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How to assess privacy violations in the age of Big Data? Analysing the three different tests developed by the ECtHR and adding for a fourth one

It is commonly believed that privacy cases are resolved by balancing the private interest (e.g. personal autonomy) and the common interest (e.g. national security) involved with a particular privacy violation. Clearly, this approach no longer holds in the age of Big Data, in which massive amounts of personal data are gathered without a pre-established goal. Not only is the balancing test inapplicable because it is often unclear how certain data gathering and processing initiatives improve the societal interest. It is also hard to demonstrate whether and if so how an individual has suffered from such massive data processing systems. Besides the balancing test, however, the ECtHR applies two other tests when dealing with privacy issues. Both have an added value when applied to privacy violations following from Big Data processes. Still, if Article 8 ECHR is to retain its significance in the new technological environment, it might be necessary to develop a new test, the rudiments of which might already be found in the Court's case law.

1. Introduction

Ever since Mill's *On Liberty*,² the notion of harm has been at the centre of Western liberal democracies' legal discourse. Not only is harm a prominent concept when discussing the limits of governments, personal injury is also a prerequisite for claiming a subjective (human) right. Thus, in principle, a person may only invoke a right to privacy if there has been a setback to his interests.³ In the field of privacy, the notion of harm has always been problematic as it is often difficult to substantiate the harm a particular violation has done, e.g. what harm follows from entering a home or eavesdropping on a telephone conversation as such when neither objects are stolen nor private information disclosed to third parties? Even so, the traditional privacy violations (house searches, telephone taps, etc.) are clearly demarcated in time, place and person and the effects are therefore relatively easy to define. Not surprisingly, the notion of harm has been a prominent concept in the approach of the European Court of Human Rights (ECtHR) when assessing cases under Article 8 of the European Convention on Human Rights (ECHR), containing the right to privacy and specifying in the first paragraph: 'Everyone has the right to respect for his private and family life, his home and his correspondence'.

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² J S Mill, *On Liberty and Other Writings* (Cambridge University Press, 1989).

³ J Feinberg, *Harm to others* (Oxford University Press, 1984).

In the current technological environment, however, the notion of harm is becoming increasingly problematic.⁴ Often, an individual is simply unaware that his personal data are gathered by either his fellow citizens (e.g. through the use of their smartphones), by companies (e.g. by tracking cookies) or by governments (e.g. through covert surveillance). Obviously, people unaware of the fact that their data are gathered will not invoke their right to privacy in court. But even if a person would be aware of these data collections, given the fact that data gathering and processing will be so widespread and omnipresent in the near future, it will quite likely be impossible for him to keep track of every data processing which includes (or might include) his data, to assess whether the data controller abides by the legal standards applicable, and if not, to file a legal complaint. And if an individual does go to court to defend his rights, he has to demonstrate a personal interest, i.e. personal harm, which is a particularly problematic notion in Big Data processes. For example, what concrete harm has the NSA's data gathering done to the ordinary citizen? This also shows the fundamental tension between the traditional legal and philosophical discourse and the new technological reality – while the traditional discourse is focused on individual rights and individual interests, Big Data processes often regard a structural development and a societal interest.

The other way around, the traditional paradigm also presupposes a clear and demarcated societal interest served with a particular (privacy) infringement, e.g. entering the home of a person who is suspected of a murder for the interest of maintaining order and combatting crime. With Big Data processes, however, the relation between the data collection and processing of personal data of a specific person, and the beneficial consequences for the promotion of national security is often vague and abstract, not in the last place, because the data gathering begins before a specific suspicion has arisen, not afterwards. Data are gathered and processed, only to evaluate at a later stage which data are valuable and for what purpose they might be used. Especially in legal cases, in which the balance between interests is assessed on an individual level, it is often difficult to determine what beneficial consequences the data gathering of this particular person has had on the promotion of national security. This again in contrast to traditional privacy infringements where, for example, information was gathered about a specific person to determine whether he had engaged in a criminal activity.

This new technological reality and the fact that neither the private nor the public interest involved with a privacy violation are particularly clear undermine a common way in which privacy cases are approached, namely by balancing the individual interest (e.g. connected to human dignity or individual autonomy) against the societal interest (e.g. related to the promotion of security).⁵ This fact has gotten much attention recently and there are numerous scholars that have tried to develop alternative privacy theories, which do not focus on individual harm. For example, some argue that a focus on the technology, rather than the concrete individual harm, may be a promising path for addressing modern privacy violations.⁶ Others have proposed to formulate privacy concerns as a matter of due process or legality⁷ – rules of due process and legality are not bound by the traditional correlation between rights and duties as they regard duties which the state must respect even when there is no concrete sign of individual harm: they function as the minimum conditions for the legitimacy of the state. Given the prominence of group profiling, there is also an increasing trend to focus on

⁴ B van der Sloot, 'Privacy in the Post-NSA Era: Time for a Fundamental Revision?' (2014) JIPITEC 1.

⁵ C Ovey & R C A White, *European Convention on Human Rights* (Oxford University Press, 2002), 209. P Leach, *Taking a Case to the European Court of Human Rights* (Oxford University Press, 2005), 163. D J Harris, M O'Boyle, E P Bates & C M Buckley, *Law of the European Convention on Human Rights* (Oxford University Press, 2009), 358. P van Dijk & G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer Law International, 1998), 81.

⁶ D Gray & D Citron, 'The Right to Quantitative Privacy' (2013) *Minnesota Law Review* 98.

⁷ G P Fletcher, 'Privacy as legality'. In: *Liberty and the rule of law* (Texas A&M University Press, 1979).

group rights instead of individual rights.⁸ This approach suggests to transpose both the claimant of a right and the interests served by claiming a right to a group level, thereby overcoming the focus on the individual. Finally, there are those who have argued that privacy should be regarded as a public good or a societal interest,⁹ rather than or in addition to the focus on the individual interest.

All of these suggestions are clearly very valuable as they try to overcome the requirement of individual harm. However, it might be equally valuable to assess in how far there might be alternatives to the balancing test. This contribution takes as starting point a case which has been recently submitted to the Court, regarding NSA-like data gathering by the British Secret Services,¹⁰ and asks how the Court should approach privacy violations stemming from Big Data processes. A broader perspective on privacy issues is taken (i.e. not restricted to technological matters) in order to distinguish three different tests the ECtHR uses when assessing three different kinds of privacy violations: the necessity test, the balancing test and the unreasonable burden test. It argues that, as has been stressed in the previous paragraphs, the balancing test is difficult to apply to modern privacy infringements revolving around Big Data. The other two tests, however, have a clear added value when analysing privacy violations in the new technological environment. In the end, however, it might be necessary to develop a fourth and final test, the rudiments of which might already be found in the Court's case law.

In this contribution, a number of points will be made. First it will be argued that although most rationales for legitimately limiting the right to privacy under Article 8 ECHR were originally linked to maintaining public order and ensuring effective law enforcement, the Court has gradually accepted economic prosperity and the respect for moral opinions and cultural traditions as independent rationales for infringing on the right to privacy (section 2). Second, this has had an important influence on the Court's approach towards assessing the common interest involved with a certain infringement (section 3), and, third, on the way it weighs it against the private interest of the applicants (section 4).¹¹ It will be argued that the Court has developed three tests in relation to the three different groups of rationales and that these reflect three philosophical traditions towards reconciling the private with the public interest. Finally, it will be analysed how these tests might be applied to issues revolving around Big Data and it will be argued that a fourth test should be introduced, which may be distilled from the Court's existing case law (section 5).

2. Rationales for limiting privacy

⁸ L Floridi, 'Open Data, Data Protection, and Group Privacy' (2014) 27 *Philosophy and Technology* 1.

⁹ J Fairfield & C Engel, 'Privacy as public good',

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418445>. B van der Sloot, 'Do data protection rules protect the individual and should they? An assessment of the proposed General Data Protection Regulation', (2014) *International Data Privacy Law* 4.

¹⁰ ECtHR, *Big Brother Watch and others v. the United Kingdom*, application no. 58170/13, Communicated Case, 07/01/2014.

¹¹ Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 *The European Journal of International Law* 5. A Nieuwenhuis, 'European Court of Human Rights. State and Religion, Schools and Scarves, An Analysis of the Margin of Appreciation as Used in the Case of Leyla Sahin v. Turkey, Decision of 29 June 2004, Application Number 44774/98' (2005) *European Constitutional Law Review* 1. S Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?' (2010) *UCL Human Rights Review* 03. T Lewis, 'What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56 *International and Comparative Law Quarterly* 02. J A Sweeney, 'Margins of appreciation: cultural relativity and the European Court of Human Rights in the post-Cold War era' (2005) 54 *International and Comparative Law Quarterly* 2.

Before focusing on three specific rationales for limiting privacy in subsections 2.1, 2.2 and 2.3, a brief introduction of the legislative history of Article 8 ECHR will be provided. It should first be noted that during the drafting phase of the ECHR, two alternative texts circulated. Alternative A opted for the method of enumeration, providing a list of essential human rights in one article and a general limitation clause in another provision. Alternative B, which finally prevailed, propagated the method of precise definition, describing a separate right per article and specifying in detail whether, and if so under which conditions, a specific right may be legitimately curtailed by the state. The Convention contains three types of rights: non-derogable rights, i.e. the right to life (except in respect of deaths resulting from lawful acts of war), the prohibition of torture and of slavery, and the *nulla poena sine lege* principle; rights which may be waived only in the state of emergency,¹² such as the prohibition on forced labour, the right to liberty and security, the right to a fair trial, and the right to an effective remedy; and, finally, rights which, under the specific conditions listed in the articles in question, may be legitimately restricted in times of peace, such as the right to privacy, the freedom of thought and religion, the freedom of expression, and the right to assembly and association.¹³

When restricting the latter rights, commonly referred to as qualified rights, governments must fulfil three conditions: the infringement should be provided for by law, it should aim at one of the rationales specified in the Convention and it should be necessary in a democratic society. The first criterion is commonly referred to as the ‘rule of law test’. It provides, among others, that there must be a law on which the interference is based and in which the authorities are provided with the specific competence to act by the democratic legislator. These legal provisions must be accessible to the citizen and be sufficiently precise and clear to enable a person to reasonably foresee the consequences of his actions. Finally, the law must provide effective safeguards against arbitrary interferences and the abuse of power by the executive branch. The second criterion is not a test in itself, not only because utter arbitrary interferences will commonly not be provided for by law, but primarily because it is subsumed in the ‘democratic necessity test’. In this test, the Court evaluates whether a certain interference is ‘necessary in relation to the aims pursued’. The second and third step are thus merged into one test.

In Articles 8-11 of the Convention, specifying the four qualified rights, two types of legitimate aims are provided. First, there are those rationales that focus on the common interest, for instance on national security, crime prevention, or maintaining the impartiality of the judiciary. Second, private interests are covered by the phrase ‘for the protection of the rights and freedoms of others’, which is included in Articles 8 (right to privacy), 9 (freedom of religion), and 11 (freedom of association), and, referring to ‘the protection of the reputation or rights of others’, in Article 10 (freedom of expression). In contrast to the other three provisions,¹⁴ private interest did not originally constitute a legitimate rationale for curtailing the right to privacy in the draft Convention, which in Article 8 ECHR only referred to the interests of national security, public safety, the prevention of disorder or crime, and the protection of health or morals.¹⁵ It was inserted only later, in order to provide rules ‘under which the party to a civil action may be compelled to give disclosure of his documents to the

¹² Article 15 ECHR paragraph 2.

¹³ Article 12 ECHR has a special status and will not be discussed in detail.

¹⁴ The first draft of Alternative B did not originally contain a right to privacy as this was thought to be subsumed by the freedom of association and information. A H Robertson, *Collected edition of the 'travaux préparatoires' of the European Convention on Human Rights = Recueil des travaux préparatoires de la Convention Européenne des Droits de l'Homme; Council of Europe. Vol. 4 Committee of Experts, Committee of Ministers, Conference of Senior Officials, 30 March-June 1950* (Nijhoff, 1975), p. 110.

¹⁵ *Ibid* 222.

other party'.¹⁶ However, although protection of private interests has played an important role in the case law of the Court, especially in relation to the freedom of expression, it has seldom been used with regard to Article 8 ECHR as rationale for curtailing the right to privacy.¹⁷

If the Court does refer to the protection of the rights and freedoms of others, it links it - almost without exception - to the common interest and more general concerns.¹⁸ For example, when a refusal of a planning permission to station caravans prevented nomadic groups from settling near a highway because of, among other things, the increased risk of accidents occurring due to lack of visibility at two of the junctions that could be used as access to and exit from the site, the Court found that this pursued the 'legitimate aim of protecting the "rights of others" through preservation of the environment and the protection of public health, through highway safety.'¹⁹ Similarly, in cases in which one or both parents complain about their child's custodial placement or about matters regarding custody, the Court does not only refer to the rights and freedoms of others, namely the child, but also to the preservation of health and morals.²⁰ Historically, the latter rationale has been applied particularly in regard to protecting children in the public interest and for the common good, for example in relation to promoting child education and prohibiting child labour. In such cases, the state adopts its role as *parens patriae*, or father of the country, which is aligned primarily to the protection of the public interest.²¹

As a consequence, the right to privacy is almost always balanced against a common interest, of which Article 8 ECHR paragraph 2 specifies three types. It provides that there shall be no interference by a public authority with the exercise of the right to privacy 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.' The first group of rationales relates to the interest of security, namely 'national security', 'public safety', and 'the prevention of disorder or crime'. The second category is formed by 'the protection of health and morals', a term which occurs in all four qualified rights. The 'economic well-being of the country', which is only referred to in Article 8 ECHR, forms the third and final category.

In this section, these three rationales for limiting privacy under the European Convention will be analysed. It should be noted that although general trends may be discerned in the jurisprudence, the Court allows states a certain margin of appreciation when choosing one of the rationales listed in Article 8 ECHR for the legitimisation of their general policy or

¹⁶ A H Robertson, *Collected edition of the 'travaux préparatoires' of the European Convention on Human Rights = Recueil des travaux préparatoires de la Convention Européenne des Droits de l'Homme; Council of Europe. Vol. 5 Legal Committee, Ad hoc Joint Committee, Committee of Ministers, Consultative Assembly, 23 June - 28 August 1950* (Nijhoff, 1975) 68.

¹⁷ ECtHR, *Stankova v. Slovakia*, application no. 7205/02, 09 October 2007. ECtHR, *Chappel v. the United Kingdom*, application no. 10461/83, 30 March 1989. ECtHR, *Connors v. the United Kingdom*, application no. 66746/01, 27 May 2004.

¹⁸ ECtHR, *Smirnov v. Russia*, application no. 71362/01, 07 June 2007. See further: ECtHR, *Luordo v. Italy*, application no. 32190/96, 17 July 2003. ECtHR, *Foxley v. the United Kingdom*, application no. 33274/96, 20 June 2000.

¹⁹ ECtHR, *Beard v. the United Kingdom*, application no. 24882/94, 18 January 2001, § 93. See also: ECtHR, *Coster v. the United Kingdom*, application no. 24876/94, 18 January 2001. ECtHR, *Jane Smith v. the United Kingdom*, application no. 25154/94, 18 January 2001. ECtHR, *Lee v. the United Kingdom*, application no. 25289/94, 18 January 2001. ECtHR, *Chapman v. the United Kingdom*, application no. 27238/95, 18 January 2001.

²⁰ See for example: ECtHR, *Moser v. Austria*, application no. 12643/02, 21 September 2006. ECtHR, *Suss v. Germany*, application no. 40324/98, 10 November 2005. ECtHR, *Maurice v. France*, application no. 11810/03, 16 October 2005. ECtHR, *Haase v. Germany*, application no. 11057/02, 08 April 2004.

²¹ D Gomein, *State Powers and the Best Interests of the Child under Article Eight of the European Convention on Human Rights* (1989) 7 *Netherlands Quarterly of Human Rights* 435.

when infringing upon a specific right of their citizens. Consequently, no absolute line can be discovered in when and under what circumstances which rationale applies. Finally, one should keep in mind that the Court often simply refers to all or to a number of rationales, which means that the legitimate aims specified in Article 8 paragraph 2 are not mutually exclusive.

2.1 Security

Of the three terms used in Article 8 ECHR relating to the rationale of security - 'national security', 'public safety', and 'the prevention of disorder or crime' - the latter is used in most cases by far. Generally, this rationale is invoked in three types of issues. First, the prevention of disorder and crime plays a role in police investigations, namely in case of wire-tapping telecommunication or controlling other means of correspondence, and in case of officials entering a private house in order to arrest its occupant or to seize certain documents or objects.²² Second, restrictions may be imposed on the privacy of prisoners, their right to correspondence, and the freedom to have regular contact with family members, as this serves the legitimate aim of prevention of crime and disorder in the prison facilities, for example in relation to smuggling alcohol, drugs, or weaponry into the facility.²³ Third, states may expel aliens who have been convicted for criminal activities from their territory or deny their application for a temporary or permanent residence permit for reasons of maintaining order and preventing crime.²⁴

Sometimes, the Court only refers to the prevention of crime, namely in cases concerning police investigations.²⁵ Likewise, prevention of disorder is occasionally accepted as an independent rationale and appears to have a slightly broader scope.²⁶ For example, in a case where a person was expelled from the state's territory and he claimed that the interference in question 'did not pursue any of the legitimate aims set out in Article 8 § 2, in particular "the prevention of crime" and, more broadly, of "disorder". He claimed that it was in reality a sanction for old offences.'²⁷ The Court, however, accepted that the government had pursued the legitimate aim of preventing disorder and not crime, apparently because there were no concrete reasons to believe that criminal activities would be prevented by the expulsion.

The interest of 'public safety' is seldom invoked and seems to function as a rationale which is applied in more general and slightly more weighty cases,²⁸ such as when a convicted criminal is denied leave from prison to attend the funeral of his parents,²⁹ when an applicant complains of the release of CCTV footage which has resulted in publication and broadcasting of identifiable images of the applicant in question while attempting suicide,³⁰ and when

²² ECtHR, *Keegan v. the United Kingdom*, application no. 28867/03, 18 July 2006. ECtHR, *Mancevschi v. Moldova*, application no. 33066/04, 07 October 2008.

²³ ECtHR, *Nazarenko v. Ukraine*, application no. 39483/98, 29 April 2003. ECtHR, *Lich v. Ukraine*, application no. 41707/98, 29 April 2003.

²⁴ ECtHR, *Boultif v. Switzerland*, application no. 54273/00, 02 August 2001. ECtHR, *Uner v. the Netherlands*, application no. 46410/99, 18 October 2006.

²⁵ ECtHR, *Murray v. the United Kingdom*, application no. 14310/88, 28 October 1994. ECtHR, *Niemietz v. Germany*, application no. 13710/88, 16 December 1992. ECtHR, *Pannullo and Forte v. France*, application no. 37794/97, 30 October 2001. ECtHR, *Iliya Stefanov v. Bulgaria*, application no. 65755/01, 22 May 2008.

²⁶ ECtHR, *Lova v. Latvia*, application no. 59643/00, 22 June 2006.

²⁷ ECtHR, *Moustaquim v. Belgium*, application no. 12313/86, 18 February 1991, § 39.

²⁸ ECtHR, *Kwiek v. Poland*, application no. 51895/99, 30 May 2006. ECtHR, *Ciorap v. Moldova*, application no. 12066/02, 19 June 2007.

²⁹ ECtHR, *Ploski v. Poland*, application no. 26761/95, 12 November 2002. ECtHR, *Lind v. Russia*, application no. 25664/05, 06 December 2007.

³⁰ ECtHR, *Peck v. the United Kingdom*, application no. 44647/98, 28 January 2003.

applicants complain about the systematic monitoring and recording of private conversations and private behaviour in the course of criminal proceedings.³¹

Finally, ‘the principal cases in which [‘national security’] has been raised indicate that it concerns the security of the state and the democratic constitutional order from threats posed by enemies both within and without.’³² Such cases bear upon, for example, general surveillance measures by secret service organisations³³ or matters in which the territorial integrity of the state is at stake.³⁴ Therefore, cases in which ‘national security’ is invoked are those which concern the national interest of a country as a whole.

2.2 Health and Morals

The term ‘the protection of health and morals’ was inserted into the Convention by Alternative B, which was proposed by the British delegation. The concept of health and morals is well-known in common law systems and relates to the power of the state to intervene in cases which are not directly linked to preventing crime or disorder, such as regulating prostitution, gambling and vagrancy, or promoting a healthy living environment, but the term is used particularly in relation to the protection of children. For example, the British Health and Morals of Apprentices Act of 1802 regulated factory conditions with regard to child workers in cotton and wool mills, inter alia limiting the working hours of children between 9 and 13 years old to a maximum of 8 hours a day and of those between 14 and 18 years old to a maximum of 12 hours, and prohibiting labour of children under 9 years old.³⁵ Not surprisingly, as it is pre-eminently in cases like these that the state adopts its role of *parens patriae*,³⁶ most cases before the European Court of Human Rights in which the protection of health and morals is invoked by the government as legitimate concern, regard the custody over or custodial placement of children, for example necessitated by violence, drug abuse, or mental incapacity of one or both of the parents.

The rationale of the protection of public health, independent of the protection of morals, is invoked very rarely and mainly relates to the medical sphere, for example if a person is a threat to himself or to society due to a mental illness.³⁷ Similarly, in a case in which the state had curtailed extreme sadomasochistic practices, which amounted to a form of consensual torture, the government invoked both the legitimate aim of the protection of public health and of public morals. However, the Court treated the case only under the rationale of the protection of health, yet adding that this ‘finding, however, should not be understood as calling into question the prerogative of the State on moral grounds to seek to deter acts of the kind in question.’³⁸

³¹ ECtHR, *P. G. and J. H. v. the United Kingdom*, application no. 44787/98, 25 September 2001.

³² S Greer, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Council of Europe, 1997), 19.

³³ ECtHR, *Leander v. Sweden*, application no. 9248/81, 26 March 1987. ECtHR, *Klass and others v. Germany*, application no. 5029/71, 06 September 1978. ECtHR, *Erdem v. Germany*, application no. 38321/97, 05 July 2001.

³⁴ ECtHR, *Slivenko v. Latvia*, application no. 48321/99, 09 October 2003. ECtHR, *Gulijev v. Lithuania*, application no. 10425/30, 16 December 2008.

³⁵ <<http://www.historyhome.co.uk/peel/factmine/1802act.htm>>.

³⁶ ECtHR, *Maurice v. France*, application no. 11810/03, 06 October 2005.

³⁷ ECtHR, *Matter v. Slovakia*, application no. 31534/96, 05 July 1999. ECtHR, *Hristozov and others v. Bulgaria*, application nos. 47039/11 and 358/12, 13 November 2012.

³⁸ ECtHR, *Laskey and others v. the United Kingdom*, application nos. 21627/93, 21826/93 and 21974/93, 19 February 1997, § 51.

The majority of the cases in which the rationale of the protection of 'health and morals' is invoked³⁹ regards legislation based on moral opinions of the majority of a country's population and on the social and cultural traditions of a state. The Convention authors included the rationale of the protection of health and morals in the Convention, but although states historically referred to the protection of morals to curtail homosexual practices, it is questionable whether it was the drafters' intention to allow states to adopt moral-based legislation. It must be noted that the Convention was adopted against the background of the Second World War in which the opinions and beliefs of the majority had resulted in the suppression and annihilation of minority groups. Consequently, any restriction on a guaranteed freedom for motives based not on the common good or general interest, but on reasons of state, was denounced firmly by the authors of the Convention.⁴⁰ For example, it was accepted that states had a right and even an obligation to promote general well-being, morality and security, but 'when it intervenes to suppress, to restrain and to limit these freedoms for, this time, reasons of state; to protect itself according to the political tendency which it represents, against an opposition which it considers dangerous; to destroy fundamental freedoms which it ought to make itself responsible for co-ordinating and guaranteeing, then it is against public interest if it intervenes. Then the laws which it passes are contrary to the principle of international guarantee.'⁴¹

Similarly, when discussing the possibility of governments to limit rights and freedoms according to their own traditions, the following typical non-moral example of legislation was referred to: 'Freedom of circulation being guaranteed, France will continue to have a Highway Code which lays down that cars must be driven on the right of the road, and England will still have a Highway Code which lays down that cars must be driven on the left of the road. It does not matter whether in France one drives on the right or the left, provided that in practice one can circulate freely in England and in France. Thus, each country will maintain the right to determine the means by which the guaranteed freedoms are exercised within its territory, but – and this is Article 5 of the draft Resolution – its legislation, in defining the measure for the achievement of these freedoms, cannot make any distinction based on race, colour, sex, language, religion, political or other opinion, national or social origin, affiliation to a national minority, fortune or birth. Any national legislation which, under pretext of organizing freedom, makes any such discrimination, falls within the scope of the international guarantee.'⁴² Article 5 of the draft resolution has become Article 14 of the adopted Convention, which prohibits discrimination on all grounds mentioned above and adds 'or other status', so as to ascertain that it provides a non-exhaustive list and that other grounds of discrimination are also prohibited.

The Court has, however, accepted respect for moral and cultural considerations, leading to restrictions on the rights and freedoms of (minority) groups in society, as a legitimate aim. This rationale is used in a substantial number of cases, with regard to Article 8 ECHR independently, together with Article 14 ECHR, or in relation to positive obligations of states, which are requested, for example, to alter or revoke laws or legal provisions that privilege certain groups in society. Famous are the cases of *Dudgeon and Norris*, regarding special age limits for consensual homosexual practices, in which the Court recognised that this served the legitimate aim of safeguarding the moral ethos or moral standards of a

³⁹ Apart from the cases in which the Court adopts its role of *parens patriae*. These cases will only get marginal attention in this study as they form a very specific and distinct doctrine in the Court's case law.

⁴⁰ A H Robertson, *Collected edition of the 'travaux préparatoires' of the European Convention on Human Rights = Recueil des travaux préparatoires de la Convention Européenne des Droits de l'Homme. Vol. 1 Preparatory Commission of the Council of Europe Committee of Ministers, Consultative Assembly, 11 May-8 September 1949* (Nijhoff, 1975), 222.

⁴¹ *Ibid* 278.

⁴² *Ibid* 276-278. Admittedly, this was referred to as a humorous example.

society.⁴³ Similar considerations have been accepted by the Court in the assessment of the rights and freedoms of transsexuals, for instance in relation to the official recognition of their newly adopted identity and their right to marry.⁴⁴

Likewise, in a number of medical ethical questions, for instance with regard to euthanasia and abortion, the Court relies on moral opinions and local traditions.⁴⁵ An example is a case in which the possibility of a woman to conceive children via *in vitro* fertilisation was restricted. The Court held that limitations on Article 8 ECHR were legitimate, among other things, because ‘the use of IVF treatment gave rise to sensitive moral and ethical issues.’⁴⁶ Finally, a number of European countries reserve a special position for the sanctity of heterosexual marriage and the traditional family, for instance in relation to the right to marry and privileged positions in regard to pensions, inheritance law and taxes. In the famous *Marckx* case, regarding differentiation in the national law between the rights of legitimate and illegitimate children to inherit, the Government referred to the traditional family and maintained ‘that the law aims at ensuring that family’s full development and is thereby founded on objective and reasonable grounds relating to morals and public order’. The Court, although denouncing any form of discrimination, accepted ‘that support and encouragement of the traditional family is in itself legitimate or even praiseworthy.’⁴⁷

2.3 Economic Well-Being

The rationale of ‘economic well-being of the country’ occurs only in Article 8 ECHR and was inserted later in the drafting process to lay down rules ‘for the powers of inspection (for example, opening letters when there is a suspicion of an attempt to export currency in breach of Exchange Control Regulations) which may be necessary in order to safeguard the economic well-being of the country.’⁴⁸ The term economic well-being was consequently closely linked to the maintenance of order and the prevention of law evasion. It must be stressed that limitations on the export of currency, especially gold, had since long been part and parcel of the emergency laws of several European countries, as the export of gold might destabilise a country’s financial system. Not surprisingly, the major part of the early cases in which the economic well-being was accepted as a legitimate rationale for limiting the right to privacy concerned matters such as searches and seizures in dwelling houses by custom officers in relation to tax evasion, and even in these cases, both the economic well-being and the prevention of crime served as a combined legitimate aim.⁴⁹

Gradually, however, this rationale has come to play a more significant role in the Court’s jurisprudence and has acquired a wider connotation. For example, it was invoked when an applicant complained about the communication of her medical records by the clinic to the Social Insurance Office to enable that office to determine whether the conditions had been met for granting the applicant compensation for an industrial injury.⁵⁰ Another example

⁴³ ECtHR, *Dudgeon v. the United Kingdom*, application no. 7525/76, 22 October 1981. ECtHR, *Norris v. Ireland*, application no. 10581/83, 26 October 1988.

⁴⁴ See section 2.3.

⁴⁵ ECtHR, *Dickson v. the United Kingdom*, application no. 44362/04, 04 December 2007.

⁴⁶ ECtHR, *Evans v. the United Kingdom*, application no. 6339/05, 10 April 2007, § 59.

⁴⁷ ECtHR, *Marckx v. Belgium*, application no. 6833/74, 13 June 1979, § 40.

⁴⁸ A H Robertson, *Collected edition of the 'travaux préparatoires' of the European Convention on Human Rights = Recueil des travaux préparatoires de la Convention Européenne des Droits de l'Homme; Council of Europe. Vol. 5 Legal Committee, Ad hoc Joint Committee, Committee of Ministers, Consultative Assembly, 23 June - 28 August 1950* (Nijhoff, 1975), 68.

⁴⁹ ECtHR, *Funke v. France*, application no. 10828/84, 25 February 1993. ECtHR, *Mialhe v. France*, application no. 12661/87, 25 February 1993. ECtHR, *Cremieux v. France*, application no. 11471/85, 25 February 1993.

⁵⁰ ECtHR, *M. S. v. Sweden*, application no. 20837/92, 27 August 1997.

is the refusal of national courts to allow a person to terminate the lease on the house he owned, which aimed at the social protection of tenants and was treated in terms of the country's economic well-being.⁵¹ The legitimate interest of the state in regulating employment conditions in the public service as well as in the private sector are also covered from the perspective of economic well-being,⁵² just like general regulation in terms of demography and the occupation of houses.⁵³ Subsequently, this rationale has had particular importance for three types of cases.

First, as firstly accepted in the case of *Berrehab*, governments have a legitimate aim with regard to regulating immigration, not only if immigrants have engaged in criminal activities, but also in relation to maintaining the national level of economic prosperity. 'The Government considered that Mr. *Berrehab*'s expulsion was necessary in the interests of public order, and they claimed that a balance had been very substantially achieved between the various interests involved. The Commission noted that the disputed decisions were consistent with Dutch immigration-control policy and could therefore be regarded as having been taken for legitimate purposes such as the prevention of disorder and the protection of the rights and freedoms of others. The Court has reached the same conclusion. It points out, however, that the legitimate aim pursued was the preservation of the country's economic well-being within the meaning of paragraph 2 of Article 8 rather than the prevention of disorder: the Government were in fact concerned, because of the population density, to regulate the labour market.'⁵⁴

Second, economic concerns are often invoked in cases regarding a healthy living environment, for example in relation to sleep deprivation due to night flights of nearby airports or the diminished quality of life caused by smog from factories in the vicinity of a living area. The Court has held, *inter alia*, that 'the existence of large international airports, even in densely populated urban areas, and the increasing use of jet aircraft have without question become necessary in the interests of a country's economic well-being'⁵⁵ and that 'the continuing operation of the steel plant in question contributed to the economic system of the Vologda region and, to that extent, served a legitimate aim within the meaning of paragraph 2 of Article 8 of the Convention.'⁵⁶

Finally, a substantial part of the cases before the Court concerning the right to privacy regards positive obligations of the state. In such cases, it has adopted as a general rule that a fair balance has to be struck between the competing interests of the individual and of the community as a whole. The general interest often relates to the public expenditure associated with ensuring the positive obligations. For example, in the cases of *Rees* (1986), *Cossey* (1990), and *Sheffield and Horsham* (1998), all against the United Kingdom, the Court denied the claims of transsexuals regarding the legal recognition of their newly adopted gender by the national government, not only because of the moral concerns involved but also because it found that what the applicants actually seemed to want is for the government 'to establish a type of documentation showing, and constituting proof of, current civil status. The introduction of such a system has not hitherto been considered necessary in the United Kingdom. It would have important administrative consequences and would impose new duties

⁵¹ ECtHR, *Velosa Barreto v. Portugal*, application no. 18072/91, 21 November 1995.

⁵² ECtHR, *Sidabras and Dziautas v. Lithuania*, application nos. 55480/00 and 59330/00, 27 July 2004. ECtHR, *Rainys and Gasparavicius v. Lithuania*, application nos. 70665/01 and 74345/01, 07 April 2005.

⁵³ ECtHR, *Gillow v. the United Kingdom*, application no. 9063/80, 24 November 1986.

⁵⁴ ECtHR, *Berrehab v. the Netherlands*, application no. 10730/84, 21 June 1988, § 25-26.

⁵⁵ ECtHR, *Powell and Rayner v. the United Kingdom*, application no. 9310/81, 21 February 1990, § 42.

⁵⁶ ECtHR, *Fadeyeva v. Russia*, application no. 55723/00, 09 June 2005, § 101.

on the rest of the population.’⁵⁷ In the intermediate case of *B. v. France* (1992), however, the Court reached a different conclusion, not because dissimilar moral standards prevailed in France or because the Court had changed its attitude towards transsexuality, but because France’s administrative system differed from the British system. In the French model, birth certificates ‘were intended to be updated throughout the life of the person concerned, so that it would be perfectly possible to insert a reference to a judgment ordering the amendment of the original sex recorded.’⁵⁸ As the administrative burden was significantly lower and the applicant did not ask for a comprehensive change of the legal system, a positive obligation was accepted by the Court.

3. Determining the Common Interest

When applying the ‘necessary in a democratic society’ test to Article 8 ECHR, the Court has accepted three main rationales for limiting the right to privacy: security, morality, and economic well-being (other matters fall outside the scope of this study). Next, it assesses whether a particular interference has been necessary by determining the general interest involved with the infringement. The Court has adopted as a rule that whilst the adjective ‘necessary’ is not synonymous with ‘indispensable’, neither does it have the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’, or ‘desirable’. Rather, there must be a ‘pressing social need’.⁵⁹ The question remains how this concept should be interpreted, who should determine whether such pressing social need exists, and which method should be adopted for determining the necessity of legal regulations, policies, or actions by the state.

It should be noted that the Convention does not lay down any given manner for a national government to ensure effective implementation of the Convention within its internal law. Rather, the choice as to the most appropriate means of achieving this is essentially a matter for the domestic authorities.⁶⁰ This is commonly referred to as the subsidiarity principle.⁶¹ States enjoy a ‘margin of appreciation’ in implementing legal safeguards, in assessing the need for an interference with fundamental rights, and in determining the most suitable manner to pursue legitimate aims.⁶² Still, this margin is not unlimited and it is subjected to European supervision. This section describes how the Court views its task in relation to the three aforementioned rationales and the common interest involved when determining the necessity of a particular infringement.⁶³

⁵⁷ ECtHR, *Rees v. the United Kingdom*, application no. 9532/81, 17 October 1986, § 42. See also: ECtHR, *Cossey v. the United Kingdom*, application no. 10843, 27 September 1990. ECtHR, *Sheffield and Horsham v. the United Kingdom*, application nos. 22985/93 and 23390/94, 30 July 1998.

⁵⁸ ECtHR, *B. v. France*, application no. 13343/87, 25 March 1992, § 52.

⁵⁹ ECtHR, *Sunday Times v. the United Kingdom*, application no. 6538/74, 26 April 1979.

⁶⁰ ECtHR, *Chapman v. the United Kingdom*, application no. 27238/95, 18 January 2001. ECtHR, *Sisojeva and others v. Latvia*, application no. 60654/00, 16 June 2005.

⁶¹ Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms. Strasbourg, 24.VI.2013. <<http://conventions.coe.int/Treaty/en/Treaties/Html/213.htm>>.

⁶² J Kratochvíl, ‘The inflation of the Margin of appreciation by the European Court of Human Rights’ (2011) 29 *Netherlands Quarterly of Human Rights* 3. E Brems, ‘The margin of appreciation doctrine in the case-law of the European court of human rights’ (1996) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 56. L R Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’ (2008) *European Journal of International Law* 19. J D Spielmann, ‘Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’ (2012) CELS Working Paper series. A Barak, ‘Proportionality and Principled Balancing’ (2010) 4 *Law & Ethics of Human Rights* 1.

⁶³ M R Hutchinson, ‘The Margin of Appreciation Doctrine in the European Court of Human Rights’ (1999) 48 *International and Comparative Law Quarterly* 03.

3.1 Security

Maintaining order and ensuring public safety are the *raison d'être* of the state.⁶⁴ Not surprisingly, the 'margin of appreciation' doctrine was first coined in cases that regarded the state of emergency (Article 15 ECHR),⁶⁵ on which the Court has held that it falls to each state to determine whether the life of the nation is threatened by a public emergency and, if so, to what extent far-reaching measures would be justifiable as attempts to overcome the emergency. Moreover, the Court has accepted that by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities essentially have a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Although states do not enjoy unlimited freedom, their discretion in this respect is particularly wide.⁶⁶

This wide margin of appreciation is usually also granted in cases in which - under Article 8 - the rationale of 'national security' is invoked, for example when democratic societies are threatened by highly sophisticated forms of espionage or by terrorism, necessitating that the State is able, in order to effectively counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. 'In these circumstances, the Court accepts that the margin of appreciation available to the respondent State in assessing the pressing social need in the present case, and in particular in choosing the means for achieving the legitimate aim of protecting national security, was a wide one.'⁶⁷ A certain margin of appreciation also exists in relation to the regulation of the military,⁶⁸ with regard to combatting terrorism,⁶⁹ when assessing the necessity and proportionality of curtailing the rights of prisoners⁷⁰ - as imprisonment pre-eminently has the aim of curtailing the rights and freedoms of a criminal as part of his conviction - and in relation to immigration policies, since it is the state's prerogative to control the entry of aliens into its territory and their residence there.⁷¹ 'The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences.'⁷²

Still, in most cases in which the rationale of security is invoked, the margin of appreciation is not particularly wide. There is no special discretion of states with respect to house searches, wire-taps in ordinary criminal proceedings and other more common privacy infringements. Consequently, the margin of appreciation with regard to maintaining security

⁶⁴ A A Ostrovsky, 'What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals' (2005) 1 *Hanse Law Review* 1. J A Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: threat to the rule of law' (2004) 11 *Columbia Journal of European Law* 113. S Marks, 'Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights' (1995) 15 *Oxford Journal of Legal Studies* 1.

⁶⁵ ECmHR, *Greece v. UK*, application no. 176/56, 26 September 1958. ECmHR, *Lawless v. Ireland*, application no. 322/57, 19 December 1959. ECmHR, *Denmark and others v. Greece*, application nos. 3321/67, 3322/67 and 3344/67, 05 September 1969. ECtHR, *Ireland v. UK*, application no. 5310/71, 18 January 1978.

⁶⁶ ECtHR, *Brannigan and McBride v. the United Kingdom*, application nos. 14553/89 and 14554/89, 26 May 1993.

⁶⁷ ECtHR, *Leander v. Sweden*, application no. 9248/81, 26 March 1987, § 59. See also: ECtHR, *Klass and others v. Germany*, application no. 5029/71, 06 September 1978.

⁶⁸ ECtHR, *Konstantin Markin v. Russia*, application no. 30078/06, 22 March 2012.

⁶⁹ ECtHR, *Murray v. the United Kingdom*, application no. 14310/88, 28 October 1994.

⁷⁰ ECtHR, *Clift v. the United Kingdom*, application no. 7205/07, 13 July 2010. ECtHR, *Laduna v. Slovakia*, application no. 31827/02, 13 December 2011.

⁷¹ ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, application nos. 9214/80, 9473/81 and 9474/81, 28 May 1985.

⁷² ECtHR, *Uner v. The Netherlands*, application no. 46410/99, 18 October 2006, § 54.

under Article 8 ECHR seems dependent on the term and circumstances of the case relied on by the state, as the Court generally grants a wider discretion where national security is involved than in relation to, for example, preventing petty theft. However, the Court never assesses in detail the width of the common interest involved, but rather seems to use a rule of thumb. Consequently, in most cases the Court accepts a normal margin of appreciation, but in those cases in which the national security or another particularly weighty interest is at stake, the ECtHR will accord a wide discretion to national governments. This is a gradual line, dependent on the relative importance of the matter.

3.2 Morality

The ‘necessary in a democratic society’ test is obviously difficult to apply with regard to moral-based legislation. To determine what is ‘morally necessary’, the Court adopts a sophisticated approach. First, it usually grants a wide margin of appreciation to national governments when assessing the moral and cultural sentiments in their countries.⁷³ Although the ‘margin of appreciation’ doctrine was first developed in relation to the state of emergency, it was only with regard to cases that concerned the protection of societal morals that it gained significance for the Convention as a whole.⁷⁴ As a principle, the Court has accepted that by ‘reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than the international judge to give an opinion, not only on the “exact content of the requirements of morals” in their country, but also on the necessity of a restriction intended to meet them’.⁷⁵ Furthermore, it has held that the scope of the margin of appreciation depends on the rationale invoked by the government to legitimise the policy or legal regulation and that it is especially wide when states rely on the protection of societal morals.⁷⁶

The Court has adopted a wide margin of appreciation in a range of matters with implications for cultural, moral, and ethical concerns, for instance those concerning the rights and freedoms of homosexuals and transsexuals, the protection of the traditional family, and medical issues.⁷⁷ Not only may national sentiments influence what is perceived as ‘morally necessary’, a state may also differentiate its legislation according to specific local standards. In *Dudgeon*, for example, the British government adopted an especially strict regime in Northern Ireland, which the Court found legitimate. ‘As the Government correctly submitted, it follows that the moral climate in Northern Ireland in sexual matters, in particular as

⁷³ See for critique: T W Stone, ‘Margin of Appreciation Gone Awry: The European Court of Human Rights’ Implicit Use of the Precautionary Principle in *Fretté v. France* to Backtrack on Protection from Discrimination on the Basis of Sexual Orientation’ (2003) 3 Connecticut Public Interest Law Journal 1.

⁷⁴ ECtHR, *De Wilde, Ooms and Versyp (“Vagrancy”) v. Belgium*, application nos. 2832/66, 2835/66 and 2899/66, 18 June 1971. ECtHR, *Engel and others v. the Netherlands*, application nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 08 June 1976. ECtHR, *Golder v. the United Kingdom*, application no. 4451/70, 21 February 1975. ECtHR, *Case “Relating to certain aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium*, application nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968.

⁷⁵ ECtHR, *A., B. and C. v. Ireland*, application no. 25579/05, 16 December 2010, § 223 & 232. See further: ECtHR, *Handyside v. the United Kingdom*, application no. 5493/72, 07 December 1976. G Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26 Oxford Journal of Legal Studies 4.

⁷⁶ ECtHR, *Sunday Times v. the United Kingdom*, application no. 6538/74, 26 April 1979. O Bakircioglu, ‘The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases’ (2007) German Law Journal 8, <<http://www.germanlawjournal.com/index.php?pageID=11&artID=846>>.

⁷⁷ ECtHR, *S. H. and others v. Austria*, application no. 57813/00, 03 November 2011. ECtHR, *Evans v. the United Kingdom*, application no. 6339/05, 10 April 2007. ECtHR, *Dickson v. the United Kingdom*, application no. 44362/04, 04 December 2007. ECtHR, *X., Y. and Z. v. the United Kingdom*, application no. 21830/93, 22 April 1997.

evidenced by the opposition to the proposed legislative change, is one of the matters which the national authorities may legitimately take into account in exercising their discretion. There is, the Court accepts, a strong body of opposition stemming from a genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law would be seriously damaging to the moral fabric of society. This opposition reflects [] a view both of the requirements of morals in Northern Ireland and of the measures thought within the community to be necessary to preserve prevailing moral standards.’⁷⁸

However, the Court places two important limitations on this wide discretion afforded to states. First, European consensus on a certain topic may overrule national or local traditions and the democratic rule of the majority.⁷⁹ Since the Convention is first and foremost a system for the protection of human rights, the Court has held that it must ‘have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved.’⁸⁰ If no European consensus exists, the Court is sometimes willing to look at international developments. For example, the earlier jurisprudence of *Rees*, *Cossey*, and *Sheffield and Horsham* was overturned in 2002 in the cases of *Goodwin and I.*, both against the United Kingdom, in which the Court attached less importance to the ‘lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.’⁸¹ As the Convention is a living instrument which must be interpreted in the present daylight, the Court continuously assesses the international sentiment on moral and ethical issues, and overturns its earlier case law if European consensus requires it to do so.

Second, although legal differentiation in order to promote or protect societal morals is accepted to some extent, the Court is less willing to allow for differentiating legislation which has the aim of promoting economic well-being or security. Thus, when the British government discriminated against female immigrants with regard to residence permits in order to promote the economic well-being of the country, it was accepted that the number of economically active men of working age in the population exceeded the number of economically active women by nearly 30%. However, the Court pointed out that many women were engaged in part-time work and that it was in any event ‘not convinced that the difference that may nevertheless exist between the respective impact of men and of women on the domestic labour market is sufficiently important to justify the difference of treatment’.⁸² Likewise, in a case in which a state discriminated against homosexuals in the army, the Court was unconvinced that this was necessary for the protection of national security and the prevention of disorder, pointing to ‘the lack of concrete evidence to substantiate the alleged damage to morale and fighting power that any change in the policy would entail’, holding that ‘there was no actual or significant evidence of such damage as a result of the presence of

⁷⁸ ECtHR, *Dudgeon v. the United Kingdom*, application no. 7525/76, 22 October 1981, § 57. M D Dubber, ‘Note, Homosexual Privacy Rights Before the United States Supreme Court and the European Court of Human Rights: A Comparison of Methodologies’ (1990) 27 *The Stanford Journal of International Law* 189.

⁷⁹ E Benvensiti, ‘Margin of Appreciation, Consensus, and Universal Standards’ (1999) *International Law and Politics* 31.

⁸⁰ ECtHR, *Konstantin Markin v. Russia*, application no. 30078/06, 22 March 2012, § 126. ECtHR, *Weller v. Hungary*, application no. 44399/05, 31 March 2009.

⁸¹ ECtHR, *Christine Goodwin v. the United Kingdom*, application no. 28957/95, 11 July 2002, § 85.

⁸² ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, application nos. 9214/80, 9473/81 and 9474/81, 28 May 1985, § 79.

homosexuals in the armed forces', and that there was no 'evidence of such damage in the event of the policy changing.'⁸³

3.3 Economic Necessity

In relation to the right to property, the Court has accepted that the margin of appreciation with regard to general economic and social policies is especially high. Gradually accepting that the economic prosperity of the country is an independent rationale for limiting privacy under the Convention, the Court simply transposed this doctrine. For example, in relation to a claim by an applicant regarding the Croatian courts' decisions to terminate her specially protected tenancy, which was publicly afforded to her, the Court held: 'State intervention in socio-economic matters such as housing is often necessary in securing social justice and public benefit. In this area, the margin of appreciation available to the State in implementing social and economic policies is necessarily a wide one. The domestic authorities' judgment as to what is necessary to achieve the objectives of those policies should be respected unless that judgment is manifestly without reasonable foundation. Although this principle was originally set forth in the context of complaints under Article 1 of Protocol No. 1 - the Court, bearing in mind that the Convention and its Protocols must be interpreted as a whole, considers that the State enjoys an equally wide margin of appreciation as regards respect for the home in circumstances such as those prevailing in the present case, in the context of Article 8. Thus, the Court will accept the judgment of the domestic authorities as to what is necessary in a democratic society unless that judgment is manifestly without reasonable foundation, that is, unless the measure employed is manifestly disproportionate to the legitimate aim pursued.'⁸⁴

This wide margin of appreciation is adopted as a general approach by the Court in relation to cases that have economic implications.⁸⁵ Unlike cases in which the state invokes a moral based rationale for limiting privacy, there are no important limitations on this wide discretion afforded to states. Only in exceptional cases, the Court finds that the economic necessity relied on by the state is insufficiently strong to legitimize an interference.⁸⁶ Mostly, the Court simply accepts the suggestion by the national state regarding the common interest at stake with a certain interference with the right to privacy. For example, Berrehab disputed the effectiveness of the government's policies in relation to the economic well-being of the country, because his expulsion would hinder him from continuing to contribute to the costs of maintaining and educating his daughter. The Court did not, however, assess this argument in detail, but rather observed that it was not its function 'to pass judgment on the Netherlands' immigration and residence policy as such.'⁸⁷ Likewise, in environmental cases, the Court has attached little importance to lacking evidence or concrete statistics of the economic interest involved with, for example, maintaining night flights, but has held, rather, that in matters of general policy, the role of the domestic policy-maker should be given special weight.⁸⁸ It seldom assesses in detail which economic gains are involved in maintaining the governmental policy or which burdens an alteration of the policy might pose on national prosperity.

⁸³ ECtHR, *Smith and Grady v. the United Kingdom*, application nos. 33985/96 and 33986/96, 27 September 1999, § 99. See also: ECtHR, *Lustig-Prean and Beckett v. the United Kingdom*, application nos. 31417/96 and 32377/96, 27 September 1999.

⁸⁴ ECtHR, *Blecic v. Croatia*, application no. 59532/00, 29 July 2004, § 65.

⁸⁵ ECtHR, *Gillow v. the United Kingdom*, application no. 9063/80, 24 November 1986.

⁸⁶ See further: ECtHR, *Moreno Gomez v. Spain*, application no. 4143/02, 16 November 2004.

⁸⁷ ECtHR, *Berrehab v. the Netherlands*, application no. 10730/84, 21 June 1988, § 29.

⁸⁸ ECtHR (Grand Chamber), *Hatton and others v. the United Kingdom*, application no. 36022/97, 08 July 2003. M Klatt, 'Positive Obligations under the European. Convention on Human Rights' (2011) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 71.

Finally, with regard to positive obligations of the state, the Court affords a wide margin of appreciation to the state to determine whether, and if so how, it must adopt and implement certain regulations. As already discussed, in the cases of *Rees*, *Cossey*, and *Sheffield and Horsham*, the Court simply accepted the government's assertion that the claims of the applicants would pose an unreasonable burden on it, namely to establish a type of documentation showing, and constituting proof of, current civil status, the introduction of which had not been considered necessary in the United Kingdom, but which would have important administrative consequences and would impose new duties on the rest of the population. Only in *B. v. France* did the Court accept the claims of the applicants because France could not refer to the same argument, but only to moral sentiments of a part of its population.

4. Determining the Private Interest

Thus, with regard to security related cases, the public interest is weighed in terms of importance, with regard to morality based cases, usually a wide margin of appreciation is granted to states, which is at the same time subjected to European supervision, and with regard to environmental cases, the public interest is mostly not weighed or assessed in detail, but rather assumed. The test of an infringement being 'necessary in a democratic society' is a binary one. An infringement may either be necessary, in which case it is legitimate, or it may be qualified as unnecessary, in which case it violates the Convention. Although the Court still adopts this test with regard to a substantial number of cases relating to the protection of security, with regard to other matters it has often approached the question of necessity as a matter of proportionality or applies a fair balance test, in which the relative weight of the common and the private interest are balanced. Finally, although it refers to the fair balance of interests and the proportionality of interferences with regard to matters in which the economic rationale is invoked, in these cases the Court in fact primarily assesses whether an 'unreasonable burden' has been imposed on an individual.

4.1 Security

With regard to ensuring national security, promoting public safety, preventing crime, and maintaining public order, the Court usually does not evaluate the private interests of the applicant. When states monitor behaviour, wire-tap correspondence, enter homes, and confiscate private documents to prevent criminal activities, the Court does not so much weigh the private interests of the individuals involved, but focuses primarily on the necessity of the infringement. Under this model, 'the Court tends to concentrate on the factual necessity of the interference to the achievement of the legitimate purposes at stake, with the right giving way if necessity is accepted. [This] approach is most frequently adopted in cases where national security and prevention of disorder/crime defences are pleaded. That the Court is prepared to let these goals override individual rights is understandable because without a minimum level of national and personal security nobody's rights are safe. However, to allow interferences on these grounds beyond what is strictly necessary would be to sanction potential oppression.'⁸⁹ Consequently, the Court assesses whether the infringement has been necessary, whether the state has abused its powers, whether it has infringed upon the rights and freedoms of its citizens in an arbitrary manner, and 'the Court must be satisfied that there exist adequate and

⁸⁹ A McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 *The Modern Law Review* 5, 688.

effective guarantees against abuse'.⁹⁰ The assessment thus remains an intrinsic one and it stays at the level of the necessity of the public policy or state action as such.

There are two important exceptions to the application of the necessity test in cases relating to security. With regard to prisoners, the necessity test is sometimes adopted, for example when the right to correspondence with, for instance, the Court has been unduly restricted, under which circumstances the Court has often simply considered that there were 'no compelling reasons why the applicant's correspondence with the Court should have been monitored. It follows that, the interference complained of in the present case was not necessary in a democratic society within the meaning of Article 8 § 2.'⁹¹ However, in relation to other matters, such as having regular contact with spouse and children, the Court adopts a balancing test and seems to assess the relative impact of an interference on a person's private and family life. Still, this balancing test is muffled in the sense that restrictions on rights and freedoms are precisely the essence of imprisonment and, subsequently, the Court has accepted that there are inherent and legitimate limitations on the rights of prisoners. Consequently, only in exceptional circumstances will a violation be found.

Secondly, with regard to expelling criminal immigrants, the Court does adopt a full fledged balancing test, identifying as relevant factors the nature and seriousness of the offence committed by the applicant, the nationalities of the various persons concerned, the length of the applicant's stay in the country, the time elapsed since the offence was committed, the applicant's conduct during that period, the applicant's family situation, such as the length of the marriage and whether there are children of the marriage, and if so, what their age is, the best interests and well-being of the children particularly in relation to the seriousness of the difficulties which they and the spouse are likely to encounter in the country to which the applicant is to be expelled, whether the spouse knew about the offence at the time when he or she entered into a family relationship, and the solidity of social, cultural, and family ties with the host country and with the country of destination.⁹² Consequently, in relation to immigration policies for the prevention of disorder and crime, the Court adopts an elaborate and sophisticated balancing test in which it tries to weigh the relative impact of the expulsion on a person's private and family life with the relative general interest involved.

4.2 Morals

In relation to the protection of morals, the balancing test of the Court in which the outcome of the case is determined by weighing the common with the private interest seems to be especially prominent. As explained in the previous section, the government is granted a wide margin of appreciation in relation to matters that have moral, cultural, and ethical implications, but this discretion is curtailed when an overriding European consensus exists. The margin of appreciation is curtailed even further if the private interest of an applicant is particularly substantial, and, not surprisingly, this is often the case with moral-based legislation. In *Dudgeon*, for example, the Court accepted a margin of appreciation for the government when protecting societal morals, but added that 'not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life.'⁹³

⁹⁰ ECtHR, *Leander v. Sweden*, application no. 9248/81, 26 March 1987, § 60.

⁹¹ ECtHR, *Drozowski v. Poland*, application no. 20841/02, 06 December 1992, § 30. ECtHR, *Campbell v. the United Kingdom*, application no. 13590/88, 25 March 1992.

⁹² ECtHR, *Boultif v. Switzerland*, application no. 54273/00, 02 August 2001. ECtHR, *Uner v. the Netherlands*, application no. 46410/99, 18 October 2006.

⁹³ ECtHR, *Dudgeon v. the United Kingdom*, application no. 7525/76, 22 October 1981, § 52.

The Court has held as a standard principle that a difference in treatment is discriminatory if it has no objective and reasonable justification and the Court has repeatedly stated that - just like gender-based differences in treatment - differences in treatment based on sexual orientation require particularly serious arguments by way of justification and particularly convincing and weighty reasons.⁹⁴ In *Goodwin*, the Court likewise accepted that the 'stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.'⁹⁵ Moreover, in the medical sphere, where often a particularly important facet of an individual's existence or identity is at stake, for instance in terms of *in vitro* fertilisation, abortion, or euthanasia, the margin afforded to the state will normally be further curtailed, because of the substantial individual interest at stake.⁹⁶

In conclusion, in cases in which morality plays a role, the margin of appreciation of states to adopt legislation in the common interest is especially wide, if not overruled by European consensus, and the private interest of the minority or individual affected by the legal regulation or policy is likewise particularly substantial. Consequently, in such cases, the Court adopts a balancing test in which it weighs the private against the public interest, the outcome of which often depends on the specific circumstances of the case, the specificities of the national moral environment and the particular situation of the applicant. In cases where the Court only relies on Article 8 ECHR, it has commonly adopted as proportionality test whether the justifications for retaining the law in force are outweighed by the detrimental effects on the life of a person, either through practical effects or through the legal position itself.⁹⁷ In cases in which both Article 8 and Article 14 ECHR are applied, the Court often adopts as an essential principle that in such cases 'the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people [] from the scope of application of the provisions at issue.'⁹⁸

4.3 Economic Well-Being

With regard to cases in which economic rationales play a role, the Court does take into account the private interest of the individual, but this interest is often less substantial than in cases which concern morality-based legislation. For example, in *Hatton*, the Grand Chamber held that although the night flights had obvious consequences for the applicants, 'the sleep disturbances relied on by the applicants did not intrude into an aspect of private life in a manner comparable to that of the criminal measures considered in *Dudgeon* to call for an especially narrow scope for the State's margin of appreciation. Rather, the normal rule applicable to general policy decisions would seem to be pertinent here, the more so as this rule can be invoked even in relation to individually addressed measures taken in the framework of a general policy'.⁹⁹

⁹⁴ ECtHR, *X. and others v. Austria*, application no. 19010/07, 19 February 2013.

⁹⁵ ECtHR, *Christine Goodwin v. the United Kingdom*, application no. 28957/95, 11 July 2002, § 77.

⁹⁶ ECtHR, *Evans v. the United Kingdom*, application no. 6339/05, 10 April 2007. ECtHR, *Pretty v. the United Kingdom*, application no. 2346/02, 29 April 2002.

⁹⁷ ECtHR, *Dudgeon v. the United Kingdom*, application no. 7525/76, 22 October 1981.

⁹⁸ ECtHR, *X. and others v. Austria*, application no. 19010/07, 19 February 2013, § 140.

⁹⁹ ECtHR (Grand Chamber), *Hatton and others v. the United Kingdom*, application no. 36022/97, 08 July 2003, § 123.

The test applied in these cases is neither a necessity test nor a balancing test, but the focus lies on the question whether an individual or a particular group in society bears an unreasonable burden as a consequence of the policy adopted. Again, this seems to be transposed from the Court's case law concerning social-economic policies and matters regarding the right to property, in relation to which the Court has adopted as a general principle that a 'fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden.'¹⁰⁰

This test differs from the two previous tests in that it does not focus solely or primarily on common interest and public policy, as with regard to infringements legitimated by their instrumentality towards ensuring safety. Neither is a particular balance struck between the private and the public interest involved with a certain infringement, such as with legal regulations and policies grounded in societal morals. Economy-based matters are primarily approached by the Court by determining the specific private interest and the particular effect of a situation or policy on a specific group of persons. Thus, although the public interest and the general policy is not questioned as such, the Court determines whether in a specific case an exception has to be made or a special treatment has to be provided to people or groups bearing an unreasonable burden.

In *Gillow*, for example, an applicant submitted two claims, one of a more general and abstract nature, aimed at the legal provisions as such, the other concerning the application of the legal rules in his specific situation. Although the Court held that 'the statutory obligation imposed on the applicants to seek a licence to live in their "home" cannot be regarded as disproportionate to the legitimate aim pursued', it continued to hold that there 'remains, however, the question whether the manner in which the Housing Authority exercised its discretion in the applicants' case - refusal of permanent and temporary licences, and referral of the matter to the Law Officers with a view to prosecution', with respect to which the Court found a violation 'as far as the application of the legislation in the particular circumstances of the applicants' case was concerned.'¹⁰¹

Similarly, this test is apparently adopted with regard to positive obligations. For example, the case of *L. v. Lithuania* (2007) did not regard the request to alter and acknowledge the newly adopted gender, as in most cases regarding transsexualism. Rather, the applicant claimed that the state had failed to provide him with a lawful opportunity to complete his gender reassignment and obtain full recognition of his post-operative gender. Although the Lithuanian law recognised the right to change not only one's gender but also one's civil status, there was no law regulating full gender reassignment surgery. This had the effect, according to the Court, that the applicant found himself in the intermediate position of a preoperative transsexual, having undergone partial surgery, with certain important civil status documents having been changed. 'The Court finds that the circumstances of the case reveal a limited legislative gap in gender reassignment surgery, which leaves the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity. Whilst budgetary restraints in the public health service might have justified some initial delays in implementing the rights of transsexuals under the Civil Code, over four years have elapsed since the relevant provisions came into force and the necessary legislation, although drafted, has yet to be enacted. Given the few individuals involved (some fifty people,

¹⁰⁰ ECtHR, *Gladysheva v. Russia*, application no. 7097/10, 06 December 2011, § 77. ECtHR, *Sporrong and Lönnroth v. Sweden*, application nos. 7151/75 and 7152/75, 23 September 1982. ECtHR, *Brumarescu v. Romania*, application no. 28342/95, 28 January 1999.

¹⁰¹ ECtHR, *Gillow v. the United Kingdom*, application no. 9063/80, 24 November 1986, § 56-58.

according to unofficial estimates []), the budgetary burden on the State would not be expected to be unduly heavy. Consequently, the Court considers that a fair balance has not been struck between the public interest and the rights of the applicant.¹⁰² Thus, given the fact that such a small group had to bear such a heavy burden was ruled undesirable by the Court; the state had to make alterations to its policy and provide relief to the victims.

With regard to environmental issues, the Court has held as a principle that ‘the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community.’¹⁰³ Consequently, states have the obligation to ease the situation of those directly affected by aircraft noise, air pollution, and smog, for instance by providing adequate and just compensation or by facilitating their migration to another part of the country. Thus, although the general policy is not questioned and left intact, when it places an unreasonable burden on a specific person or group, this burden should be relieved or compensated. Finally, with regard to immigration control in the economic interest, the Court does not weigh the economic interest involved against the individual interest, but rather determines whether in the particular circumstances of the case, an exception should be made to the general, in itself legitimate, policy. For example, when the Dutch government decided to expel an immigrant - which decision would seriously affect her and the ties with her child – who had not pursued to regularise her stay in the Netherlands until more than three years after first having arrived in that country and whose stay there had been illegal throughout the entire period, the Court held that ‘by attaching such paramount importance to this latter element, the authorities may be considered to have indulged in excessive formalism.’¹⁰⁴ Thus, although the policy was deemed legitimate in itself, the application of the regulation in this particular case placed an excessive burden on the claimant.

5. Analysis

Privacy, under the Convention, is the right which is concerned most with the private interest. While other qualified rights relate to the communal experience of religion, the freedom of peaceful assembly and association, including the right to form and to join trade unions, and the freedom of expression, which is often linked to concerns over the pursuit of truth through the market place of ideas and the well-functioning of the press as the fourth estate in the modern democratic society, privacy primarily relates to the personal interest and the private realm. Moreover, in contrast to the other qualified rights protected under the ECHR, the right to privacy is hardly ever weighed against other private interests, but is limited almost without exception by invoking societal goals. In those few cases in which private interests clash, the balance test is applied. But in general, three legitimate aims have played an important role in the Court’s jurisprudence, namely maintaining security, protecting societal morals and promoting the economic well-being of the country, when it comes to the legitimacy of infringing on the right of privacy.

In political and legal philosophy, a wide range of different theories have been suggested in order to reconcile the private with the common interest.¹⁰⁵ Virginia Held has

¹⁰² ECtHR, *L. v. Lithuania*, application no. 27527/03, 11 September 2007, § 59.

¹⁰³ ECtHR, *Fadeyeva v. Russia*, application no. 55723/00, 09 June 2005, § 128. ECtHR, *Dubetska and others v. Ukraine*, application no. 30499/03, 10 February 2011.

¹⁰⁴ ECtHR, *Rodrigues Da Silva and Hoogkamer v. the Netherlands*, application no. 50435/99, 31 January 2006, § 44.

¹⁰⁵ See among others: S Greer, ‘“Balancing” and the European court of Human Rights: A Contribution to the Habermas-Alexy Debate’ (2004) 63 *The Cambridge Law Journal* 2. R Alexy, ‘Constitutional Rights, Balancing and Rationality’ (2003) 16 *Ratio Juris* 2. J Habermas, *Between facts and norms: contributions to a discourse theory of law and democracy* (The Mit Press cop., 1996).

famously distilled three general philosophical traditions from these models: unitary theories, preponderance or aggregative theories and general interest theories. Unitary theories suggest that there simply does not exist a difference between the private and the common interest. If something (for example an action) is not in the general interest, but the individual believes it is in his private interest, he is simply mistaking. If he would truly and rightly assess his individual interest, he would come to understand that what he thinks he wants, for example committing a crime or disobeying the law, will not be to his personal benefit. As earliest proponent of this theory, Held refers to Plato: ‘In the *Crito* Socrates argues, against his apparent interest in escaping prison, that “injustice is always an evil and dishonor to him who acts unjustly,” and that consequently he must keep the agreement he has, by living in Athens, implicitly made to obey the laws of the state even when they pronounce a sentence of death upon him. Thus “keeping an agreement to obey the law” is for Plato the right thing to do, and anything which is right, or just, is in the public interest and in the interest of every individual.’¹⁰⁶

Preponderance or aggregative theories provide that individuals do have a clear understanding of their subjective interest. Moreover, such models propose that the general interest is not an independent existing good, but can merely be described as the aggregate of individual opinions. Held refers to Hobbes as earliest proponent of this branch of theories and cites from his *Leviathan* in which he holds that in ‘the voluntary acts of every man, the object is some good to himself.’¹⁰⁷ Not only does the individual, according to Hobbes, have a clear understanding of what are his private interests, an aggregative common interest is the best way to decide on the nature of laws, as for Hobbes ‘it is empirically true that such rules are necessary for society, and ‘morality’ is the name that men use for this system of rules. Their ultimate justification is that without them no one would be in a position to gratify any of his desires.’¹⁰⁸ Held refers to Hume as second proponent of this theory, whom she cites as saying that in all determinations of morality, public utility is ever principally in view. ‘Hume concludes that “since morals ... have an influence on the actions and affections, it follows that they cannot be derived from reason ... The rules of morality ... are not conclusions of our reason.” Morals can only be derived from sentiment.’¹⁰⁹ It can be argued that in such theories, the common interest is determined best on the basis of an aggregate of these sentiments or individual interests. In such way, a conflict can arise between the majority opinion and specific groups and individuals.

General interest theories, finally, propose that the common interest is determined by the general interest. Under the general interest theories, individuals do have a clear understanding of their private interests, but the general interest is not described as the majority opinion, but as the interest that is to the benefit of all. As the most well-known example of such theories, Held refers to the Pareto criterion. ‘Pareto’s well-known criterion of optimality for economic changes appeals to a notion of common interest. Assuming that only individuals themselves are able to assign values to their own utilizes, Pareto asserts that the “welfare” of a group of individuals may be considered to increase if at least one individual in the group is made better off – in terms of their utility values – without anyone being made worse off.’¹¹⁰ Consequently, a general interest is only accepted when a certain policy or legal regulation is in the interest of all of the members of society, or at least, does not negatively affect one or more persons.

¹⁰⁶ V Held, *The public interest and individual interests* (Basic Books, 1970), 140-141.

¹⁰⁷ Ibid 51.

¹⁰⁸ Ibid 53. This is a citation Held takes from Monro, on its turn reviewing Watkins view on Hobbes.

¹⁰⁹ Ibid 58.

¹¹⁰ Held 107-108.

The Court seems to adopt each of these theories in the different fields of its jurisprudence when reconciling the right to privacy with the common interest. If the common interest is related to the protection of security, either in terms of national security, public safety, preventing crime or maintaining order, the Court seems to rely primarily on a unitary theory, in which there exists no tension between the private and the public interest. The common interest in relation to safety is the starting point of the Court's analysis, as safety is to the benefit of everyone and because without a minimum level of national and personal security, nobody's rights are safe. By contrast, there is no legitimate private interest in conducting crime or engaging in terrorist activities or in concealing such actions. The only reasonable interest people have is not to be subjected to arbitrary interferences, infringements without reasonable suspicion or abuses of power and consequently, the Court has focused on the necessity of the interferences by states upon the right to privacy and the question of whether there existed sufficient safeguards in order to prevent or remedy abuse of power by the executive branch.

With regard to limitations on the right to privacy for the protection of societal morals, the Court seems to adopt a preponderance theory. It takes as principal starting point the national democratic legislative process and the outcome of it, reflecting the majority opinion, based on sentiments and morals, possibly having negative consequences for the freedom of individuals or minority groups in society. However, it does weigh the private interest with the common interest, in which case the Court is willing to restrict the national democratic legislative process if the private interest prevails. The European consensus test, which is also used to limit the national consensus, can also be described as an aggregative theory, namely on European level. If the majority of European countries has adopted a certain type of legislation or practice, then a heavy burden is placed on the national state to assert why its position is unique and demands a different approach.

Finally, the Court seems to adopt a general interest theory when it reflects upon matters that involve economic rationales. The economic well-being of the country, like security, is clearly in the interest of all. Consequently, this general interest is seldom disputed by applicants or analysed in detail by the Court. In contrast, its prime concern is to determine whether an individual or specific group in society had to bear an unreasonable burden in relation to the maintenance of a situation or policy that is in the interest of society. After Pareto-fashion, the Court holds that if an unreasonable burden is imposed on the applicants, the government is held to provide adequate and just compensation or to facilitate their migration to another part of the country. Consequently, no one may suffer from a (significant) disadvantage when policies or practices are adopted in the pursuit of the general interest.

A special position is reserved for immigrants and to some extent, prisoners. A necessity test is applied to prisoners when it directly regards the prevention of crime and disorder in prison facilities, for example in relation to smuggling alcohol, drugs or weaponry. Here a unitary theory is adopted. In relation to other matters, however, such as having regular contact with spouse and children, the Court seems to adopt a proportionality test, albeit a muffled one as restrictions on rights and freedoms are precisely the essence of imprisonment. The private interest in this respect is not, as with most cases regarding security, related or connected to engaging in crime or concealing it, but to having a relative social life despite the imprisonment. Likewise, with regard to the expulsion of immigrants for the prevention of crime and disorder, the Court does not adopt a unitary theory, as it does in most security related cases. This could be so because the common and the private interest play another role than in relation to most cases that concern the promotion of safety. First, the private interest is only partially linked to the interest of the immigrant and mostly to the interests of his family members, such as his spouse and children, who are not (directly) responsible for his actions, but are nevertheless affected by his expulsion. Second, the general interest in relation to safety

does not so much apply to the immigrant himself, as he is excluded from that common interest by way of his expulsion. The conflict here seems to be between the private interest of the immigrant's family to stay and the common interest to expel the immigrant.

Of these three tests, it is the balancing test that has received most attention from the commentators of the ECtHR. 'Establishing that the measure is necessary in a democratic society involves showing that the action taken is in response to a pressing social need, and that the interference with the rights protected is no greater than is necessary to address that pressing social need. The latter requirement is referred to as the test of proportionality. This test requires the Court to balance the severity of the restriction placed on the individual against the importance of the public interest.'¹¹¹ Likewise, both in privacy specific and in more general literature, the predominant focus is on balancing the different interests involved in a particular case. For example, Aleinikoff has famously suggested that we live in 'an age of balancing', in which most cases are resolved by weighing the private and public good.

Not only in literature, however, the balancing test is applied most, but also in many other jurisdictions such as by American courts, by national European courts and by the Court of Justice of the European Union. The balancing test is adopted as general test for addressing infringements on fundamental rights and freedoms. This focus is understandable when it concerns the other three qualified rights and especially the freedom of speech, among others protected under Article 10 of the Convention. In contrast to the right to privacy, the right to expression is often limited in order to protect the rights and freedoms of others, such as the right to reputation of individuals. In such cases, two private interests, which have no principle priority over each other, should be reconciled, and a fair balance between the interests is commonly believed to be the most suitable approach for weighing two individual rights. Second, if a public interest is invoked as a legitimation for restricting Article 10 ECHR, another public interest will often be concerned with its expression, such as the freedom of the press, its vital role as watch-dog, or the general pursuit of truth through the marketplace of ideas. Again, two interests of equal importance are invoked and a fair balance of the two interests involved seems to provide the most appropriate outcome. Finally, if the private interest and the common interest do conflict in relation to the freedom of expression, the common interest invoked often relates to the protection of health and moral, regarding which the Court generally adopts a primary focus on balancing both interests, as described in this study.

With regard to Article 8 ECHR, however, the Court seldom balances this right against other private interests; it should be kept in mind that under the ECHR, applicants may only complain about the conduct of states and not about individuals and companies. No general interest is usually concerned with the protection of the right to privacy and limitations for the preservation of societal morals is only one of the three rationales commonly invoked. While the private interest concerning the protection of morals is directly opposed to the common interest, this does not hold true for the other two rationales. With regard to restricting the right to privacy in security issues, a person has no legitimate private interest, assuming that the infringement has been non-arbitrary, based on legitimate suspicion, and necessary, and that the legitimate safeguards have been met. Likewise, the country's economic well-being is in the interest of all and the Court holds that any unreasonable burden that is imposed on a person or a group must be relieved or compensated. Consequently, concerning the latter two rationales, the tension between the private and the general interest is non-existent or absolved, while in morality-based cases, this tension remains.

The question this contribution has posed is how the Court should approach cases regarding privacy violations following from Big Data processes. An example might be the

¹¹¹ C Ovey & R C A White, *European Convention on Human Rights* (Oxford University Press, 2002), 209.

assessment of the presumed NSA-like data gathering by the British Intelligence Services, about which the Court has recently received a complaint.¹¹² In the past few years, the Court already had to deal with issues revolving around mass surveillance, the processing of personal data on large scales and the use of meta-data. It will be likely that these types of cases will only gain prominence as the technological developments continue. Thus, a poignant question becomes how the Court should approach such cases. What test should it adopt, when one of the core problems relating to privacy violations following from Big Data processes is that the harm and the interests involved are relatively vague and abstract?

As has already been suggested in the introduction, the most well-known test, that of balancing the different interests, seems unfit for these type of cases. Often, an individual is simply unaware that his personal data is gathered and even if a person would be aware of these data collections, given the fact that data gathering and processing are so widespread and omnipresent, it will quite likely be impossible for him to keep track of every data processing which includes (or might include) his data. If an individual does go to court to defend his rights, he has to demonstrate a personal interest, i.e. personal harm, which is a particularly problematic notion in Big Data processes. The other way around, the balancing test also presupposes a clear and demarcated societal interest served with a particular privacy infringement. With Big Data processes, however, the relation between the data collection and processing of personal data of a specific person, and the beneficial consequences for the promotion of national security is often vague and abstract.

Consequently, it might be promising to look at the necessity test for addressing issues such as regarding the complaint about the behaviour of the British secret services, as this test is developed for cases relating to security interests. Like the NSA, British organizations, and indeed the intelligence services of many other countries, gather and process large amounts of personal data in order to, among other things, combat terrorism. Although it may sometimes be difficult to substantiate the general interest served with these types of processes, the Court allows a wide margin of appreciation to states in cases in which the rationale of 'national security' is invoked, which is allowed by the Court when it regards matters of terrorism. Thus, the government has some room when it comes to determining the societal interest involved with Big Data processes. Moreover, this test might seem like a good starting point, because the individual interest is not explicitly taken into account in the assessment of the Court, as is the case with the balancing test.

Still, the Court will adopt its role as European supervisor and will marginally assess the activities of the state. It has to be stressed that this approach too, is primarily linked to the current privacy paradigm. It makes sense to apply a necessity test when a data collection is executed with a particular goal in mind, e.g. a particular person, group or institution is suspected of planning a criminal activity and data are collected about them and their plans to prevent these activities or prosecute them. Even if there is but a slight suspicion that a certain person or group might be planning a crime there is a sufficiently clear societal interest the government can point to. With Big Data processes, however, it is the other way around. Data are not collected for a specific purpose or reason, rather they are collected, stored and analysed to find patterns, statistical correlations and for the creation of group profiles. Only afterwards does it become clear what data are valuable and for what purposes they may be used. As the complaints about Big Data processes, such as the one submitted recently, often do not regard the specific use of the data for defined goals, but the data gathering as such, it will be hard to impossible for data collectors, such as the state, to specify at that point what societal interest is served with the data collection and to what extent. Consequently, the

¹¹² ECtHR, 'Big Brother Watch and others v. UK, appl.no. 58170/13, 07 January 2014.

necessity test requires a clear societal interest, which is often difficult to substantiate in Big Data processes.

Perhaps, then, it is more promising to employ the unreasonable burden test. One advantage is of course that the societal interest is presupposed by the Court, which is a benefit in relation to the necessity test. The individual interest, however, needs to be demonstrated, which, as stressed above, proves difficult in Big Data processes. Still, the Court does not require harm or a setback to interest as such but only a 'burden', which is used by the Court as a rather flexible term. Moreover, the Court has done something peculiar in these types of cases, namely it has adopted as essential notion whether the 'quality of life' of the applicant has been harmed. The issue with many environmental cases, particularly, is that, like the cases revolving around Big Data, the notion of harm is so problematic. What harm does noise pollution do to the individual's private or family life? How can one substantiate, for example, that medical problems have arisen from smog or air pollution? What harm does the greenhouse effect do to the individual complainant? Even if personal harm can be demonstrated, the causal connection between environmental pollution and individual harm is often very difficult to demonstrate. This is exactly why the Court has introduced the notion of 'quality of life', as whether the 'quality of life' is diminished can in principle only be determined by the subject itself. Thus, the notion of harm becomes a subjective, rather than an objective matter.

To give an example, in *Ledyayeva and others*, the applicant complained that there had been a violation of Article 8 of the Convention on account of the government's failure to protect their private lives and homes from severe environmental nuisance arising from the industrial activities of a steel-plant. The government denied the existence of any significant pollution and the causal link to the diminished health of the applicant. The Court held, however, that whereas 'in many cases the existence of an interference with a Convention right is evident and does not give rise to any discussion, in other cases it is a subject of controversy. The present four applications belong to this second category. There is no doubt that serious industrial pollution negatively affects public health in general. However, it is often impossible to quantify its effects in each individual case, and distinguish them from the influence of other relevant factors, such as age, profession etc. The same concerns possible worsening of the quality of life caused by the industrial pollution. The "quality of life" is a very subjective characteristic which hardly lends itself to a precise definition.'¹¹³ It is this term that allowed the Court to declare the case admissible.

Although the idea of relatively abstract general interests and subjective personal interests is a very promising starting point, it is not enough to enable the Court to deal adequately with privacy violations following from Big Data processes. It still focuses on the burden on specific individual claimants, while Big Data processes do not regard individuals or small groups (living in the vicinity of an airport, a factory or a piggery), but rather have an effect on everybody. A fourth test needs to be developed, in which both interests weighed are formulated on a general and abstract level. There are already rudiments of such an approach available in the Court's jurisprudence. Reference can be made to a group of cases that regards laws and policies that may stigmatise certain groups in society. Sometimes, the Court is willing to accept that the mere existence of laws may create a stigma, leading to an infringement of a person's privacy, even without a law being applied on a person or having any other concrete effect.¹¹⁴

¹¹³ ECtHR, *Ledyayeva, Dobrokhotova, Zolotareva and Romashina v. Russia*, application no. 53157/99, 53247/99, 53695/00 and 56850/00, 26 October 2006, § 90. See further: M Fitzmaurice, 'The European Court of Human Rights, Environmental Damage and the Applicability of Article 8 of the European Convention on Human Rights and Fundamental Freedoms' (2011) 13 *Environmental Law Review* 2.

¹¹⁴ ECmHR, *Di Lazzaro v. Italy*, application no. 31924/96, 10 July 1997.

For example, it has been accepted that where the national legislator had adopted a prohibition on abortion and the applicant neither was pregnant, nor had been refused an interruption of pregnancy, nor had been prosecuted for unlawful abortion, an interference with her private life still existed.¹¹⁵ Likewise, in *Marckx*, the inheritance laws had not yet been applied to the applicants and presumably would not be applied for a certain period of time, but the Court argued nonetheless that they had a legitimate interest in challenging a legal position, that of an unmarried mother and of children born out of wedlock, which affected them - according to the Court - personally.¹¹⁶ Finally, with regard to a claim by an applicant about the regulation of homosexual conduct, the Court has held that ‘the very existence of this legislation continuously and directly affects his private life’.¹¹⁷ In these cases, the ECtHR is willing to look beyond the specific interest of the individual claimant and focus on more general and societal concerns, namely the stigmatisation that follows from a certain legal or social position.

With regard to covert surveillance and storing personal data, the Court is sometimes also willing to adopt a more flexible approach. The Court has been willing to accept a slight relaxation of the requirement of individual harm and personal interest, in particular with regard to secret services. In the famous *Klass v. Germany* case, for example, the Court held that it is unacceptable that ‘the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the person concerned is kept unaware of its violation’.¹¹⁸ Similarly, in some cases the Court has also been prepared to adopt a broader interpretation with regard to complaints about legislation authorizing surveillance practices, which is drafted in very broad and general terms. In these cases, such as that of *Lordachi v. Moldavia*, the Court has determined that ‘[t]he mere existence of the legislation entails, for all those who might fall within its reach, a menace of surveillance; this menace necessarily strikes at freedom of communication between users of the postal and telecommunications services and thereby constitutes an “interference by a public authority” with the exercise of the applicants’ right to respect for correspondence.’¹¹⁹

In similar fashion, the Court has stated in a case, that of *Liberty v. the UK*, that ‘the authorities were authorized to capture communications contained within the scope of a warrant issued by the Secretary of State and to listen to and examine communications falling within the terms of a certificate, also issued by the Secretary of State. Under section 6 of the 1985 Act arrangements had to be made regulating the disclosure, copying and storage of intercepted material. The Court considers that the existence of these powers, particularly those permitting the examination, use and storage of intercepted communications constituted an interference with the Article 8 rights of the applicants, since they were persons to whom these powers might have been applied.’¹²⁰ Consequently, cases in which the plaintiff does not know whether he was subjected to a particular surveillance practice and has no chance to determine whether this was so, and cases in which a complainant submits an *in abstracto* claim, about the mere existence of a law or a policy, may be declared admissible by the Court.

Yet the Court is willing to do so only in exceptional circumstances. In most cases, even regarding presumed covert surveillance, it holds that there must at least be a reasonable suspicion that the applicants have been affected by the matter complained of. For example, in *Halford v. the UK* the applicant alleged that the interception of her telephone calls amounted

¹¹⁵ ECmHR, *Brüggemann and Scheuten v. Germany*, application no. 6959/75, 19 May 1976.

¹¹⁶ ECtHR, *Marckx v. Belgium*, application no. 6833/74, 13 June 1979, § 27.

¹¹⁷ ECtHR, *Dudgeon v. the United Kingdom*, application no. 7525/76, 22 October 1981, § 41. ECmHR, *Johnson v. the United Kingdom*, application no. 10389/83, 17 July 1986. ECtHR, *Modinos v. Cyprus*, application no. 15070/89, 22 April 1993. ECtHR, *Norris v. Ireland*, application no. 10581/83, 26 October 1988.

¹¹⁸ ECtHR, *Klass and others v. Germany*, application no. 5029/71, 06 September 1978, § 36.

¹¹⁹ ECtHR, *Lordachi and others v. Moldavia*, application no. 25198/02, 10 February 2009, § 34.

¹²⁰ ECtHR, *Liberty v. Great Britain*, application no. 58243/00, 01 July 2008, § 57.

to violations of Article 8 of the Convention, but the government disputed this fact and said that, moreover, there was no reasonable likelihood that she was a victim of wire-tapping. The Court held, however, that ‘there was a reasonable likelihood that calls made by Ms Halford from her office were intercepted by the Merseyside police with the primary aim of gathering material to assist in the defence of the sex-discrimination proceedings brought against them.’¹²¹ Likewise, in *Matthews v. the UK* (1996) the Commission referred to the fact ‘that the applicant was active in the campaign against Cruise (nuclear) missiles in the United Kingdom’ in order to assume for the purposes of the decision that the applicant has established a reasonable possibility that her telephone conversations were intercepted pursuant to a warrant for the purposes of national security.¹²² The other way around, if applicants can not substantiate such reasonable suspicion or claim that they are part of the group specifically categorised in the surveillance laws or policies, the Court may declare the case inadmissible. The Court has not yet decided which approach it wants to adopt when it regards covert surveillance, the principle of a ‘reasonable likelihood’ or that of the effect following from the ‘mere existence’ or laws or policies.¹²³ Yet it is clear that only the latter will prove potent in the age of Big Data.

In conclusion, it is uncertain whether claims about Big Data will be declared admissible under the ECHR. Moreover, even if they are declared admissible, it is unclear how the ECtHR could approach such dilemmas in a satisfactory way. There are generally three tests it has developed to deal with different privacy questions, one in which it primarily focuses on the public interest, another in which it primarily focuses on the individual interest and a third in which it balances both interests. With Big Data, however, neither of these tests apply as the different interests at stake are often vague and abstract. Consequently, a fourth test needs to be developed in which the Court can take into account more structural and societal developments. There are rudiments to be found for such an approach in the Court’s jurisprudence, but until now it has shied away from wholeheartedly accepting such a test. However, if Article 8 ECHR wants to retain its relevance for privacy protection in the age of Big Data, the ECtHR would need to develop this test further and accept it as an fourth and independent approach. *Klass*, *Liberty* and *Lordachi* are the fundamentals on which the Court should build this new approach.

¹²¹ ECtHR, *Halford v. the UK*, application no. 20605/92, 25/06/1997, § 48.

¹²² ECmHR, *Matthews v. the UK*, application no. 28576/95, 16/10/1996.

¹²³ See further: ECtHR, *Kennedy v. Great Britain*, application no. 26839/05, 18 May 2010.