goodwill as a possession developed in cases brought by individual applicants in respect of a loss of goodwill in their professional practices.<sup>178</sup> In subsequent decisions, the Court has described this line of cases as establishing that 'goodwill may be an element in the valuation of a professional practice'.<sup>179</sup> The Court has sometimes referred to the goodwill of businesses in cases involving the withdrawal of, or refusal to grant, licences;<sup>180</sup> but in *Malik* it stated that in these cases it 'has tended to regard as a "possession" the underlying business or professional practice in question.'<sup>181</sup> In other words, when identifying 'goodwill' as a possession, the Court has in fact been protecting the contribution made by that goodwill to the value of a distinct asset – a business or professional practice – owned by the applicant. Where goodwill in that sense is injured, the result is a fall in the value of the relevant asset, which can sensibly be described as an interference with the applicant's property in that asset.

In contrast, whenever a corporate applicant has complained of a loss of its own goodwill, the Court has rejected its application on the basis that it amounted to a complaint of loss of future income.<sup>182</sup> The reputation of a company attaches to the company itself; any value that it has contributes to the value of the company, not to any of the company's assets. As such, a fall in the value of a company's reputation ultimately manifests itself as a fall in the value of the company itself. This cannot represent a diminution of the value of an asset owned by the company, because the company cannot own itself.<sup>183</sup> The proper claimants in respect of a fall in the value of a company would be its shareholders or owners.<sup>184</sup> Since

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<sup>178</sup> eg *Olbertz v Germany* App no 37592/97 (ECtHR, 25 May 1999); *Döring v Germany* App no 37595/97 (ECtHR, 9 November 1999); *Wendenburg* (n 163); *Buzescu v Romania* App no 61302/00 (ECtHR, 24 May 2005).

<sup>179</sup> *Ian Edgar* (n 165); *Denimark* (n 157); *Malik v UK* (n 157) para 93 (emphasis added).

<sup>180</sup> eg *Tre Traktörer* (n 159) para 53.

<sup>181</sup> *Malik v UK* (n 157) para 94 (emphasis added).

<sup>182</sup> *Ian Edgar* (n 165); *Denimark* (n 157).

<sup>183</sup> See eg *Lonrho plc v Fayed* (No 5) [1994] 1 All ER 188 (CA) 196.

<sup>184</sup> *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL) 61-62.

a claim in libel can only properly be brought to protect the reputation of the claimant, not of the claimant's assets,<sup>185</sup> on this interpretation of the Strasbourg jurisprudence the corporate interest in reputation protected in defamation law cannot constitute a possession under A1P1.

### **Other arguments**

Oster argues that corporate reputation is, or ought to be, encompassed by A1P1.<sup>186</sup> One strand of his argument is based on Robert Post's theory identifying three conceptions of reputation that have influenced the development of defamation law: reputation as property, honour, and dignity.<sup>187</sup> Noting that companies can make no sensible claim to Post's conceptions of reputation as honour or dignity, Oster argues that 'it is a distinctive feature of a company's suit for defamation that it may exclusively be explained by the conception of reputation as property.'<sup>188</sup>

But the observation that a corporation has no claim to dignity or honour only leads to the conclusion that its reputation can exclusively be conceptualised as property if one accepts Post's three conceptions as coherent and exhaustive. Post himself did not claim that his conceptions were exhaustive.<sup>189</sup> Further, there are good reasons to reject the characterisation of corporate reputation as in itself a form of property. For example, it is not alienable separately from the company to which it attaches, and alienability is seen by some as a core characteristic of property.<sup>190</sup> The fact that a good reputation has

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<sup>185</sup> See eg *Joyce v Sengupta* [1993] 1 WLR 337 (CA) 341.

<sup>186</sup> Oster (n 43) 262-63.

<sup>187</sup> Robert C Post, 'The Social Foundations of Defamation: Reputation and the Constitution' (1986) 74 CLR 691. The 'property' conception is described at 693-99.

<sup>188</sup> Oster (n 43) 259 (emphasis in original).

<sup>189</sup> Post (n 187) 693.

<sup>190</sup> Rolph (n 172) 21.

pecuniary value to a company does not necessarily lead to the conclusion that it should be characterised as a form of property.<sup>191</sup>

In English law, although a company's goodwill is in some circumstances its property, not all aspects of a company's reputation count as goodwill.<sup>192</sup> For example, goodwill is treated as a property interest in the tort of passing off, but 'mere reputation ... does not by itself constitute ... property' in the context of that tort.<sup>193</sup>

More importantly, the characterisation of corporate reputation as property, whether in theory or in domestic law, is not determinative of whether it is a 'possession' under A1P1. The concept of 'possessions' that dictates the scope of A1P1 protection is autonomous, and does not necessarily reflect the position in domestic law.<sup>194</sup> Van Marle itself is a good example: the ECtHR in that case was unswayed by the state's argument that in Dutch law 'there was no such thing as a "right to goodwill" which could be regarded as property'.<sup>195</sup> There would be even less reason for the Court, if asked to decide whether corporate reputation is a possession under A1P1, to base its decision on the interest's fit with the conceptions of reputation described by Robert Post.

It might also be pointed out that, in common with corporate Art 8 rights, to date the Court has only protected goodwill under A1P1 in cases where the interference in question resulted directly from state action.<sup>196</sup> If a right to corporate reputation is found to exist under A1P1, then it will only affect English defamation law if it gives rise to positive obligations. As argued with respect to Art 8, this may make it less likely that the ECtHR

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<sup>191</sup> Lawrence McNamara, *Reputation and Defamation* (OUP 2007) 42.

<sup>192</sup> Lonrho (n 183) 196.

<sup>193</sup> *Anheuser-Busch Inc v Budejovicky Budvar NP* [1984] FSR 413 (CA) 470 (Oliver LJ). See also *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2015] UKSC 31, [52].

<sup>194</sup> *Öneryildiz v Turkey* [2004] ECHR 657, para 124.

<sup>195</sup> *Van Marle* (n 156) para 40.

<sup>196</sup> *R (Malik)* (n 168) [21].

will find a corporate right to reputation to exist in the context of a defamation dispute, but it is probably not a barrier to the existence of the right.<sup>197</sup>

### **Summary**

A1P1 does not protect corporate reputation. This is either because a company's reputation is not 'marketable'; because its financial value lies in its effect on future earnings, which are unprotected by A1P1; or because it makes no contribution to the value of a distinct asset owned by the company. The characterisation of reputation as 'property', either in theory or domestic law, should not override these arguments.

### **Conclusion: cause for concern**

I have argued that there is no good justification, whether in the ECtHR's jurisprudence or in theory, for the existence of a Convention right to corporate reputation. Nevertheless, the EDV decision indicates that the Court is willing to entertain the possibility that it will find such a right to exist in the future. The apparent ease with which the Court has assumed that corporate reputation might fall within the scope of Art 8 or A1P1 should be concerning. The discovery of a Convention right to corporate reputation could have important consequences for English corporate defamation law, both in terms of its current application and in its effect on future reform efforts.<sup>198</sup>

If found to exist under Art 8 specifically, a right to corporate reputation could even make English defamation law incompatible with the Convention, because of the Defamation Act 2013, sub-s 1(2), which requires for-profit corporate claimants to show 'serious financial loss', or a likelihood thereof, to succeed in a defamation action. The ECtHR has ruled that reputational harm will only engage Art 8 subject to a threshold of seriousness,

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<sup>197</sup> cf *Legal & General Assurance Ltd v Kirk* [2001] EWCA Civ 1803, [33], [42].

<sup>198</sup> See text to notes 38-65.

and this threshold would also apply to corporate applicants.<sup>199</sup> But the threshold adopted by the ECtHR relates to the seriousness of the ‘attack’ on reputation, whereas the sub-s 1(2) threshold relates to the existence or probability of financial consequences of a reputational injury. It is difficult to see the ECtHR, treating a company’s reputation as ‘part of’ its right to private life, requiring it to show a distinct category of consequential loss for an attack on its reputation to engage Art 8.

Further, and to my mind more importantly, there is a strong interest in the ECtHR’s interpretation of Convention rights being conceptually coherent, both to protect the Court’s legitimacy and ability to influence domestic rights protection,<sup>200</sup> and as a matter of principle. As such, a Convention right to reputation should not be extended to corporations unless there is a strong justification for doing so.

But, despite the arguments against a Convention right to corporate reputation made above, it is not implausible to think that the Court might find such a right to exist: it has form in extending Convention rights to corporate applicants without sufficiently considering whether doing so would be conceptually appropriate.<sup>201</sup>

Two cases in particular illustrate this problem: *Comingersoll SA v Portugal*<sup>202</sup> and *Société Colas Est v France*.<sup>203</sup> In the former, the Court decided that a corporation was entitled to non-pecuniary compensation under Art 41, taking into account ‘the company’s reputation, uncertainty in decision-planning, disruption in the management of the company ... [and] the anxiety and inconvenience caused to the members of the

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<sup>199</sup> *Ärzttekammer* (n 22) para 62.

<sup>200</sup> See eg Lord Hoffmann, ‘The Universality of Human Rights’ (Judicial Studies Board Annual Lecture, 19 March 2009) at <<https://www.judiciary.gov.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/>>.

<sup>201</sup> Anna Grear, ‘Challenging Corporate ‘Humanity’: Legal Disembodiment, Embodiment and Human Rights’ (2007) 7(3) HRLR 511, 537-38; *Emberland* (n 8) 200.

<sup>202</sup> *Comingersoll* (n 106).

<sup>203</sup> *Colas* (n 54).

management team.’<sup>204</sup> In the latter, the Court held that the word ‘home’ in Art 8 included a company’s business premises.<sup>205</sup> As discussed above, the Court’s reasoning in both of these cases was influenced by concerns relating to the rule of law.<sup>206</sup> Emberland suggests that, when the Court relies on this kind of argument, it ‘pays scant, if any, attention to what form of person or what kinds of interests ... would benefit’.<sup>207</sup>

Rule of law arguments are unlikely to be important in a typical corporate defamation claim. But in both *Colas* and *Comingersoll* the Court also relied on the ‘dynamic interpretation’ concept. While the Court’s use of the ‘dynamic’ or ‘evolutive’ method of interpretation is usually based on its assessment of the changing conditions in which it is required to apply the Convention, or the developing consensus among member states as to the appropriate minimum standards for human rights protection,<sup>208</sup> its use in *Comingersoll* and *Colas* was based instead on the ‘gradual and case-by-case extension of the Convention’s scope as a form of “snowball effect.”’<sup>209</sup> Emberland has characterised this method of reasoning as relying on the Court’s ‘belief in the inevitable expansion of the Convention’, and noted that this belief ‘has the capacity ... to prevail over profound disagreement within the Court as to the nature and purpose of ECHR protection.’<sup>210</sup>

Although expanding the scope of Convention protection is not necessarily problematic, it is more likely to be where the beneficiaries are corporations rather than human beings.<sup>211</sup>

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<sup>204</sup> *Comingersoll* (n 106) para 35.

<sup>205</sup> *Colas* (n 54) para 41.

<sup>206</sup> See text to notes 139-140.

<sup>207</sup> Emberland (n 8) 46.

<sup>208</sup> See eg George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007).

<sup>209</sup> Marius Emberland, ‘Protection against Unwarranted Searches and Seizures of Corporate Premises under Article 8 of the European Convention on Human Rights: The *Colas Est SA v France* Approach’ (2003) 25 *Mich J Int’l L* 77, 93. See also van den Muijsenberg and Rezai (n 140) 59.

<sup>210</sup> Marius Emberland, ‘Compensating Companies for Non-Pecuniary Damage: *Comingersoll SA v Portugal* and the Ambivalent Expansion of the ECHR Scope’ (2004) 74(1) *British Yearbook of International Law* 409, 432.

<sup>211</sup> *Ibid.*



The different characteristics of human and legal persons should encourage caution in extending to the latter fundamental rights designed with the former in mind. The ease with which the Court has abandoned this caution in the past should raise concerns regarding the likelihood that it will properly take into account the nature of corporate reputation if it is asked to decide whether that interest falls within the scope of a Convention right in the future.