Protecting the Secrecy of Telecommunications: a Comparative Study of the European Convention on Human Rights, Germany and the United States

by Blanca Rodríguez Ruiz
European University Institute

Thesis presented with a view to obtaining the Doctorate in Law
of the European University Institute

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Introduction

This thesis has a specific purpose: it attempts a study of how the right to the secrecy of telecommunications is protected in three different systems. That this is the object of the thesis will already be clear from its title. More lengthy considerations are needed to justify *why* I am examining the right to the secrecy of telecommunications at all. In addressing this question I find myself reasoning at three different levels, which correlate with three different stages of my knowledge of the right to the secrecy of telecommunications.

At the first level, my answer to the question why study the right to the secrecy of telecommunications is relatively simple: studying this right seems interesting and important, given that it protects one of the spheres of private life, one's telecommunications, that appears most threatened by the public power. Indeed, one comes across not infrequent press reports about cases of illegal wire-tapping and the interception of telecommunications by some branch of the State. Since one assumes that only a small percentage of cases of interception ever see public light, one is left with the uncomfortable feeling that our telecommunications are simply left to unrestricted surveillance by the State, a State left free to intervene when and as frequently as it wish. At this first level of my research, this alone made the right to the secrecy of telecommunications sufficiently worth studying.

At a second level, it is clear that the right to the secrecy of telecommunication operates in context. The first recognition of the right dates back to the late eighteenth century and at that time the right was couched in terms very similar to those of today. This raises the question of the relation of the right to its background context. For while the terms of the right have not changed greatly the background has: we now live in a highly technological age. Thus it must be examined whether the 'old right' can stand the strain of the changed circumstances and, if not, to make suggestions as to how this could be achieved.

Of course, one could reply that the right to the secrecy of telecommunications is not alone in its status as an 'old right in a new world'. Many other contemporary fundamental rights find their roots in the French *Déclaration des Droits de l'Homme et du Citoyen* of 1789 and have also survived to the present day with their wording practically unchanged. Nevertheless, and now I move to the third of the three levels,

the case of the right to the secrecy of telecommunications seems to me somewhat peculiar. This is because in recent times it has had to meet at least three important changes both of technological and of sociological character and these have considerable ramifications for the actual concepts surrounding the right. The first one of these changes is purely technological and only exists as yet as a threat not yet come into being: technological developments threaten to alter the conceptual boundaries of the right to the secrecy of telecommunications. The boundaries of the right are defined by the conceptual boundaries of the terms 'secrecy' and 'telecommunications'; the problem is that some new means of telecommunication threaten to blur the line between telecommunications held in secret and those accessible to all; this is most typically the case with wireless telephone conversations carried out through radio waves accessible from an ordinary radio set. Such new means can challenge the scope of the term 'secrecy', hence also the boundaries of the right to the secrecy of telecommunications.

The second change concerns the way the right to the secrecy of telecommunications is regarded in present democracies, as opposed to the way it was regarded when originally recognised. When this right first arose, and until recent times, the secrecy of telecommunications lay at the disposal of public authorities, in the sense that these found hardly any physical obstacle when they wanted to interfere with it; hence the need to grant it legal protection. To a great extent, this is still very much the case. Yet today technology has developed sophisticated means which enable not only the interception but also a reinforced protection of the secrecy of telecommunications. In some extreme cases technology can even make it impossible for a third party to interfere with certain telecommunications (this is the case with acts of digital telecommunication with party-to-party encryption), even if the third party in question is the public power and the intended interference has a legitimate purpose. If we combine this circumstance with the growth of organised crime and the importance of telecommunication surveillance to combat it, then the result might be a shift of standpoint from which the right to the secrecy of telecommunications is regarded. Instead of a defenceless aspect of privacy in need of legal protection, the secrecy of telecommunication might now appear as an aspect of privacy highly protected on technical grounds. Legal intervention might then seem to be required, not so much to reinforce its technical protection, but to bind it within adequate legal limits[1]. In this context, it seemed to me an important task to reaffirm the role of the right to the secrecy of telecommunications in present democracies and to insist in drawing a clear line

[1]As examples of this position, see E.S. Silver, "The Wiretapping-Eavesdropping Problem: A Prosecutor's View", 44 *Minn. L. Rev.* 835 (1960), and H.K. Lipset, "The Wiretapping-Eavesdropping Problem: A Private Investigator's View", 44 *Minn. L. Rev.* 873 (1960).

between the respect that this right continues to deserve as a matter of principle, on the one hand, and the regulation of exceptional possibilities of interference, on the other.

The right to the secrecy of telecommunications has had to meet at least a third change. This concerns the increasing need to protect the right not only against the State but also against third persons. As an aspect of privacy, the secrecy of telecommunications finds its most immediate enemy in society, yet the State has always possessed the means for much more powerful and systematic interferences; hence the constitutional recognition of this right as a fundamental right against the State. The problem today is that certain private persons are in a position to endanger the secrecy of certain telecommunications to the same degree as the State (this is notably the case of employers with respect to the telecommunications engaged in by their employees at the work place), yet as a fundamental right, the right to the secrecy of telecommunications protects individuals in principle only against public acts of interference. It therefore seemed important to explore what possibilities Constitutions leave open for protecting the fundamental right to the secrecy of telecommunications also against interferences carried out by private persons.

In this thesis, then, I have set myself the task of exploring how the 'old' right to the secrecy of telecommunications can best face the present times and the changes they have brought about. To be more precise, I suggest that the fundamental right to the secrecy of telecommunications can be best protected if approached on the basis of the three following leading ideas: [1] the right to the secrecy of telecommunications ought to be regarded as essentially liberal in character, hence as a negative right of defence against the State, while in addition, but only secondarily, this right also ought to impose positive obligations upon the State; [2] the right to the secrecy of telecommunications ought to be regarded as a participatory rather than as an individualistic right; [3] the conceptual boundaries of the right to the secrecy of telecommunications ought to be defined as clearly as possible on the basis of a unifying rationale. Before developing these ideas, however, I would like to make it clear what I mean by the expression 'fundamental rights'. Given that this expression has been and will repeatedly be used in the thesis, it is crucial that we avoid confusion and misunderstandings from the beginning.

The expression 'fundamental rights' first appeared in pre-revolutionary France at the end of the eighteenth century ("*droits fondamenteaux*") and has since been largely

used in constitutional theory, most notably in Germany ("*Grundrechte*"[2]). In spite of its rather long history, this expression is still not consistently applied either by academic authors or in official legal texts; in particular, it is often intermingled with other expressions such as "human rights", "public liberties", or "fundamental liberties". Some predominant tendencies in the use of the term can nonetheless be singled out both in continental Europe and in the United States. In continental Europe, the expression "fundamental rights" is most often used to refer to human rights[3] insofar as they are granted positive constitutional protection within a given national system. Fundamental rights are therefore defined on the basis of both substantial and formal traits. The substantial trait is that fundamental rights are regarded as human rights, that is they are intended to preserve values which in their cultural, juridical context are regarded as human rights. The formal trait is that fundamental rights are recognised in a Constitution as binding provisions and not as mere programatic principles; this implies, first, that fundamental rights have direct binding effect on the three branches of the State, including the legislature, and, second, that there is adequate judicial protection against their possible violation[4].

In the United States, definitions of "fundamental rights" most commonly conceive them as the rights implicit in those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" or as those rights "implicit in the concept of ordered liberty"[5]. As these definitions indicate, in the United States the expression "fundamental rights" is only characterised by substantial features. That this is so is confirmed by the fact that, according to the Supreme Court, being included in the U.S. Bill of Rights contained in the first eight constitutional amendments is neither a sufficient nor a necessary condition for a right to be considered "fundamental". Nevertheless, once defined as fundamental rights, a formal characteristic is attached to them, namely they are made the object of the protection provided by the due-process clauses of the fifth and the fourteenth amendments. In this

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[2]This expression appeared for the first time used in Title IV of the *Paulskircheverfassung* of 28th of March 1949 (see P. Cruz Villalón, "Formación y Evolución de los Derechos Fundamentales" *REDC* No. 25-27, p. 35 at 56).

[3]The definitions of the expression 'human rights' also vary. For a critical analysis of this question see A.E. Pérez Luño, *Derechos Humanos, Estado de Derecho y Constitución*, Madrid 1984, p. 21.

[4]For some examples of this approach to fundamental rights see P. Cruz Villalón, "El Legislador de los Derechos Fundamentales" *Anuario de Derecho Público y Estudios Políticos*, p. 7, Granada 1989; G. Peces-Barba, *Los Derechos Fundamentales*, p. 13, Madrid 1983; C. Starck, "The Constitutional Definition and Protection of Rights and Freedoms" in *Rights, Institutions and Impact of International Law according to the German Basic Law*, p. 20, Baden-Baden, 1987. See also A.E. Pérez Luño, *Derechos Humanos* ... pp. 30-31 and the bibliography mentioned therein.

[5]*Hebert v. Louisana*, 272 US 312, 316 (1926) and *Palko v. Connecticut*, 302 US 319 at 325 (1937), respectively; references from P.G. Kauper, "Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The *Griswold* Case" in *The Right of Privacy. A Symposium*, New York 1971, p. 39 at 40.

thesis, and unless otherwise specified, I use the expression "fundamental rights" in its continental European sense. Occasionally, when speaking only of the United States, I prefer to use the expression "constitutional rights". Now that this terminological point has been made clear, let me start to develop the three leading ideas that I have proposed for my thesis.

[1] One of the leading ideas of this study will be that the right to the secrecy of telecommunications is best protected if it is fundamentally regarded as a liberal right of defence against the State. Indeed, the recognition of this right and of fundamental rights in general is rooted in the liberal tradition. Modern fundamental rights arose as marking the dividing line that has separated civil society from public power. They arose as marking the boundaries of the area of freedom from the public power retained by individuals and as reminders that this area may not be infringed by the State. Fundamental rights arose, in other words, as rights of defence against the State (*Abwehrrechte*). Liberalism regards freedom as the natural state of the individual and the State as the natural enemy of freedom. Hence, the area of individual freedom from the State is defined as wide as possible, whilst the possibility for the public powers to infringe upon the exercise of rights is considered exceptional and subject to strict interpretation[6]. I will argue in this thesis that approaching fundamental rights on the basis of this liberal pattern entails significant advantages for the protection of these rights[7]. The case of the right to the secrecy of telecommunication will prove very illuminating on this point.

However, my claim that fundamental rights ought to be approached on the basis of a pattern *essentially* liberal does not imply that this pattern ought to be *purely* liberal in the most traditional version of the term. A purely liberal approach to fundamental rights lies open to criticism in as far as it implies a hands-off attitude of the public power with respect to the exercise of these rights. Indeed, liberalism accords the individual a wide scope of freedom, yet it does not imply a positive commitment of the State to make freedoms actually possible. A purely liberal conception of fundamental rights could thus be rightly accused of being blind to the fact that the exercise of rights can be rendered impossible not only by an active infringement of the public power but also by the absence of the necessary social or even legal preconditions for their exercise.

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[6]"Die Freiheit des einzelnen [ist] *prinzipiell unbegrenzt*, während die Befugnis des Staates zu Eingriffen in diese Sphäre *prinzipiell begrenzt* ist". C. Schmitt, *Verfassungslehre* p. 126 at 164 (1928) (quotation taken from Ossenbühl, "Die Interpretation der Grundrechte in der Rechtsprechung des Bundesverfassungsgerichts", (1976) *NJW*, p. 2100 at 2101).

[7]Note that I am only referring to rights fundamentally liberal in character, hence to rights originally conceived as negative obligations for the State.

These shortcomings of a purely liberal approach to fundamental rights have long been felt both in Europe and in the United States. In the United States, they became most apparent in the field of racial discrimination. It was clear that in order that racial discrimination could disappear, the public power could not merely adopt an attitude of negative respect for fundamental rights, in general, and for the right to equality, in particular. In addition, it would also have to adopt positive measures to enhance the equal protection of fundamental rights. This idea led in 1868 to the enactment of the fourteenth amendment to the Federal Constitution, according to which no state shall "deny to any person within its jurisdiction the equal protection of the laws". The fourteenth amendment aimed at extending to black citizens the protection of laws traditionally granted to white citizens[8] and, in order to reach this aim, it intended to impose upon the states not only negative obligations (the obligation to refrain from acting) but also positive obligations, i.e. the obligation actively to guarantee the equal protection of the laws to every citizen. "Denying includes inaction as well as action and denying the equal protection of the laws includes the omission to protect"[9]. The Warren Court's cases on racial discrimination are good examples of the states' positive obligations deriving from the fourteenth amendment.

In continental Europe, different approaches to fundamental rights have been proposed which stress that these rights have not only a negative dimension but also a positive one, so that they also impose positive obligations upon the State. In this sense, fundamental rights have been conceived as *objective* constitutional values[10] and as 'institutional guarantees' (*institutionelle Gewährleistungen*)[11], that is as *objective*

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[8]On this issue, see John Silard, "A Constitutional Forecast: Demise of the 'State Action' Limit on the Equal Protection Guarantee", 66 *Col. L. Rev.* 855 at 267 et seq. (1966).

[9]*U.S. v. Hall*, 26 Fed. Cas. 79, 81 (No. 15,282) (S.D. Ala. 1871) (quotation taken from J. Silard, "A Constitutional Forecast..." at 269, footnote 51; see also footnote 50). Positive obligations rested primarily on the states and were under the ultimate control of the federal power. As the Supreme Court put it, "[t]he equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right" (*US v. Cruikshank*, 92 US 542, 544 (1875) -quotation from J. Silard, "A Constitutional Forecast ...", footnote 50).

[10]This conception stems from R. Smend's "integration doctrine" (*Integrationslehre*), according to which fundamental rights are the constituent elements of a cultural system of values (Smend, *Staatrechtliche Abhandlungen*, 1955, p. 264 et seq.). In this respect, see Böckenförde, "Grundrechtstheorie und Grundrechtsinterpretation" (1974) *NJW*, p. 1529 at 1533.

[11]For the conception of fundamental rights as 'institutional guarantees' see Häberle, *Die Wesensgehaltgarantie des Art. 19 Abs. 2 Grundgesetz*, C.F. Müller, Heidelberg 1983. Note that the concept of *institutionelle Gewährleistungen* differs from the concepts of *Institutsgarantie* and *Institutionsgarantie* developed by Carl Schmitt in the Weimar era. With these two terms Schmitt was not referring to any particular dimension of rights but, respectively, to institutions of public law (municipal autonomy, freedom to teach, etc) and to institutions of private law (family, property, marriage, etc) which were considered so important that the Constitution protected their essential core even against the legislative power (see Ossenbühl, "Die Interpretation der Grundrechte ..." at 2103). Yet

principles of the constitutional order which as such must not only be respected but also positively pursued by the State[12]. Moreover, in Europe as in the United States, it has been argued that fundamental rights have a positive *subjective* dimension, that is that they grant the individual a claim that the State develop the necessary means to exercise his fundamental rights[13]. This idea that rights have a positive subjective dimension has become more urgent with the development of the social State, for in this context fundamental rights are often recognised which do not require that the State refrains from acting but that it adopts some positive measures to enable their exercise[14]. Also traditional liberal rights of defence are often read in the sense that they have a positive subjective dimension. In particular, the idea has been put forward that every fundamental right enshrines the positive claim that the State develops the necessary legal, procedural and organisational background to enable the protection of a right both against third parties and against the State itself[15].

The idea that fundamental rights are objective principles of the constitutional order is today perfectly accepted. More controversial remains the question of whether fundamental rights also have a positive subjective dimension. Commentators[16] often argue against this view on the grounds that States have limited means at their disposal to facilitate the exercise of rights actively, hence that the extent to which they provide individuals with means for the exercise of a particular right remains a policy choice, a

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in spite of their different meanings, the concepts *Institutsgarantie* and *Institutionsgarantie* can still be regarded as the most immediate precedents of the present conception of rights as institutional guarantees.

[12]A brief review of the different approaches to rights as institutional guarantees can be found in T. Wülfing, *Grundrechtliche Gesetzesvorbehalte und Grundrechtsschranken*, Berlin 1981, pp. 65 et seq.

[13]See in particular M. Hund, "Staatliche Schutzpflichten statt Teilhaberechte?" *Festschrift für Wolfgang Zeidler*, Band 2 p. 1445, Walter de Gruyter, Berlin - New York, 1987. See also Robert Alexy, *Theorie der Grundrechte*, Nomos Verlagsgesellshaft, Baden-Baden, 1985, pp. 414-415. Alexy justifies the subjective character of the positive dimension of rights on the basis of the following reasoning: fundamental rights are principles, which implies that they enshrine the duty of their optimalisation; under a purely objective approach to the State's positive obligations vis-à-vis fundamental rights these rights enjoy a lesser protection than under a subjective approach to such positive obligations; hence the State's positive obligations must also have a subjective dimension. In other words, Alexy considers that the existence of a subjective positive dimension of fundamental rights is a requirement of the conception of fundamental rights as principles. The only question is how the coverage of this dimension of rights is to be defined. (For the conception of rights as principles and the duty of their optimalisation, see Alexy, *Theorie der Grundrechte*, pp. 75 et seq.).

[14]Good examples of this are the Constitutions of the new German *Länder*, all of which insist on the recognition of subjective rights of social character which impose strong positive obligations upon the corresponding *Land* (see E. Denninger, "La Reforma Constitutional en Alemania: entre Etica y Seguridad Jurídica" 84 *Revista de Estudios Políticos* 69 (1994).

[15]The different ways in which rights can enshrine positive claims against the State and the different implications of these different claims are issues which have been carefully analysed by R. Alexy, *Theorie der Grundrechte*, pp. 395 et seq. See also Konrad Hesse, "Bestand und Bedeutung der Grundrechte in der Bundesrepublik Deutschland" (1978) *EuGRZ*, 427 at 433 et seq.

[16]See Böckenförde, "Grundrechtstheorie ..."; Ossenbühl, "Die Interpretation der Grundrechte ..." at 2104 et seq.; Christian Starck (ed.) *Rights, Institutions and impact of International Law according to the German Basic Law*, Nomos Verlagsgesellschaft, Baden-Baden, 1987, pp. 42 et seq.

choice which, in addition, is greatly conditioned by financial constraints. Be this as it may, the foregoing considerations should have illustrated that a purely liberal conception of fundamental rights appears today as clearly insufficient. Indeed, it was never my intention to suggest otherwise. As a matter of fact, in chapter 4 of this thesis I will insist upon the importance of recognising a positive dimension to fundamental rights, I will even insist upon the importance of recognising them a *subjective* positive dimension; moreover, in chapter 7 I will underline the relevant role that the positive dimension of fundamental rights plays in the recognition of a third-party effect to these rights, so that they can apply, though indirectly, in private relationships. Nonetheless, my original claim remains unaltered: I believe that fundamental rights ought to be approached on the basis of a pattern essentially liberal in character, for this entails significant advantages for their protection. Fundamental rights may have, indeed they ought to have, a positive dimension, yet this should only come to add to their negative dimension, never to replace it. Other considerations, in short, should be annexed to liberal rights but not replace them altogether.

One could raise the objection that making the above claim is superfluous or at best of very limited interest, since in any case the approach to fundamental rights I am arguing for prevails both in literature and in case law. Still today, the prevailing approach to fundamental rights is for the most part liberal in character. We still conceive of fundamental rights primarily as rights of defence against the State, hence as negative subjective claims of the individual against the State, so that most generally an objective and eventually a social approach to these rights have only come to complement this negative dimension by way of bringing out some others that the liberal approach overlooked[17]. It has even become a common-place to speak of the 'double character' (subjective/objective) of fundamental rights. I am well aware that this is the case. My feeling is nonetheless strong that insisting on the importance of the basically liberal approach to fundamental rights is not at all redundant. For one thing, at the theoretical level this approach has been put into question on a few but important occasions[18]. Moreover, often enough courts turn their back to the liberal approach to fundamental rights, with the result that the idea that these rights deserve the widest possible protection is disregarded; often enough, for example, courts disregard the essentially liberal character of the right to the secrecy of telecommunications. The respective implications of a liberal and of a non-liberal approach to fundamental rights will be

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[17]F. Ossenbühl, "Die Interpretation der Grundrechte ..." at 2100; K. Hesse, "Bestand und Bedeutung ..." at 430 et seq.

[18]Let me for example mention the work of Friedrich Müller (*Die Positivität der Grundrechte. Fragen einer praktischen Grundrechtsdogmatik*, Duncker & Humblot, Berlin 1969, part. pp. 17 et seq.) or of Peter Häberle (*Die Wesensgehaltgarantie des Art. 19 Abs. 2 Grundgesetz*, C.F. Müller, Heidelberg, 1983). I will refer to both of them more in detail in section 1 of chapter 3.

addressed in chapter 3, where I will study the structure of these rights and, in particular, of the right to the secrecy of telecommunications. Indeed, as we will see, the negative implications of a non-liberal approach to fundamental rights come to light with particular clarity in the structure of these rights.

[2] The right to the secrecy of telecommunications is a traditional liberal right of defence against the State and ought to continue being basically this, while at the same time an additional positive dimension ought to be recognised, even a subjective positive dimension. So far I have dealt with the first of the leading ideas of my study. There is however more to the right to the secrecy of telecommunications than just the question of whether and to what extent it should be read on the basis of liberal patterns. I would now like to draw attention to a peculiarity of this right: the right to the secrecy of telecommunications appears to be part of a more general right, a right which has recently been gaining very much in importance. I am referring to the right to privacy. The secrecy of telecommunications is recognised as a fundamental right because it is an aspect of privacy which is thought to deserve constitutional protection. This is so even in cases where the secrecy of telecommunications stands as a completely independent right the definition of which need not be drawn by reference to privacy. Even in such cases, privacy continues to be the interest lying behind the recognition and protection of the right to the secrecy of telecommunications and continues to have a word to say in its interpretation and understanding. The way privacy is conceived is thus of decisive importance for the conception of the right to the secrecy of telecommunications.

There are two different ways of regarding privacy and the right to privacy[19]. Privacy can be regarded as a right of the individual the protection of which responds to purely individualistic interests. Alternatively, privacy can also be regarded as a right of the individual which allows her both free participation in public affairs and the free exercise of her other fundamental rights; in other words, privacy can also be regarded as a condition for the existence of a constitutional democracy. This latter conception relies upon the assumption that an individual can only act freely if she can keep an area of seclusion and secrecy for herself and exclude others from it, that is if there is an area where she can develop her personality free from the eyes of society and of the State. If no such area exists, that is, if all somebody does or enjoys doing (from issues such as

[19]In the following pages I will repeatedly use expressions such as privacy, the private sphere, the right to privacy in a manner that might sometimes appear somewhat confusing or even inconsistent. The same goes for expressions such as publicity or the public sphere. Indeed, both privacy and publicity are omnibus terms which admit various different uses. The different meanings attached to the term 'privacy' will be explored in section 1 of chapter 1, where some attention will also be paid to the term 'publicity', even if only in a derivative way. I hope that this section will shed some light upon the use of both these words in the present introduction.

what she reads or how much she drinks to the people or places she frequents) were to be known to all, then this person would feel too inhibited to participate in public life freely, for she would be conditioned by the fear that the information people have about her could be used against her at any time.

These two approaches to privacy have very different practical consequences. According to the individualistic approach, the protection of the right to privacy works against the interests of democracy. The right to privacy only serves the interests that single individuals have in concealing information from the public eye, something they do for their own sake simply because they have a preference for developing their personality in private. Yet a healthy democracy relies to a great extent in publicity and in the availability of information. The right to privacy is therefore presumed 'undemocratic' and is accorded rather low weight when balanced against interests which are thought to tend towards the common good. The participatory approach to privacy, on the other hand, regards the right to privacy as one of the foundations of democracy. Recognising for individuals a right to privacy is a condition for their free participation in public life, including both political participation and the free exercise of fundamental rights; in turn, the free exercise of fundamental rights and free political participation are at the basis of a constitutional democratic State. The right to privacy thus appears a crucial element of democracy and is granted accordingly strong weight when balanced against other competing interests.

I will argue in this thesis that the right to privacy, and therefore the right to the secrecy of telecommunications, ought to be regarded as participatory rights and not as enemies of democracy. This claim is not only justified by the obvious fact that the participatory approach is more generous towards these rights than the individualistic approach is. Over and above this circumstance, my claim relies on a participatory view of the democratic constitutional State. I will rely, in particular, on the approach to the constitutional democratic State proposed by discourse theory as developed by Robert Alexy[20]. Let me now try to sketch the main points of this theory.

The point of departure of discourse theory is that what is true and what is right must be reached through free debate. To be sure, discourse theory does not conceive of truth and right in absolute terms; rather, they are both regarded as the outcome of consensus. This means that a value is considered more or less true, and defending it is considered more or less right, depending on the number of people that agree on the

[20]In particular, see his article "A Discourse-Theoretical Conception of Practical Reason", (1992) *Ratio Juris* 231 et seq.; see also Alexy, "Rights, Legal Reasoning and Rational Discourse" (1992) *Ratio Juris* 143 et seq.

value in question. The broader the agreement, the closer to truth we are. Yet, discourse theory insists, an agreement can only be held valid if the process of deliberation through which it is attained can be held correct, which can only be the case if deliberation is based on the free and equal participation of everyone who is interested in taking part[21]. In brief, according to discourse theory truth is not attained through proof but through deliberation and persuasion and the truth of values can only be judged by testing their formal correctness, that is by testing the formal correctness of the process of deliberation through which they have been asserted[22]. Discourse is thus proposed as a way of dealing with moral questions, hence as a way of solving conflicts of interests, both at a social and at a political level[23].

In order to justify this discourse-theoretical approach to the solution of conflicts and the importance laid on deliberation, discourse theory falls back upon human nature and draws attention to the interest that most human beings have in correct reasoning. In particular, Alexy falls back upon what he calls the "most general form of life of human beings"[24], which in his view implies that most individuals make and expect others to make "assertions", i.e. "speech acts which raise an implicit claim to truth or correctness"[25]. In other words, the idea is that it is part of the most general form of life to ask *why*, whenever a statement is made. Yet, it is one thing to say that individuals generally have an interest in correct reasoning and quite a different thing to say that they are always willing to respect the rules of correct reasoning[26]. This is clearly not always the case. Rules thus need to be enacted if one wants to ensure that decisions will be adopted in a discourse-theoretical manner; to put it differently, discourse-theoretical deliberation leads to the conclusion that rules need to be enacted in order that discourse itself can be preserved.

At the political level, the need of rules to preserve discourse-theoretical deliberation justifies the existence of the State. Thus, discourse theory does not regard the State as the result of a compact between individuals and a sovereign, but as the result of discourse and debate; moreover, discourse theory regards the constitutional

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[21]The requisites for correct discourse are of course more complex than that. They consist both of rules relating to the structure of the arguments that can be made in a discourse-theoretical process and of rules controlling the discourse process itself. See Alexy, "A Discourse-Theoretical Conception...", at 235.
[22]As was to be expected, this approach to truth has not gone without criticism. See for example Ota Weinberger, "Conflicting Views on Practical Reason. Against Pseudo-Arguments in Practical Philosophy" (1992) *Ratio Juris* 253, part. at 257.
[23]Alexy, "A Discourse-Theoretical Conception ...", at 237.
[24]Ibid. at 242.
[25]Ibid. at 240. The justification of discourse theory in all its complexity is developed in pp. 238 et seq.
[26]Ibid. at 244.

democratic State as the only possible result of discourse and debate, for a constitutional democratic State guarantees the freest and broadest possible political debate. In principle, democracy ensures that all individuals can participate in the discourse-theoretical process of taking political decisions on an equal basis. Yet, as a system based on majority rule, democracy allows the political majority to take political decisions regardless of any discourse-theoretical constraint. Some institutional mechanisms have to be provided to prevent this result; this is precisely the role assigned to the Constitution and to judicial review of the constitutionality of acts of the public powers. Particularly important is the danger that the political majority leaves minorities out of the public debate. This can be prevented by way of recognising for all individuals certain fundamental rights necessary for discourse, so as to ensure that all, even minorities, can enjoy free participation in public life[27].

In sum, on the basis of discourse theory a participatory conception of the State calls for a constitutional, democratic State as the political system best qualified to provide participation. It is in this context that the importance of privacy comes to light. As mentioned above, the right to privacy guarantees every individual the position of autonomy she needs in order to participate in the public debate and to exercise her fundamental rights freely. This is not to say, however, that the participatory approach to privacy is blind to the dangers that excessive privacy entails. On the contrary, it is well aware that, as the individualistic approach points out, excessive privacy can deprive society and the political order from information useful for their own preservation; this is why it does not grant the right to privacy absolute protection but subjects it to restrictions. The difference between the participatory and the individualistic approach to privacy at this point lies in the relative importance that privacy is granted when balanced against other interests, which is significantly higher in the context of the former than in the context of the latter.

Let me now anticipate a criticism that could be raised against my present contention. One could object that defending a participatory approach to the right to privacy does not sit well with my previous claim that the right to the secrecy of telecommunications ought to be basically conceived as a right of defence against the State. Fundamental rights, I said above, are fruits of the liberal tradition and arose as marking the line that in modernity separates individuals from the State, thus making this line more difficult to trespass over. I then claimed that this conception of fundamental rights ought to be preserved in its essentials. It could very well appear that this

[27]Ibid. at 248. According to Alexy some basic human rights could also be justified as being a likely result of discourse-theoretical debate; yet he admits the difficulties of regarding them as the only possible result of such debate (ibid. at 245 et seq.).

approach to fundamental rights is tied to a contractual conception of the State, which draws a line between the individual and the public power. On the other hand, it would appear that this approach lies in contradiction with the idea that the State is the result of participation and debate, because this presupposes the non-existence of the above-mentioned line. Now, it is right to point out that a participatory approach to the State can rely on the absence of a division between individuals and the public power, the most typical example being the Greek polis. Yet it is wrong to assume that this must necessarily be the case. Many participatory theories of the State assume the modern division between the private and the public[28]. Nor does discourse theory imply the inexistence of such a dividing line. Rather, the existence of that line can be regarded as necessary to the discourse, because only a division between the private and the public can guarantee the autonomy that every individual requires for free deliberation. The difference with participatory theories is that, from a participatory point of view, the line between the public and the private does not only split the former from the latter, but also helps to define them both. Individual participation in public matters belongs precisely to this dividing line, because it helps to construct and to preserve both the area of publicity and the area of privacy or negative freedom retained by individuals. If we now turn to the right to privacy, we can see that this right can very well be regarded primarily as a negative right of defence against the State even if conceived as a participatory right. The difference is that thus regarded privacy stands as a cornerstone of democracy, for which it deserves greater respect.

Let me also note that not every version of liberalism relies on an excluding barrier between individuals and the State. My present contention is for example very much in tune with, and finds strong support in, Benjamin Constant's liberalism[29]. Constant was a fierce defender of individual privacy. He praised privacy from the State and from the public affairs as the cornerstone for the modern conception of liberty: whilst "the liberty of the ancients ... consisted in an active and constant participation in collective power, our freedom must consist of peaceful enjoyment and private independence"[30]. Yet at the same time Constant regarded excessive independence from public affairs as irresponsible and as a danger for a healthy political system. He liked to

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[28]'Liberal Republicanism' is a case in point (Cass R. Sunstein, "Beyond the Republican Revival" 97 *The Yale L. J.* 1539 at 1566 et seq. (1988)). See also Bruce A. Ackerman, "The Storrs Lectures: Discovering the Constitution" 93 *The Yale L. J.* 1013 (1984).

[29]Most relevant to this argument is the speech given at the Athénée Royal in Paris (1819) "The Liberty of the Ancients compared with that of the Moderns" (in *Benjamin Constant. Political Writings.* Trans. and ed. Biancamaria Fontana, Cambridge University Press, 1988, pp. 307 et seq.). The participatory character of Constant's liberalism is also one of the leading ideas in Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism*, Yale University Press, 1984 (part. Chapter 1 and the Epilogue).

[30]B. Constant, "The Liberty of the Ancients....", at 316.

stress the paradox that excessive civic privatism could undermine the political basis necessary for the enjoyment of private rights, hence for the enjoyment of civic privatism itself[31]. He therefore claimed that individuals ought to renounce a certain level of civic privatism and undertake political participation[32]. In his view, privacy and participation in public life (i.e. publicity) were closely interrelated as the two sides of a single coin, so that the one was both an end in itself and a means to preserve the other, and vice versa. On the one hand, political participation was necessary to ensure a political system that would continue to guarantee individual privacy[33]. Note that Constant referred to political participation in discourse-theoretical terms as "*la discussion publique*", as a process of argumentative, rational discussion which encouraged mutual learning and intellectual exchange[34]. On the other hand, political participation, conceived in this discourse-theoretical fashion, was only possible if individuals enjoyed a certain area of privacy and freedom from social regulation[35]. In sum, Constant went beyond the liberal uninterestedness for the public and the idea of 'coexistence through mutual indifference' and enriched liberalism with a claim for participation through discourse and debate. He thus argued that a participatory and a liberal approach to the State could coexist in a fruitful combination.

I hope that the foregoing considerations have succeeded in supporting my contention for a participatory approach to the right to privacy and to the right to the secrecy of telecommunications. I also hope that they have shown the coherence of regarding these rights both in a participatory light and as essentially liberal in character. Throughout this thesis I try to offer further support to my present contention on a more practical basis. In particular, I try to offer some evidence of the different implications both of an individualistic and of a participatory approach to privacy and the secrecy of telecommunication, which will give me a chance to show the advantages of the former over the latter. We will first be confronted with these two different approaches in chapter 1, yet their respective practical implications, particularly the practical implications of the individualistic approach, will come to light in more detail in chapters

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[31]S. Holmes, *Benjamin Constant and the Making...*, at 247. See also Constant, "The Liberty of the Ancients ...", at 326.

[32]A balance thus had to be reached between privacy and publicity that would respect the modern conception of freedom. Constant regarded representative democracy as the result of this balance. Representative democracy allows individuals to participate in public affairs while at the same time it frees them from the yoke of these public affairs and leaves them time for their private ones, that is it lets them enjoy their liberty in the modern sense of the word (Constant, "The Liberty of the Ancients ....", at 325-326). This role of representative democracy as a compromise between privacy and publicity (a compromise which results in so-called private citizenship) has also been emphasised by Bruce A. Ackerman, "The Storrs Lectures ...", part. in the second lecture, pp. 1032 et seq.

[33]B. Constant, "The liberty of the Ancients ...", at 323.

[34]S. Holmes, *Benjamin Constant and the Making...*, at 245.

[35]S. Holmes, *Benjamin Constant and the Making...*, at 245-246.

4 and 5, where I will study the object of the right to the secrecy of telecommunications, and in chapter 6, where I will study the content of the right.

[3] We have now seen that the right to the secrecy of telecommunications is an aspect of the more general right to privacy, hence that the way the right to privacy is conceived affects the conception of the right to the secrecy of telecommunications. This close connection between privacy and the secrecy of telecommunications leads me to the third leading argument of the thesis, i.e. the idea that drawing the conceptual boundaries of a right in clear terms has significant advantages for the protection of this right. Developing this argument seems above all important on account of the uncertainties that surround the definition of the right to privacy[36]. In addition, the importance of this argument is enhanced by the rise of telecommunication technologies which challenge the present boundaries of the right to the secrecy of telecommunications. The role that new technologies can play in the definition of this right will come to light below. For the moment I will concentrate on the threat that the uncertainties surrounding the definition of the right to privacy pose for a clear definition of the right to the secrecy of telecommunications.

The scope of the right to privacy is highly controversial, that is, it is highly controversial exactly which areas of reality the right to privacy embraces and which other areas are left out of its scope. In addition, most of the areas that arguably make up the right to privacy are not even held together by a common rationale; rather, many an area responds to a rationale of its own, which makes the scope of this right even more inaccessible and difficult to grasp. The conceptual boundaries of the right to the secrecy of telecommunications, on the other hand, can easily be drawn in clear terms. To this end, it suffices to give the terms 'secrecy' and 'telecommunications' a rather clear definition, which does not appear as too difficult a task. Yet, problems of uncertainty and ill definition can also affect the right to the secrecy of telecommunications, precisely because this is an aspect of the broader and ill-defined right to privacy. In principle, this circumstance need not affect the definition of the right to the secrecy of telecommunications, as long as this is recognised as a right independent from privacy, that is to say as an independent right that covers an autonomous sub-area within the broader area of privacy. On the other hand, problems might arise if the right to the secrecy of telecommunications only receives indirect recognition as part of the right to privacy. For then the risk is high that the secrecy of telecommunications be not regarded as an autonomous and well-defined area within the broader and ill-defined area of privacy, but simply as part of the bric-a-brac that makes up the right to privacy,

[36]The controversy surrounding the definition of the right to privacy will be addressed in chapter 1.

as one of the many aspects of privacy that one needs not define beyond the definition of privacy itself. On this account, I will argue in this thesis that one should avoid subordinating the recognition of the right to the secrecy of telecommunications to the recognition of the right to privacy.

Now we may ask, why is it so important that the scope of a right be defined in clear terms? Of course, clear definitions help us to establish in which cases a particular right is at stake, thus increasing legal certainty. Yet one could wonder whether, and if so, "where, when and how far *un*certainty has value"[37], for clear definitions can make the boundaries of rights rather rigid, too rigid for them to be enlarged so as to embrace new circumstances that seem worthy of protection. It thus appears that ill-defined rights are more suitable tools to administer material justice than well-defined rights are, since the former are more open than the latter to meet new social demands. Let me illustrate this point with an example that concerns the rights to privacy and to the secrecy of telecommunications. The right to privacy is ill-defined, yet by the same token it allows that situations that it does not cover as yet, but that start to be perceived as deserving to be considered part of the right, can be included within its scope. The right to the secrecy of telecommunications, on the other hand, only covers situations which fit the definition of the term 'telecommunications' and of the term 'secrecy'. This means that this right cannot be claimed in cases of person-to-person conversations or in the context of telecommunications which are not actually and objectively held in secret, however much both these situations might seem worthy of protection. Now, technological developments have presently produced new means of telecommunication which work through open channels and which therefore do not provide a solid basis for secrecy. Yet some of these new means appear to be so similar to some traditional ones that they arouse in the user expectations of secrecy as high as these traditional means do (I am thinking, for example, of cordless telephones which carry conversations through ordinary radio waves accessible to all from an ordinary radio station). Should the secrecy of such open-channel means of telecommunication be included within the right to the secrecy of telecommunications? To be sure, their secrecy can at any rate be protected by reference to the right to privacy. The question is whether it should be protected as part of the right to the secrecy of telecommunications, given how close the situation created by these new means is to the traditional scope of this right. If yes, then the right to the secrecy of telecommunications must suffer some loss in clarity (the term 'secrecy' would have to be defined on the basis of some looser rationale, instead of by reference to the objective existence of secrecy). If on the other hand this right is to

[37]Karl Llewellyn, "Some Realism about Realism - An Answer to Dean Pound" 44 *Harv. L. Rev.* 1222 at 1242 (1930-31) (emphasis in original).

maintain its well-defined boundaries, then it cannot embrace these new means of telecommunication.

In brief, the choice is between legal certainty and flexibility. In this thesis I will defend the view that legal certainty ought to be preferred to the insecurity of ill-defined rights (hence that open-channel telecommunications ought not to be included within the scope of the right to the secrecy of telecommunications), even at the expense of some loss in flexibility. This claim is grounded upon one consideration: the ill definition of a right can result not only in an enlargement of its scope, but is also likely to make this scope narrower. If in an effort to enlarge the scope of a right its conceptual boundaries are made too flexible, then there is the risk that the definition of this right can no longer find a common, unifying rationale. If this occurs, the right in question stops being a valid point of reference for any legal claims and it becomes difficult to ascertain both what this right covers and what it does not cover. Anything can be included within its scope and anything can be excluded from it; the scope of this right can be made all-embracing, as well as be reduced to a minimum.

If such a situation is reached, the task of deciding what belongs to the scope of rights thus loosely defined is ultimately undertaken case by case by the judiciary. This might appear as the best solution, for the judiciary can and should act as a recipient of the existent social demands concerning the definition of rights. However, leaving the definition of fundamental rights at the expense of social demands is precisely part of the trouble. Indeed, society can demand that rights embrace new circumstances that seem worthy of protection, yet more often than not social demands are likely to go into the opposite direction and to encourage that the scope of rights be narrowed. I insisted above upon the idea that fundamental rights are held by the individual as instruments of defence against the State. Yet I also suggested that in many ways fundamental rights are tools laid in the hands of political and social minorities, so that the majority cannot exclude them from public debate and a discourse-theoretical way of proceeding can prevail. Indeed, it is only too natural that the majority tries to take advantage of its position in order to take decisions in an authoritarian manner rather than on the basis of discourse, hence that they try to leave minorities out of public debate. It is therefore to be expected that the leading voice of society often has a preference against fundamental rights being defined in too generous terms and that majoritarian social claims require that the scope of a right be narrowed beyond its present boundaries. As I will try to illustrate in this thesis, the right to privacy is a case in point.

The best way to make sure that the scope of fundamental rights is not left up to the simple preferences of the majority, hence that fundamental rights can preserve the

role of minorities in public deliberation, is by giving these rights a rather clear definition, that is a definition which responds to a clear and coherent unifying rationale. My contention for a clear definition of rights therefore goes beyond the advantages of legal certainty itself -after all legal certainty has also been argued for by sociological theories of law on the grounds that the solution of cases ought to fulfil social expectations[38]. It is also a quest for a certain stability of rights as instruments of defence of minorities against the self-centred preferences of the political and social majority. I would however like to make one point clear. I am not arguing that law should ignore social demands concerning the recognition of new situations as the object of fundamental rights. Quite the opposite, law should be encouraged to meet such demands. Yet I insist that these should be met by means different to the enlargement of the scope of a fundamental right beyond its clear unifying rationale, for this solution can very well lead to the undesirable results described above. If new situations arise which are thought to deserve protection and which cannot be couched within the rationale of any of the existing rights, then it is better to create a new right that embraces such new situations rather than to make a well-defined right stop being so. In the case of telecommunications carried out through open channels, for example, my contention implies that their secrecy should not be covered by the right to the secrecy of telecommunications, for the boundaries of this right would have to be made too loose, yet that the protection of their secrecy should be couched within a different area of the right to privacy.

I would like to make yet another point clear. My contention that rights ought to be well defined does not imply that a right such as privacy ought not to exist at all, on the grounds that this definition is intrinsically unclear. It does imply, however, that the ill-defined character of the right to privacy ought to be reduced to a minimum. To this end, one ought above all to avoid controversy and agree on a definition of privacy. Moreover, one ought to agree on a definition which restricts the scope of the right to privacy to some of the contended areas with a view to making the unifying rationale of the right as clear and easy to identify as possible. In chapter 1 I will propose a definition of the right to privacy which tries to fulfil these conditions. Furthermore, the coverage of the right to privacy ought to be reserved for those sub-areas of privacy which do not stand as autonomous rights. As soon as a part of privacy starts to take shape as an autonomous sub-area, and in as far as this appears as better defined than privacy itself, such an area should be cut out from the broad scope of privacy and defined as an independent right. The right to the secrecy of telecommunications stands

[38]See, e.g., John Dewey, "Logical Method and Law", 10 *The Cornell L. Q.* 17, part. at 26 (1924-25); Karl Llewellyn, "Some Realism about Realism ..." at 1244 (1930-31).

as one such area, hence it should always be regarded as an independent right the rationale of which ought be kept clear. The different implications of an independent recognition of this right and of recognising this right by reference to the right to privacy will come to light in chapters 4 and 5, as I study the object of the right to the secrecy of telecommunications.

The three arguments developed above will constitute the leading thread of my study of the right to the secrecy of telecommunications. This study will take the form of a comparison, that is I will try to develop the three above arguments as I compare the way the secrecy of telecommunications is protected in different systems. As elements of this comparison I have chosen the European Convention on Human Rights (henceforth ECHR), Germany and the United States of America. Germany and the United States stand as representative examples of the two different approaches to the rights to privacy and to the secrecy of telecommunications illustrated in points 2 and 3 above. In Germany, privacy is viewed as a participatory right, so that the recognition and protection of the right to privacy (hence the recognition and protection of the right to the secrecy of telecommunications) is regarded as an essential condition for democracy. In addition, the German Basic Law recognises the secrecy of telecommunications as a fundamental right independent from, though somewhat related to, the right to privacy, hence the right to the secrecy of telecommunications can be and actually is defined in rather clear terms. In the United States, the approach to privacy and to the secrecy of telecommunications is the complete opposite. To begin with, the right to privacy (hence the right to the secrecy of telecommunications) is regarded as a purely individualistic interest the protection of which is thought to go against the well-being of society and democracy. In addition, the right to the secrecy of telecommunications receives constitutional recognition and protection only in as far as it is part of the broader right to privacy. A comparison between Germany and the United States will help us to appreciate the advantages for the right to the secrecy of telecommunications that the double position adopted by Germany has over the one adopted by the United States.

The third element of this comparison, the ECHR, will enrich this study of the right of the secrecy of telecommunications in at least two different ways. First of all, the ECHR places itself at the borderline between certainty and flexibility in the definition of the right to the secrecy of telecommunications. To be sure, the ECHR defines this right in clear terms, yet it also offers an example of the dangers entailed by a non-clear definition of this right; to be precise, it offers an example of the dangers of defining this right by reference to a non-clear and rather loose rationale. Second and most important, the ECHR illustrates very clearly the ideas I developed in point 1 above. It illustrates the advantages of conceiving the right to the secrecy of

telecommunications essentially as a negative right of defence against the State in the most liberal fashion, while it also shows the possibility and the advantages of adding a positive dimension, even a subjective positive dimension, to this essentially negative right. This conception of the secrecy of telecommunications in the ECHR differs from the way in which it is conceived in Germany and in the United States: neither the German Constitutional Court nor the United States Supreme Court have sustained the liberal character of this right with consistency; nor have they taken the step of recognising in this right an additional positive subjective dimension.

In addition, the ECHR has significant influence upon the recognition and protection of the right to the secrecy of telecommunications in Germany. Admittedly, the Convention does not prevail over the German Basic Law or even over German ordinary laws. According to art. 59 of the Basic Law, international treaties enjoy the same level in the hierarchy of norms as federal laws do. Yet the position predominantly sustained both by German authors and by the Federal Constitutional Court is that the Convention, as interpreted by the Convention's organs, must be complied with in the interpretation and application of German fundamental rights even by the Constitutional Court[39].

Including the ECHR within this thesis forces me to be more precise as to its object. The purpose of this thesis is to study the right to the *secrecy* of telecommunications, which in principle excludes any considerations as to the freedom to engage in telecommunications. This is not to deny the obvious fact that, in order that telecommunications can be granted complete protection, both their freedom and their secrecy must be guaranteed. Nevertheless, I have preferred to regard the freedom to communicate and the secrecy of telecommunications as two different rights and have chosen to study only the second one.

Freedom to and secrecy of telecommunications are also regarded as independent constitutional rights in both Germany and in the United States. In Germany, art. 10 of the Basic Law recognises the secrecy of telecommunications; on the other hand, the freedom to communicate is not explicitly recognised as a fundamental right, yet it has been couched by the Constitutional Court within the general right of freedom recognised in art. 2.1 of the Basic Law[40]. In the United States, the freedom to and the

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[39]On this issue, see Jochen Abr. Frowein, "The Federal Republic of Germany" in M. Delmas-Mary (ed.), *The European Convention for the Protection of Human Rights. International Protection versus National Restrictions*, pp. 121-129. Kluwer Academic Publishers. The Netherlands, 1992.

[40]See BVerfGE 90, 255 at 259 et seq. The issue of art. 2.1 and the general right of freedom it recognises will be addressed in section 2 of chapter 1.

secrecy of telecommunications have been classified by the Supreme Court under the heading of two different rights, namely the right to free speech (first amendment)[41] and the right against unreasonable searches and seizures (fourth amendment), respectively. Only in the context of European Convention on Human Rights is the situation different. Art. 8 of the Convention recognises a "right to respect for correspondence" which embraces both the freedom to engage in and the secrecy of telecommunications. The doctrinal developments of this article thus apply to both these rights; in fact, part of the doctrine applied to the secrecy of telecommunications has originally been developed with reference to the freedom to engage in telecommunications. The two rights in question thus exert some influence upon each other; additionally, their common recognition has some influence upon the scope of the right to correspondence taken as a whole. In the light of these circumstances, the freedom to engage in telecommunications will have to be paid some attention in the context of the ECHR.

Let me now draw out what will be the structure of this thesis. In chapter 1 I will address some *preliminary questions* concerning the reasons why the secrecy of telecommunications should be protected as a constitutional right. I will also propose a definition of privacy for its use in the context of the thesis. In chapter 2 I will study the *historical development* of the right of the secrecy of telecommunications. Only then will I focus on the *object* of the right to the secrecy of telecommunications, that is on the scope embraced by this right. This will be studied for three chapters: chapter 3 will deal with the *structure* of the right to the secrecy of telecommunication and will draw a distinction between the coverage and the protected scope of this right. Chapter 4 will then concentrate on its *coverage* and chapter 5 on its *protected scope*. After the object, attention will be shifted to the *content* of the right to the secrecy of telecommunications, that is to the juridical claims with which its holders are provided to defend its exercise; this will be the purpose of chapter 6. Finally, in chapter 7 I deal with the issue of who are the *subjects* of the right to the secrecy of telecommunications, that is the double issue of who are the holders (who can claim its protection) and who are the addressees of this right (against whom can the right be claimed). A last remark: as far as Germany and the United States are concerned, this thesis will concentrate on the right to the secrecy of telecommunications as recognised in their respective Federal Constitutions. Accordingly, attention will focus primarily on the constitutional texts and case law, whereas the statutory regulation of this right will be taken into account only in as far as it contributes to the understanding of the constitutional right itself.

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[41] See, e.g., *Lamont v. Postmaster General of the U.S.*, 381 US 301 (1965); *Ginzburg v. US*, 383 US 463 (1966); *Bount v. Rizzi*, 400 US 410 (1971); *US v. Reidel*, 402 US 351 (1971); *Procunier v. Navarette*, 434 US 555 (1978);*Turner v. Safley*, 482 US 78 (1987); *Sable Communications of Cal. Inc. v. Federal Communication Commission*, 492 US 115 (1989).

CHAPTER 1: REASONS FOR PROTECTING THE SECRECY OF TELECOMMUNICATIONS

Introduction

The protection of telecommunications is a pervasive concern in western legal systems. Most contemporary written Constitutions and Bills of Rights recognise the secrecy of telecommunications as a fundamental right. This is the case with those countries in the EEC with a written constitutional document[1], with the only exception of Ireland. Moreover, in Constitutions where the secrecy of telecommunications is not explicitly mentioned, it has been found to fall within the scope of some other constitutional clause. That is notably the case with the United States of America where the Fourth Amendment to the Federal Constitution[2] has been interpreted by the Supreme Court to cover not only the secrecy of private letters -"papers"- but also the secrecy of telephone conversations[3]. It thus seems that most western constitutional systems agree in ranking the secrecy of telecommunications among the rights deserving of constitutional protection, in particular among the so-called 'fundamental rights'.

Now we may ask, what are the reasons why the secrecy of telecommunications deserves constitutional attention as a fundamental right both in Europe and in the United States of America? The immediate, uncontroversial answer is that the secrecy of this particular mode of communication belongs to the privacy of individuals, privacy being a value worthy of constitutional protection. This answer, however, only brings to light further questions: why is privacy a value worthy of protection?; if it is, why is it not simply and overtly protected as such by constitutional texts?; more fundamentally, why do Constitutions pay particular attention to the area of privacy embodied by the secrecy of telecommunications?

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[1]Art. 22 of the Constitution of Belgium (1831); art. 72 of the Constitution of Denmark (1953); art. 10 of the Basic Law of Germany (1949); art. 19 of the Constitution of Greece (1975); art. 15 of the Constitution of Italy (1947); art. 28 of the Constitution of Luxembourg (1868); art. 13 of the Constitution of the Netherlands (1983); art. 34 of the Constitution of Portugal (1976, first revision 1982); art. 18 of the Constitution of Spain (1978). Constitutions dating from the XIX century only mention the protection of letters (Belgian Constitution) or of both correspondence and telegrams (Constitution of Luxembourg).

[2]"The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized"

[3]Case of *Katz v. U.S.*, 389 U.S. 347 (1967).

The following sections will attempt to give an answer to the above questions. Before facing them, however, I will focus on the definition of privacy. Given the central role played by privacy in the protection of the secrecy of telecommunications, the definition of this term appears as an appropriate starting point.

Section 1: The Concept of Privacy

1. A First Look at the Concept of Privacy

Defining privacy has not proven to be easy. Commentators have disagreed about the concept and the scope of privacy since it became a matter of juridical concern. Disagreement has increased over time, as new situations arose in which privacy could arguably be seen to be at stake. Given the complex background of the concept of privacy, this section will not attempt another definition of it. Rather, it will be devoted to the more modest but no less difficult task of throwing some light upon the problems that are involved in its definition. This section is meant to clarify what the word 'privacy' means in different contexts and, more importantly, it is meant to clarify what privacy means in this thesis. Also for the sake of clarity, I will begin by looking at the origins of the term in juridical circles. Only then will I consider the issue of how privacy should be defined as it stands today.

1.1 The Origins of 'Privacy'

The legal origins of privacy can be traced back to the United States at the end of last century, more particularly to the famous article of Charles Warren and Louis D. Brandeis, "The Right to Privacy", which today stands as a classical piece of legal literature[4]. It is in Warren and Brandeis' article that privacy was for the first time clearly asserted as a valuable social interest which ought to be explicitly protected by judges. In order to support their claim, Warren and Brandeis argued that privacy had already been considered as an implicit value worthy of protection in the common law. Common-law rights to intellectual and artistic property already existed and their judicial protection was re-interpreted as indicative of a broader interest in privacy. Thus more specific rights brought to light broader principles[5]. This interest in privacy implicit in the common law led Warren and Brandeis to conclude that privacy itself was to be considered as a common-law right. Being a common-law right, privacy ought to be entitled to independent recognition and receive general and consistent application.

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[4] 4 *Harv. L. Rev.* 193 (1890).

[5] As main examples they refer to the cases of *Prince Albert v. Strange*, 2 DeGex & Sm. 652; *Abernethy v. Hutchinson*, 3 L. J. Ch. 209 (1825); *Tuck v. Priester*, 19 Q.B.D. 639 (1887); *Pollard v. Photographic Co.*, 40 Ch. Div. 345 (1888); *Yovatt v. Winyard*, 1 J. & W. 394 (1820).

Privacy, of course, had a very specific meaning for Warren and Brandeis. Their article appeared as a reaction against the increasing intrusion of the press into peoples' private lives, an intrusion which, in their view, was "overstepping in every direction the obvious bounds of propriety and of decency"[6]. The prime aim of their article was to find a legal basis for a tort action against such intrusions. The concept of privacy was thus suitably shaped to support a battle against the powerful mass media. Describing it as "the right to be let alone"[7], Warren and Brandeis conceived privacy as the right of an individual to keep his peace of mind (to protect "his thoughts, sentiments and emotions"[8]) by way of preventing unconsented publication and reproduction of his works of art, papers, image and voice, or of any fact regarding him -in other words, of any aspect of his personality, as long as the public or the general interest were not concerned.

Although the publication of the article by Warren and Brandeis had little immediate effect upon law-making and case law[9], the attention of other writers was at once drawn to privacy[10]. The innovative character of their ideas had a positive

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[6]Ibid. p. 196. Their article was a reaction against the sensationalist coverage of the social life of members of Warren's family.

[7]Ibid. 195, 205. The expression was taken from the work of Judge Thomas M. Cooley, A *Treatise on the Law of Torts*, 2nd ed, 1888, p. 29. On the basis of this particular source, the appropriateness of using the phrase for Warren and Brandeis' purposes has been called into question. Walter F. Pratt ("Warren and Brandeis Argument for a right to Privacy", (1975) *Public Law*, 161 at 163) has contended that Judge Cooley "wrote of 'the right to be let alone' as explicative of 'the right to immunity from attacks and injuries'; he was simply listing and explaining what he considered to be rights which every government is expected to recognise....The expression 'the right to be let alone' which has become a trademark of the Warren and Brandeis article had originally no relation to privacy even though Warren and Brandeis used it as synonymous with privacy".

[8]Ibid. p. 205.

[9]In the nineteenth century, only a few cases were -timidly- solved on the independent basis of a right to privacy. According to William L. Prosser ("Privacy", 48 *Calif. L. Rev.*, 383, 385, notes 8-10 (1960)) these cases were just the following: *Manola v. Stevens* (N.Y. Sup Ct. 1890), unreported (see N.Y.Times, June 15, 18, 21, 1890); *Mackenzie v. Soden Mineral Springs Co.*, 27 Abb. N. Cas. 402, 18 N.Y.S. 240 (Sup. Ct. 1891); *Marks v. Jaffa*, 6 Misc. 290, 26 N.Y.S. 980 (Super. Ct. N.Y.City 1893); *Schuyler v. Curtis*, 147 N.Y. 434, 42 N.E.22 (1895); *Corliss v. E.W. Walker Co.*, 64 Fed. 280 (D.Mass. 1894). According to the same source (p. 386, note 15), the first case clearly recognising a right to privacy was *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1905), although we will have to wait until the thirties to see a settled judiciary trend in favour of the direct protection of privacy in tort cases (see also Harry Kalven, Jr., "Privacy in Tort Law -Were Warren and Brandeis Wrong?" *Law and Contemporary Problems*, Vol. 31, 326, 327, (1966)). For the most influential early cases denying a right to privacy see Louis Nizer, "The Right of Privacy -A Half Century Developments" 39 *Mich. L. Rev.*, 526, 531-534 (1941).

[10]Let me mention some of the literature I have had access to: O'Brien, "The Right to Privacy", 2 *Col. L. Rev.*, 437 (1902); Larremore, "The Law of Privacy", 12 *Col. L. Rev.* 693 (1912); Lisle, "The Right of Privacy (a Contra View)", 19 *Ky. L. J.* 137 (1931); Winfield, "Privacy", 47 *L. Q. Rev.*, 23 (1931); Nizer, "The Right of Privacy", 39 *Mich. L. Rev.*, 526 (1941); Feinberg, "Recent Developments in the Law of Privacy", 48 *Col. L. Rev.* 713 (1948); Ludwig, ""Peace of Mind" in 48 Pieces vs. Uniform Right of Privacy", 32 *Minn L. Rev.* 734 (1948); Symposium on Privacy in *Law and Contemporary Problems*, Vol. 31, 252 (1966); Hyman Gross, "The Concept of Privacy", 42 *N. Y. U. L. Rev.* 35 (1967); Charles Fried, "Privacy", 77 *Yale L. J.* 475 (1968); *The Right to Privacy. A Symposium on the Implications of Griswold v. Connecticut 381 U.S.479 (1965)*, Da Capo Press, New York, 1971; Pennock and Chapman (ed.), *Privacy*, Nomos XIII, New York (1971); Louis Lusky,

influence upon most contemporary authors, a large number of whom welcomed and accepted them[11]. Their article, however, was and still is heavily criticised on different grounds: for example, the need and viability of protecting privacy has been challenged[12]; the "mass communication tort of privacy" has been criticised[13]; doubt has been cast on the reliability of the cases put forward to illustrate that privacy already enjoyed some limited and indirect protection in the common-law tradition[14]; even the pioneering character of the article has been questioned[15]. Similarly, the guide-lines concerning the concept of privacy offered by Warren and Brandeis have not always been accepted[16].

Thus, Warren and Brandeis' article introduced the issue of the protection of privacy, but left the question of the definition of privacy far from settled. Yet, even if writers had unanimously agreed with the ideas contained therein, this would still be the case; for Warren and Brandeis did not give complete enough an answer to the question at issue. Affirming that the concept of privacy includes freedom from unwanted intrusion of the press in one's own affairs, if admitted, is clearly insufficient[17]. Outside that area, different aspects of individuals' lives have actually been identified with privacy in a more or less debatable way, as will be discussed below. The reference to the "right to be let alone" is not much more helpful. Vivid though it may be, the expression is "hyperbolic on its face"[18], too vague and ill-defined, so that, although

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"Invasion of Privacy: a Clarification of Concepts", 72 *Col. L. Rev.* 693 (1972); Louis Henkin, "Privacy and Autonomy", 74 *Col. L. Rev.* 1410 (1974); Walter F. Pratt, "Warren and Brandeis Argument ..."; Gary L Bostwick, "A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision", 64 *Calif. L. Rev.* 1447 (1976); Barren, "W. & B., The Right to Privacy, 4 *Harv. L. Rev.*, 193 (1890): Demystifying a Landmark Citation", 13 *Suffolk U. L. Rev.*, 875 (1979); Richard A. Posner, "The Uncertain Protection of Privacy by the Supreme Court", *Sup. Ct. Rev.* 173 (1979); Ruth Gavison, "Privacy and the Limits of Law" 89 *Yale L. J.* 421 (1980); W.A. Parent, "Recent Work on the Concept of Privacy", 20 *Am. Phil. Q.* 341 (1983); Schoeman (ed.), *Philosophical Dimensions of Privacy. An Anthology*. Cambridge Univ. Press, Cambridge, 1984; David Bedingfield, "Privacy or Publicity? The Enduring Confusion Surrounding the American Tort of Invasion of Privacy", 55 *Modern L. Rev.*, 111 (1992). See also Notes, 12 *Col. L. Rev.* 1 (1912); "The Right to Privacy Today", 43 *Harv. L. Rev.*, 297 (1929-30); 30 *Cornell L. Q.* 398 (1945); "The Right to Privacy in Nineteenth Century America", 94 *Harv. L. Rev.*, 1892 (1981).

[11]"With a few exceptions, writers have agreed, expressly or tacitly, with Warren and Brandeis" (W.L. Prosser, "Privacy", at 384).

[12]Denis O'Brien, "The Right to Privacy" at 445; Note, "The Right to Privacy Today" 43 *Harv. L. Rev.*, 297 (1929-1930).

[13]H. Kalven, Jr., "Privacy in Tort Law ..." at 333-339.

[14]Walter F. Pratt, "Warren and Brandeis Argument ..."; H. Kalven, Jr., "Privacy in Tort Law ..." at 329-330.

[15]Note, "The Right to Privacy in Nineteenth Century America", 94 *Harv. L Rev.*, 1892 (1981). It is argued that the concept of privacy as understood by Warren and Brandeis had already been accorded some -limited- explicit protection in the legal world.

[16]See, e.g., Barren, "W. & B., The Right to Privacy, ..."; Bedingfield, "Privacy or Publicity? ..."; Lisle, "The Right of Privacy ..."; Harry Kalven, Jr., "Privacy in Tort Law ...".

[17]See in this regard H. Kalven, Jr., "Privacy in Tort Law ..." at 330.

[18]L. Lusky, "Invasion of Privacy ..." at 696.

writers have liked to adhere to it on account of its powerful image, it has not always provided a solid enough basis for consensus.

As a result, for over one century, authors, particularly in the United States, have struggled to analyse the concept of privacy systematically. Since the principle of the protection of privacy has been largely accepted by American courts, a great part of this effort has gone on rationalising court decisions adopted on the basis of a general privacy tort, on classifying them according to the aspect of privacy seen to be at stake, and frequently on criticising their understanding of the right to privacy[19].

1.2 'Privacy' Today

As the above historical overview shows, the rise of privacy in juridical circles was controversial and unsystematic. This background explains the diversity of viewpoints from which privacy is approached today and the lack of agreement on its definition. Certainly, there exists a prima facie agreement as to its core. In this respect, legal literature barely mirrors what could be described as the basic popular understanding of privacy in the context of our western societies. It seems, in fact, uncontroversial that privacy includes the right to seclusion or solitude[20] (right to repose[21], right to anonymity[22] or against unwanted intrusion[23]). The same may be said

[19]for example, W. Feinberg, "Recent Developments ..." at 717) classifies the privacy tort cases in four groups, according to the "interests of personality" protected by them: interest in life history, in likeness, in name, and interest in privacy "as ordinarily understood", that is, as protection against unwanted intrusions. Prosser ("Privacy" at 389), focusing on the activities proscribed in privacy torts cases, identifies four different torts under that common headline: "intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; public disclosure of embarrassing private facts; publicity which places the plaintiff in a false light in the public eye; appropriation, for the defendant's advantage, of the plaintiff's name or likeness". G.L. Bostwick's ("A Taxonomy of Privacy ...") classifies the protected areas of privacy: privacy of repose, of sanctuary and of intimate decisions, the latter being the most recent category, introduced by the Supreme Court in *Griswold v. Connecticut* (381 U.S. 479 (1965)).

[20]W. S. Prosser, "Privacy", at 389-392; R. A. Posner, "The Uncertain Protection of Privacy ..." at 175 (who refers to seclusion as "physical privacy"); R. Gavison, "Privacy and the Limits of Law" at 428.

[21]Gary L. Bostwick, "A Taxonomy of Privacy ...", at 1451-1456.

[22]R. Gavison, "Privacy and the Limits of Law" at 428.

[23]W. Feinberg, "Recent Developments ..." at 725.

of the references to privacy as to the "control of information about oneself"[24] (privacy as secrecy[25] or sanctuary[26]).

Outside that area of consensus, the scope of privacy has been heavily debated. Let me give the two most significant examples. First, the Supreme Court of the United States has identified privacy with "autonomy", understood, in particular, as a right to make one's own intimate decisions such as those concerning the use of contraceptives[27]. This identification has been criticised[28] on the grounds that the terms "privacy" and "autonomy" stand for different concepts and for different kinds of rights of freedom. To be more precise, it has been argued that the former describes an area where individuals should be *free from* intrusion, whereas the latter refers to individuals' *freedom to* act in the way they wish, that is it describes an area of individual liberty. It has even been argued that by using the term 'privacy' to refer to a freedom to act the Supreme Court wrongly "equates privacy with the purposes for which people want privacy"[29]. These criticisms are particularly relevant since the idea of personal autonomy to take intimate decisions has been the cornerstone of the recognition of privacy as a general, all-embracing constitutional right.

Second, American courts have included within the realm of the right to privacy protected in tort law the "right to one's name and likeness"[30], i.e. the right of every individual to control the use made of his own name and his own image -a typical case of violation of this right is the unconsented use of the plaintiff's name or likeness (e.g. of a photograph) in advertising or for other purposes[31]. The inclusion of this right as part of privacy has been contested. It has been argued against it that one's name and likeness, rather than being aspects of the right to privacy are part of the "right of publicity (...) which is a right to make money out of one's public prominence"[32], "a

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[24]Louis Lusky, "Invasion of Privacy ..." at 693; Charles Fried, "Privacy" at 482. Parent criticises the idea that privacy can be defined as 'control of information about oneself', yet his definition of privacy as "absence of *undocumented* personal knowledge about a person" corresponds to this very idea of control (see Parent, "Recent Work ..." at 343 and 346 -emphasis added).

[25]C. Fried, "Privacy" at 482; R.A. Posner, "The Uncertain Protection of Privacy ..." at 175; R. Gavison, "Privacy and the Limits of Law" at 428.

[26]G.L. Bostiwick, "A Taxonomy of Privacy ...", at 1456-1465.

[27]Case of *Griswold v. Connecticut* (381 U.S. 479 (1965)).

[28]See L. Henkin, "Privacy and Autonomy" at 1425 et seq.; Posner, "The Uncertain Protection of Privacy ..." at 193; Gavison, "Privacy and the Limits of Law" at 438; Parent, "Recent Work ..." at 343.

[29]Posner, "The Uncertain Protection of Privacy ..." at 193.

[30]Feinberg, "Recent Developments ..." at 721; Prosser, "Privacy" at 389.

[31]Examples of such cases can be found in Feinberg, "Recent Developments ..." at 721 et seq.; Bedingfield, "Privacy or Publicity? ..."; M. B. Nimmer, "The right of publicity", 19 *Law and Contemporary Problems*, 203 (1954); and H. R. Gordon, "Right of Property in Name, Likeness, Personality and History" 55 *Nw. U. L. Rev.*, 553 (1960).

[32]Hofstadter and Horowitz, *The Right of Privacy*, Central Book Co., New York, 1964, p. 6.

commercial right akin to copyright or trademark"[33]; in other words, a kind of property right. Criticisms on this point also have important consequences for the definition of privacy. The reason is that the protection of the right to one's name and to one's likeness played a central role in the development of a judicial trend towards the protection of privacy in the field of tort law[34].

2. The Distinction between "Privacy" and "Publicity".

The reference to the right of publicity made above offers a valuable hint as to how to approach the definition of privacy. The concepts of privacy and publicity can be juxtaposed in such a way that each one of them is defined in opposition to the other. As an approach to that definition and to a better understanding of the intricacies involved therein, it will thus be illuminating to contrast the concept of privacy with the concept of publicity. This is what I shall try to do in the following pages.

The distinction between privacy and publicity can be drawn in two different contexts. I will refer to them as 'the context of civil society' and 'the context of the political organisation of power'. In the context of civil society, the opposition between publicity and privacy can be drawn in the following way. Publicity can be identified with the areas of one's self that are exposed to other individuals in such a manner and to such an extent that they can be considered as part of a space occupied by all. Privacy, on the other hand, embraces those other aspects of one's self that each individual withdraws from general knowledge and keeps apart from society. It follows from this distinction that, in this 'civil' context, societies and social relationships can only be based on publicity. That is to say, only publicity or the public aspects of the lives of a group of individuals provide the grounds needed for the existence of a society. Societies, in fact, can be conceived as networks of reciprocal relations among

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[33]D. Bedingfield, "Privacy or Publicity? ..." at 112. The phrase "right to publicity" was first used by Jerome Frank in *Haelan Laboratories v. Topps Chewing Gum* (202 Fed. 2nd 866 (1953)). This case encouraged the recognition of publicity values as rights worthy of protection which are distinct from the right to privacy and closer to the right to property. Although some cases followed this trend (see Hofstadter and Horowitz, *The Right of Privacy*, at 64 et seq.), the judicial protection of publicity rights has continued to be intermingled with the recognition of a right to privacy (see D. Bedingfield, "Privacy or Publicity? ..."). For a thorough analysis of the confusion surrounding the distinction between "privacy" and "publicity" in this context and of the implications of this confusion, see M. B. Nimmer ("The right of publicity") and H. R. Gordon ("Right of Property in Name ...").

[34]The right to one's name and likeness appears in Feinberg's and in Prosser's classifications of the tort cases on privacy (see above footnote 19), the second one of which has been largely influential in the development of the law of privacy (incidentally, note that even Prosser has doubts as to the privacy or the property nature of this right -"Privacy" at 406-407). Furthermore, in some states, such as New York (N.Y. CIVIL RIGHTS LAW §§ 50-52), the right to one's name and likeness has embodied all the protection accorded to privacy (see H.D. Krause, "The Right to Privacy in Germany -Pointers for American Legislation?" (1965) *Duke L. J.*, 481, 503).

individuals' areas of publicity. The relevance of this close connection between publicity and society for the protection of privacy will come to light below.

Moving to the context of the political organisation of power, the term 'publicity' refers to the political power, whereas 'privacy' refers to civil society to the extent that it is distinct from the former. Thus, in the political context, the term privacy embraces both privacy and publicity as described in the 'civil' context. This line between privacy and publicity in the political context has not always been drawn. To be precise, 'political' privacy has been opposed to 'political' publicity only since the medieval political structures were replaced by the modern State[35]. Both in ancient and in medieval times, the social and political organisations of communities coincided. In the ancient cities, political participation was an essential aspect of being part of society[36]. Similarly, medieval societies were organized into different strata of free citizens which were related to one another not only by social and economic links but also by links of political dependence. No clear borderline could then be drawn between political structures and social relations; rather, the former were so complex that they overlapped with all aspects of the latter. As a consequence, a distinction between political publicity and privacy did not exist in pre-modern communities.

The public and the private -'political'- spheres have been kept separate only since modern States arose. As a matter of fact, these arose on the basis of a distinction between the public person or sovereign and the private person or citizen[37]. In this new context, a line was drawn between the rights and duties of the former and those of the latter; similarly, a distinction was imposed between the role to be played by citizens as persons or as members of society[38] -private rights and duties- and the rights and duties

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[35]In this 'political' sense, privacy can be identified with negative freedom, that is, with "the area within which the subject is or should be left to do or be what he is able to do or be without interference by other persons [or the State]", as opposed to positive freedom, which has to do with the control over decisions concerning oneself, hence with the control over political power (Isaiah Berlin, *Four Essays on Liberty*, p. 121-122. Oxford 1969). In the context of this terminology, it has been pointed out that, contrary to positive freedom, negative freedom "is not a prominent ideal, or perhaps an explicit ideal at all, before the Renaissance, or even, in its full form, the beginning of the eighteenth century" -that is to say, before the rise of modern States (I. Berlin, ib. Introduction, p. xli-xlii).

[36]Although slaves belonged to the community in the broad sense, strictly speaking they were not members of society. The civil society was exclusively composed by free individuals (see in this regard J. Pérez Royo, *Introducción a la Teoría del Estado*, Barcelona 1980, pp. 129 et seq).

[37]The theory of the social contract illustrates this point. In a State "outre que la personne publique, nous avons à considérer les personnes privées qui la composent, et dont la vie et la liberté sont naturellement indépendantes d'elle". In this context the State was conceived as "un engagement réciproque du public avec les particuliers, et que chaque individu...se trouve engagé sous un double rapport: savoir, comme membre du souverain envers les particuliers, et comme membre de l'État envers le souverain" (J.-J. Rousseau, *Du Contrat Social*, in *Écrits Politiques*, Le livre de poche, Paris 1992, pp. 240 and 229 resp.).

[38]Cifr. J.-J. Rousseau, *Du Contrat Social* at 240.

of citizens as subjects -public rights and duties[39]. Fundamental rights arose as examples of this latter category of rights. Conceived as public rights of citizens against the State, they came to offer protection to 'political' privacy, that is they came to strengthen the line which separated the State ('political' publicity) from the sphere of society ('political' privacy)[40]. The distinction between fundamental and private rights of citizens was thus made to lie in their respective addressees (the public power as opposed to other members of society), not necessarily in their object, which could very well coincide.

The lack of a distinction between political privacy and publicity in pre-state political structures had some consequences upon 'civil' privacy as well, that is, upon those areas that individuals may retain and keep separate from their social relations. In particular, that lack of distinction tended to narrow the scope of 'civil' privacy and to weaken its actual protection. As was noted above, civil societies are built on the basis of a prior surrender of some areas of an individual's self to 'civil' publicity, since 'civil' publicity appears as an essential requirement for the existence of societies. It is thus only natural that societies tend to enlarge the area of publicity upon which their existence is based, so that they can prevent anti-social conduct and thus ensure their preservation and growth. As a result, societies, far from providing for a mechanism for the protection of an individual's privacy, intrinsically stand as a major threat to it. The scope of an individual's 'civil' privacy and its actual protection must therefore be primarily guaranteed against society. To this end, individuals must rely on a power different from and politically superior to society[41]. Such a power, as pointed out above, cannot be found in pre-modern political organisations, for here social and political structures coincide, hence political power was as unable as is society to protect 'civil' privacy. Direct protection of an individual's privacy thus appeared as rather unfeasible.

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[39]In the writings of some modern authors such as Locke and Kant the contrast between society and the State implies an opposition between the natural character of the former and the artificial character of the latter. As a consequence, "natural law" would be identified with "private law", that is, with those laws ruling the relations among people as members of society; on the other hand, "public law", which regulates the structure and functioning of the State and its relations with citizens as subjects, would be considered an artificial creation of the State (see J. Pérez Royo, *Introducción a la Teoría* ... at 173 et seq).

[40]See S. Holmes, *Benjamin Constant and the Making of Modern Liberalism*, Yale University, 1984, p. 56.

[41]The difference in the position of individuals vis-à-vis society and vis-à-vis a political power independent from the former is illustrated by the theories of social contract. Two kinds of 'social contract' have been distinguished: "One was concluded between individual persons and supposedly gave birth to society; the other was concluded between a people and its ruler and supposedly resulted in legitimate government". *In the first case, individuals "lose*, by virtue of reciprocation, *their isolation, while in the other instance it is precisely their isolation which is safeguarded and protected*" (Hannah Arendt, *On Revolution*, 1965, Penguin Books, rep. 1990, p. 169-171 -emphasis added).

The pre-modern world, however, did not leave 'civil' privacy absolutely defenceless. Privacy was the object of indirect protection, namely through the protection accorded to private property. In pre-modern societies, in fact, private property was conceived as "a sort of private enclave split off from the general political [hence social] domain"[42]. It was, hence, the only possible "dividing line between public and private"[43]. On these grounds, property was the most important, though indirect, source of protection not just of privacy, but of all individual freedoms.

The only direct source of protection of individual privacy is therefore a political power distinct from society itself to which this latter has to submit, a power to which people relate as independent individuals from a position of equality. In other words, only a political power such as the State[44] is in the position to guarantee a space where individuals can be free from the interference of other persons[45]. To offer the possibility of protecting, however, should not be mistaken for actual protection. Even in modern political structures freedom in general and privacy in particular continue to be guaranteed by means of the protection of private property[46]. The evolution of the protection of privacy in the United States, as will be dealt with in a later chapter, is a very good example of the predominant role of property in the protection of individual rights.

To summarise, the foregoing notes on the distinction between privacy and publicity offer a point of departure from which to approach the question of what is the scope of the term 'privacy'. In particular, they were meant to convey the idea that the term privacy can be defined with respect to two different contexts, namely the civil and

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[42]Stephen Holmes, *Benjamin Constant and the Making* .. at 64.

[43]Hannah Arendt, *On Revolution*, at 252.

[44]I am aware of the simplicity of this conception of the State, which responds to liberal political patterns. In contemporary societies the boundaries between State and society are not so clear-cut. Simultaneous and reciprocal movements of approach are taking place: as the State moves toward society, the latter produces institutions which rival with the former in public power and organization (see, e.g., R. M. Unger, *Law in Modern Society*, New York, 1976, pp. 192 et seq.). Nevertheless, the liberal premise of the separation of State and society still underlies the structure of contemporary States to such an extent that the political distinction between "privacy" and "publicity" as depicted above can still be considered basically valid.

[45]It is telling that in the early modernity 'civil' privacy was often confused with the definition of an area of 'political' privacy, that is they spoke of the protection of 'civil' privacy when they were really referring to the distinction of society from the State. This is clear in statements such as Saint-Just's: "La liberté du peuple est dans sa vie privée" (quotation taken from Spiros Simitis, "Reviewing Privacy in an Information Society" 135 *U. Pa. L. Rev.*, 707 at 730).

[46]As has been pointed out, property rights offered the only realm for the protection of freedom all throughout the eighteenth and nineteenth centuries, for then the State, in its liberal conception, had amongst its primary aims "not...to guarantee liberties but to protect property; it was property, and not the law as such, that guaranteed freedom. ... [W]ho said property, said freedom, and to recover or defend one's property rights was the same as to fight for freedom" (H. Arendt, *On Revolution* at 180). Only in the twentieth century have persons and personal freedoms become the object of direct protection.

the political. In the civil context, privacy must be opposed to and claimed against society; in the political context, privacy must be opposed to and claimed against the political power. In both cases, the protection of privacy must be provided for by the State.

3. 'Civil' Privacy and 'Political' Privacy

As noted above, privacy can be defined with respect to two different contexts, which have been referred to, respectively, as civil and political. On the basis of this distinction, the concepts which fall within the scope of privacy could be classified into two groups, the group of those concepts considered to be 'civil' privacy and the group of those considered to be 'political' privacy.

3.1 'Civil' Privacy

It is worthy of note that, in its civil sense, privacy embraces all those concepts which are undisputably regarded as aspects of privacy by all: both privacy as secrecy and privacy as seclusion or solitude[47] must be fundamentally opposed to and claimed against society and against the degree of civil publicity that society imposes on individuals. Yet, although the undisputed areas of privacy belong to its civil sense, not all concepts claimed to be 'civil' privacy are uncontroversial. The protection of one's name and likeness is a case in point.

As was mentioned above, the inclusion of this right as part of 'civil' privacy by American courts has aroused doctrinal controversy. This controversy can now be better understood, since it concerns precisely the borderline between 'civil' privacy and publicity. The underlying idea seems to be that 'one's name and likeness' ought not to be considered part of 'civil' privacy but part of 'civil' publicity, since at the core of this right there lies the economic profit which can derive from the -public- exploitation of one's name and likeness. To be more precise, commentators ultimately make the criticism that the right to the public exploitation of one's name and likeness ('civil' publicity) has been unduly mixed up with the aspects of 'civil' privacy (seclusion and secrecy) which are related to these two personal values. This confusion recalls the time

[47]Nonetheless, the scope of the political concept of privacy proves useful to assert when an intrusion has taken place. In this context, account must sometimes be taken of the "public" or "private" character of documents, persons, premises or activities. All these cases fall within the political realm of the distinction privacy/publicity as described above. With respect to this, see Strömholm's *Working Paper on the Right of Privacy*, Nordic Conference of Jurists, Stockholm, 1967, pp. 30-36.

when property provided the only grounds for the protection of individuals' privacy, that is the time when one's property rights had to be claimed in order that one's privacy was protected. In other words, American judges seem to interpret property-right claims (claims concerning the exploitation of one's name or likeness) as formal claims of which the real purpose is to protect an area of privacy and therefore label them as privacy claims.

Although 'civil' privacy can be fundamentally claimed against society, political power is by no means innocuous with respect to it. This is why there are areas of 'civil' privacy, in particular areas of privacy as secrecy and as seclusion, which are often considered to be also part of 'political' privacy worthy of particular protection and thus recognised as fundamental rights of freedom against the State. The branch of the State by which 'civil' privacy can be most seriously endangered is the executive. This branch, "corps intermédiaire établi entre les sujets et le souverain pour leur mutuelle correspondance, chargé de l'exécution des lois et du maintien de la liberté"[48], is in fact in close contact with individuals and may bring to force actual limits to civil privacy, just as society does[49]. Moreover, the position of the executive to constrain privacy is much stronger than that of society. Accordingly, more effective protection against possible excesses of the executive power is needed. These considerations are important in the protection of the right to seclusion and secrecy and, more particularly, in the right to the secrecy of telecommunications. Interference with private telecommunications has always proven to be a very effective means to the end of law enforcement. In fact, the secrecy of telecommunications is more strongly protected against the activities of the police or other investigative bodies which form part of the executive than it is against society in general.

The judiciary and the legislative branches have a less immediate influence upon 'civil' privacy. These branches decide the extent to which 'civil' privacy must be protected against immediate interferences with it; in other words, they settle the scope of the object and content of 'civil' privacy. In this respect, the legislative acts at the abstract level and subject only to the Constitution, should there be one[50]; in the absence of any constitutional dependence, the area of civil privacy that must be protected as a right and the content of its protection is decided by the legislature. The judiciary, for its

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[48]J.J. Rousseau, *Du Contrat Social*, at 264.

[49]Often the executive and society even associate to threaten 'civil' privacy: it is for example not unusual that information gathered by privacy firms such as banks or credit-card companies is processed by the government; similarly, data collected by the government is also used for private purposes (see S. Simitis, "Reviewing Privacy ..." at 726).

[50]Together with national Constitutions, the legislative is also obliged to respect supra-national conventions to the extent that they have been duly ratified by the State.

part, acts at the concrete level, that is, on a case-by-case basis, and is bound by legislation and, ultimately, by the Constitution. This means that the capacity of the judiciary to have a direct influence on the scope and content of 'civil' privacy is in inverse proportion to the existence and clarity of constitutional and legislative provisions in the issue.

3.2 'Political' Privacy

As opposed to the aspects of privacy mentioned above (privacy as seclusion, as secrecy, as the right to one's name and likeness), the question of whether or not individual autonomy may be protected as privacy arises within the framework of the political concept of privacy. The affirmative answer to the above question has been led by the Supreme Court of the United States in its decision on the case of *Griswold v. Connecticut*[51]. This case concerned the constitutionality of a Connecticut statute forbidding the use of contraceptives and applied, as in the case at stake, even to married couples. The Court ruled that such a statute limited individual autonomy to take intimate decisions and was thus contrary to the constitutional right to privacy. Such a right, it admitted, is not explicitly recognised in the Constitution; yet it stated that it can be seen to arise from the "penumbras, formed by emanations"[52] of some constitutional guarantees.

The above position of the Court has been heavily criticised on various grounds, many of them beyond the scope of current concerns[53]. I would just like to note that the inclusion of instances of individual autonomy such as the right to use contraceptives within a general right to privacy has been contested. As has already been mentioned, this inclusion has been criticised on the basis that privacy, understood as *freedom from* intrusion, must not be mistaken with autonomy, understood as *freedom to* act. Let me add at this point that the cornerstone of this criticism lies in the distinction between 'civil' privacy and 'political' privacy, something which has not generally been

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[51] *Griswold v. Connecticut*, 381 U.S. 479 (1965). The opinion was delivered by Mr. Justice Douglas, and counted with three concurring opinions (one of which joined by two more justices) and two dissenting ones.

[52] *Griswold v. Connecticut*, at 484.

[53] Several issues were at stake in Griswold: the creation of a general constitutional right to privacy from the 'penumbras' and 'emanations' of particular constitutional rights; the conception of privacy as autonomy; the notion of fundamental right; the extension of the due-process clause of the fourteenth amendment to the newly created right to privacy; last but not least, the role of the Supreme Court as a judiciary organ, that is, the tension between self-restraint and judicial activism. The position of the Court with respect to each one of these issues has been the object of heated doctrinal debate. For all-round comments and criticisms on this case, see, e.g., *The Right of Privacy. A Symposium on the implications of Griswold v. Connecticut 381 U.S. 479 (1965)*. New York, 1971.

perceived[54]. In fact, understood as *freedom from* intrusion, privacy appears as a right originally addressed against society and which is only derivatively claimed against the public powers; in other words, the right to privacy originally protects the individual against acts of intrusion by society. Understood as *freedom to* act, autonomy is on the other hand a right exclusively addressed against the public power, that is it is an instance of the negative freedom ('political privacy') retained by citizens vis-à-vis the State.

It should remain clear that commentators have not contested that the right to use contraceptives can be the object of constitutional attention; they have only criticised the idea that an area of autonomy can be recognised as part of the right to privacy, even if this area belongs to the field of intimate decisions. Being an instance of negative freedom, nothing prevents this area from being thought of as deserving recognition and protection as a constitutional right, provided that this right is not labeled as 'privacy'. As a matter of fact, before the Griswold judgment the Supreme Court had granted constitutional recognition and protection to areas of autonomy in the context of family life without any mention of privacy[55] and these decisions had remained uncontroversial. Had this jurisprudential line been followed, the questions raised by the inclusion of autonomy under the heading of privacy could have been altogether avoided[56].

It ought to be pointed out that the idea of guaranteeing autonomy as an aspect of privacy was not original to the U.S. Supreme Court. At the time Griswold was decided, the German Constitutional Court had already elaborated a consistent doctrine in this direction, according to which the freedom to take personal decisions (in particular in matters concerning family or sexual life) is regarded as part of the right to privacy[57]. This doctrine clearly coincides with the one introduced in Griswold, to the extent that it could arguably have influenced this latter case. It is however worthy of note that in Germany this doctrine has not given rise to the criticisms it has been subjected to in the United States. This can easily be explained on the basis of the constitutional background of this doctrine in Germany. In Germany the right to take

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[54]See, however, Gavison, "Privacy and the Limits of Law" at 438.

[55]See, e.g., *Meyer v. Nebraska*, 262 US 390 at 399; *Pierce v. Society of Sisters*, 268 US 510 at 534-535; *Skinner v. Oklahoma*, 316 US 535 at 541; *Prince v. Massachusetts*, 321 US 158 at 166. All these cases were referred to by Justice White in his concurring opinion to the *Griswold* judgment.

[56]After *Griswold*, the Court has continued to consider that a general right to privacy embraces instances of autonomy, in particular in cases concerning intimate decisions. See, e.g., *Eisenstadt v. Baird* (405 US 438 (1972)) and *Carey v. Population Services International*, (431 US 678 (1977)), where privacy is read to cover the right of unmarried couples to use contraceptive; or *Roe v. Wade*, (410 US 113 (1972)), where privacy is read to include the right of women to abort.

[57]See, e.g., BVerfGE 39, 1 at 43 (on the right to abortion); 60, 123 at 134 (on the right of transexuals to change their apparent sex in order to accommodate their physical to their psychical sex).

personal decisions has been developed within the context of art. 2.1 of the German Basic Law, which recognises a right to the free development of one's personality. As will be explained in the next section, this right is generally understood as embracing the general freedom to act without public interference, freedom which according to most commentators equals a negative freedom against the State. In other words, art. 2.1 of the German Basic Law recognises a right to 'political' privacy, hence a right which can very well cover the 'autonomy to take intimate decisions'. In this context, it is irrelevant that this aspect of autonomy has been recognised within areas of the right to the free development of one's personality which the Constitutional Court defines as 'privacy'. The reason is precisely that here 'privacy' appears an aspect of a general right to 'political' privacy, that is as a right originally addressed against the State. In Germany, autonomy is therefore uncontroversially regarded as an aspect of the constitutional right to privacy because this right is primarily conceived as 'political' privacy, that is as a right which is originally addressed against the State.

4. Four Different Levels to Approach Privacy.

A source of much confusion when discussing the concept of privacy is that it is often unclear at which level the discussion is being held. In fact, the word privacy can be and is actually used in at least four different ways, frequently without due clarification. These are the descriptive level, the value level, the legal level and the 'interest' level. The following paragraphs will attempt to distinguish between these four different levels at which the concept of privacy can be approached[58].

4.1 Descriptive Level

The word 'privacy' can be used in a purely descriptive sense. 'Privacy' thus appears as an aseptic term, the definition of which implies no explicit juridical or moral connotation. Logically, this appears as the most primitive notion of privacy. Versions of such a neutral definition can be found in dictionaries. The definitions of privacy they offer are based on two concepts, the concept of seclusion -what has been called a state of "zero relationship"[59]- and the concept of secrecy. Privacy is for example defined

[58]A similar approach to the definition of privacy can be found in R. Gavison ("Privacy and the Limits of Law" at 423). Also she distinguishes different contexts (three) in which one can speak of privacy, namely privacy as a neutral concept, privacy as a value and privacy as a concept useful in legal contexts.

[59]Edward Shils, "Privacy: Its Constitution and Vicissitudes", *Law and Contemporary Problems*, Vol.31, 281 (1966).

both as a "state or condition of being withdrawn from the society of others, or from public interest; seclusion" and as "a condition approaching to secrecy or concealment","a private matter, a secret"[60].

It is noteworthy that this two-fold definition of privacy is at the basis of the doctrinal consensus about the meaning of privacy and is only concerned with privacy as a civil concept, that is, as the area of an individual's self that is separate from society. Societies, in other words, are always viewed as public entities; in no way do dictionaries identify privacy with society and oppose it to political power. Despite the historical importance of such an identification in political theory and in the actual protection of civil privacy, 'lay-language' interprets privacy merely as a civil concept.

Touching on a different point, attention must be drawn to the fact that the definitions of privacy are not fixed irrespective of context. This is true even at this descriptive level. The simple fact that definitions rely on words makes them relative at least to the language used. A definition of privacy given in English on the basis of an English term can thus have only limited validity outside the Anglo-Saxon world, through more or less accurate translations[61]. Nevertheless, given the American origins and long tradition of the concept of privacy, the English word "privacy" and the concept attached to it enjoy wide acceptance in non Anglo-Saxon cultures. Both are often referred to by French, Italian, and Spanish authors[62], who thus compensate for the lack, in their mother tongue, of a term suitable to express the intricacies of the concept of privacy[63].

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[60]*The Oxford English Dictionary*, Vol. XII, p. 515 (2nd ed. Clarendon Press, Oxford): "privacy: 1.a.; 3.a; 4.a."

[61]As a matter of fact, the English word "privacy" does not have a perfectly equivalent term in most western European tongues. That is the case in French ("Privacy: Retraite; isolement. Intimité." *Larousse Dictionary Français-Anglais, English-French*, 1981, p. 518); German ("Privacy: 1. Zurückgezogenheit, Ungestörtheit, Abeschiedenheit, Einsamkeit, Eigenleben. 2. Heimlichkeit, Gegeimhaltung" *Langenscheidts Enzyklopädisches Wörterbuch Englisch-Deutsch*, Vol. I/2, 1963, p. 1081); Italian ("Privacy: 1. Intimità. 2. Riserbo, segretezza." *Grande Dizionario Inglese-Italiano, Italiano-Inglese*, Aldo Garzanti Ed. 1961, p. 623); Portuguese ("Privacy: Retiro, solidão, retraimento; reserva, segredo" J. Albino Ferreira: *Dicionário Inglês-Português*. Porto. Nova Edição 1970; p. 590); and Spanish ("Privacy: Soledad, retiro, aislamiento; vida privada; intimidad; secreto, reserva; sigilo" *Collins Spanish-English, English-Spanish Dictionary*, 2nd ed. 1988, p. 464).

[62]See, e.g. Mario Are, "Interesse alla qualificazione e tutela della personalità" *Studi in memoia di A.Asquini*, Vol. V, p. 2193, note 51 (Cedam, Padova, 1965); Giselher Rüpke, *Der verfassungsrechtliche Schutz der Privatheit*, p. 29 (Nomos Verlagsgesellschaft, Baden-Baden, 1976); Antonio E. Pérez Luño, *Derechos Humanos, Estado de Derecho y Constitución*, p. 327 (Tecnos, Madrid, 1984); François Rigaux, "Liberté de la vie privée" *Revue Internationale de Droit Comparée*, p. 541 (1991).

[63]Sometimes, however, authors like to stress the conceptual differences between the English notion of privacy and similar notions used in their mother tongue. Thus, e.g., F. Rigaux, "Liberté de la vie privée" at 541: "La notion américaine de *privacy* a aussi un contenu plus étendu que la notion française de 'vie privée'"; see also similar clarifications in M. Are ("Interesse alla qualificazione ..." at 2193) with respect to the Italian expression "diritto alla riservatezza".

Reasoning on the basis of cultural relativity, the descriptive definitions of privacy offered by dictionaries appear as too simplistic. Dictionaries, in fact, overlook the fact that, in our cultural context, privacy is defined on the basis of an idea of control. This idea of control can be divided up into two elements, an element of *volition* and an element of *reversibility*[64]. Privacy is not any situation of solitude or secrecy. Privacy is a situation of solitude or secrecy in as far as this situation has been *voluntarily* chosen and in as far as, in addition, this situation can any time be *reversed*, that is in as far as "the abrogation of privacy by intrusion from the outside or by renunciation from the inside is practically possible"[65]. The distinction between involuntary and voluntary, irreversible and reversible solitude and secrecy corresponds to two stages in the logical evolution of the concept of privacy as a state[66]. Contemporary western societies seem to belong to the second one of these two stages, since in this context states of involuntary (or a-voluntary) or irreversible isolation or secrecy are no longer regarded as privacy: as has even been pointed out, "to refer for instance to the privacy of a lonely man on a desert island would be to engage in irony"[67]. To summarise, volition and reversibility are elements of the descriptive definition of privacy and they convey the idea that privacy only exists where some control can be exercised over a situation of solitude or over a situation of secrecy. At the descriptive level, privacy can therefore be defined as the control over one's solitude or secrecy[68].

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[64]The *Oxford English Dictionary*, ("privacy: 1.b.) does mention the element of choice in the concept of privacy, but only as connected to the existence of a *right* to privacy, something which will be developed below. My contention is that elements of choice such as volition and reversibility must already be present in a value unladen, purely neutral definition of privacy. Against this contention, R. Gavison believes that in order "to be nonpreemptive [i.e. value unladen], privacy must not depend on choice" ("Privacy and the Limits of Law" at 427). In my opinion, however, the act of choosing can very well be individualised and regarded in purely aseptic terms, without making any value judgments as to the rightness of the actual choice; moreover, a description of privacy without regard to elements of choice seems too poor in content to stand for the way privacy is currently understood.

[65]E. Shils, "Privacy: Its Constitution ..." at 281. This author describes privacy as "the absence of interaction or communication or perception within contexts in which such interaction, communication, or perception is practicable"; in other words, privacy only exists "where there is a feasible alternative to privacy" (ibid., pp. 281-282)

[66]Stanley I. Benn: *A Theory of Freedom*, Cambridge University Press (1988), p. 266. In the context of "privacy as a state", the author contrasts the "simple state of ...not sharing...with anyone" with the "more complex variant notion of a state in which...there is sharing only because [and insofar as] the subjects want to share".

[67]Ch. Fried, "Privacy" at 482.

[68]Referring only to privacy as secrecy, Charles Fried ("Privacy" at 483) defines privacy as "control over knowledge about oneself".

4.2 Value Level

The introduction of volitional elements into the definition of privacy leads the way to a more complex approach to its definition, in particular it introduces the issue of its definition as a value. Privacy, as has been explained, presupposes not only factual solitude and secrecy but a real possibility of choosing between solitude and secrecy, on the one hand, and publicity, on the other hand. As with all options, the option for privacy entails value considerations, that is the individual must decide internally which aspects of her life she believes should be withdrawn from the public eye. More significantly, the community as a whole must also form an opinion as to the extent to which individuals' predilection for privacy ought to be respected; in other words, as to what is the socially acceptable scope of privacy.

The value considerations formulated above constitute what is commonly referred to as the "right to privacy". When an individual speaks of her right to privacy she alludes to what she considers her legitimate area of seclusion and secrecy. For a community, the expression is a synonym of what is believed to be the general state of mind as to the legitimate scope of privacy, that is, the scope of privacy that must be respected. The definition of this "right to privacy" will focus on the latter -general- views. On this point, some comments are in order.

First, it should be made clear that the expression "right to privacy" is not meant to convey the idea of a right strictly speaking, that is of a legal right. The notion of privacy dealt with here is that of a non-legal "right". Privacy thus "suggests its connotation of inherent "rightness" -social, political, economic, and especially moral"[69]; it provides "a reason for claiming or striving toward or awarding a legal right"[70]. It is not, however, a legal right itself.

Second, the so-called "right to privacy" relies on a descriptive definition of that term. This means that the "right to privacy" results from the application of value considerations to the initial linguistic notion of privacy. This means that the definition of the "right to privacy" can be narrower than the purely descriptive definition of privacy but cannot be larger than this one[71]. In preceding paragraphs, descriptive privacy has been identified with the control over one's solitude and secrecy. Following

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[69]Karl. N. Llewellyn, "A Realistic Jurisprudence -The Next Step" 30 *Col. L. Rev.*, 432, 440 (1930).
[70]Ibid.
[71]Nevertheless, it will be explained below that the legal notion of privacy can be broadened beyond the original, lay bounds of this term, which may affect the notion of the non-legal "right to privacy" and favour its parallel broadening; yet in this case we are facing two different concepts of privacy sheltered under the same term in a misleading way.

the foregoing considerations, the definition of a "right to privacy" may affect the circumstances under which such solitude and secrecy should be considered a legitimate right. Further, a "right to privacy" may also overlook certain aspects of the concept of solitude or of secrecy[72], or of both; moreover, a "right to privacy" may conceivably not exist at all[73]. That notion, on the contrary, may not cover areas outside the boundaries of a descriptive definition of privacy. Such areas simply belong to the scope of some different non-legal right.

Finally, it is wort calling attention to the cultural relativity of the notion of "right to privacy". Cultural bias is certainly not an exclusive feature of the value notion of privacy; it is, however, a particularly important feature when privacy is approached at this level. Due to its value implications, the content of the "right to privacy" is open to widely differing interpretations according to cultural grounds and, more significantly, it also varies within a given society at a given time. Pluralistic societies are privileged witnesses of this. In them, value views may not even be shared by relatively small groups of individuals with similar backgrounds and living conditions. This is specially so in the case of the "right to privacy", a "right" which has been claimed only recently and in order to face new and continuously changing situations. Not surprisingly, social opinion about the scope of the legitimate exercise of privacy is not yet very stable[74]. In addition to this, and as a result of the same reasons, the juridical meaning of privacy lacks the support of a settled tradition which could act upon its moral conception. Let us now turn to this juridical face of the concept of privacy.

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[72]R. A. Posner ("The Uncertain Protection of Privacy ..." at 175), for example, expresses his disagreement with the protection of secrecy as an aspect of privacy. Although secrecy is admittedly an aspect of privacy, Posner believes that it is generally not a moral right. This position rests on his belief that "an individual's claim to be allowed to conceal information about himself...is frequently nothing more that a claim to be allowed to manipulate other people's opinion", which he considers a -morally- rejectable "element of fraud".

[73]This is, however, highly unimaginable. As has been remarked, "once a civilization has made a distinction between the "outer" and the "inner" man...., between society and solitude, it becomes impossible to avoid the idea of privacy" (Milton R. Konvitz, "Privacy and the Law: a Philosophical Prelude", *Law and Contemporary Problems*, Vol. 31, 272, 273 (1966)). As I understand it, this "idea of privacy" refers to the "right to privacy", to a "private space in which man may become and remain himself" (ibid., ref. note 7 to Herbert Marcuse, *One-Dimensional Man*, 1964 p. 10). In fact, value considerations are so rooted in the concept of privacy that it is difficult to imagine that its neutral definition is not backed by some social approval, at least to some basic degree, as to the legitimacy of its exercise.

[74]Ch. Fried ("Privacy" at 478), e.g., speaks of "the view of morality upon which *my* conception of privacy rests" (emphasis added).

4.3 Legal Level

The term privacy can also be used in a strictly juridical sense, to refer to the particular area of privacy, as defined above, which is protected by law. Privacy, in other words, can be used to refer to the right to privacy, in the strict sense of the expression. The difference between the right to privacy in this strict, legal sense and its wider meaning commented on above lies in the juridical protection that only the former is granted. Formal legal recognition is not enough to give rise to a legal right. A legal right exists maybe not by virtue of the fact that an available remedy exists for its violation, but at least by "the official recognition that some kind of remedy could be had"[75], again, in case of its being violated. Should this remedy not exist, the so-called "right" would remain in the field of purposes and good intentions, even if it is explicitly recognised. This is not the appropriate place to study the extent to which the right to privacy, in the systems where it is formally recognised, enjoys the actual protection of some legal remedies against its violations. It is important, however, to bear in mind that actual protection, as a conceptual feature of legal rights, is a crucial part of the concept of privacy in the juridical sense.

The logical relationship between the legal right to privacy and the notions of privacy which were previously defined, is similar to the one existing between the moral "right to privacy" and the descriptive definition of this term; that is, the right to privacy may be narrower than the definition of privacy at the preceding levels, but it may not, in principle, be wider. Let us see the extent to which this logic is actually respected.

[1] The area of privacy juridically protected must rest, in the first place, on the descriptive notion of privacy as described above. Not all systems, however, mirror this theoretical pattern. In particular, American courts have recognised a right to privacy outside the scope of its descriptive notion as seclusion and secrecy. This is, as already pointed out, the case of the protection of 'the right to one's name or likeness' and of 'the right to autonomy to take intimate decision' as aspects of the right to privacy.

Despite criticisms pointing to the fact that the inclusion of the two rights mentioned above within the scope of the right to privacy is conceptually groundless, such an inclusion seems to be consolidated practice among American courts. After all, "the [Supreme] Court is entitled to use ordinary language in a technical legal sense"[76], that is it is perfectly legitimate for the Court to re-define a term in order to use it in a

[75]K. N. Llewellyn, "A Realistic Jurisprudence..." at 440.
[76]R.A. Posner, "The Uncertain Protection of Privacy ..." at 192.

technical legal sense, so that a single word stands for two different concepts, one lay and one legal. Such a way of proceeding could certainly create a good deal of confusion, yet this can be avoided, at least to some extent, if the terms in question are only re-defined in coherent and clear terms. The definition of the right to privacy as 'the right to one's name or likeness' appears to be coherent and clear and so does the definition of privacy as 'the right to autonomy to take intimate decisions', provided that the term 'intimate' is also given a clear and coherent definition. This does not seem a difficult task, particularly since the concept of 'intimacy'[77] can be reduced to the concepts of 'seclusion' and 'secrecy', which are uncontroversially regarded as aspect of the lay meaning of privacy. On this basis, the right to privacy appears to embrace not only a right to seclusion and/or secrecy but also a right to take decisions in areas where one has a right to seclusion and/or secrecy.

The above re-definitions of privacy in the 'legal sense' can however be criticised on different grounds. Let me start with the right to one's name and likeness. The fact that this right is covered under the right to privacy raises an objection of a technical character, namely that thereby property rights are protected by means of tort-law actions against the violation of privacy, something which has proven inadequate in procedural terms and substantially insufficient[78]. As for the right to autonomy to take intimate decisions, it seems inadequate that rights so different in nature as privacy and autonomy (remember the distinctions 'freedom from/freedom to', 'freedom -primarily- against society/freedom against the State') be recognised under the same heading. This seems inadequate in particular because a right which results from the fusion of such diverse elements will inevitably lack internal coherence, that is it will lack the degree of distinctiveness that is necessary to make it a meaningful provision[79]. Though thus briefly exposed, these two reasons are of considerable weight and strongly advice that 'one's name and likeness' and the 'autonomy to take intimate decisions', respectively, be excluded from the concept of privacy as a right. It seems however that American courts have thus far disregarded these criticisms in their approach to the right to privacy.

[2] The actual existence of the same sort of logical relation between privacy as a non-legal right and privacy as a legal right is more difficult to show. The reasons for this are the difficulties in defining privacy as a non-legal right. In this sense, one can

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[77]"Intimacy: 1.a.: The state of being personally intimate..."; "intimate: 2. Pertaining to the inmost thoughts or feelings; proceeding from, concerning, or affecting one's inmost self; closely personal" *The Oxford English Dictionary* , Vol.VIII , pp. 6-7). For the definition of privacy as 'seclusion', see footnotes 59-60 above and accompanying text.

[78]See in this regard M.B. Nimmer, "The right of publicity" 204 et seq.

[79]On this point see R. Gavison, "Privacy and the Limits of Law" at 437.

but expect the legislative power to take account of the worse or better defined social feelings concerning the due protection of privacy and to legislate accordingly. As has been pointed out, defining the values which must guide that protection is "the task of moral philosophy, reflected in the political function of legislation"[80]. Given the lack of juridical tradition of the term privacy, the moral standards of society should exert great influence on the definition of its protected area.

4.4 'Interests' Level

The word privacy is frequently used to refer not to a right itself, but to the reasons ("interests") justifying the protection granted to some right[81]. Usually referred to as a right, privacy is not really one in these cases, either in the legal or in the non-legal sense of the expression. Rather, it plays the role of the interest which lies behind the protection of other substantive rights (e.g. the secrecy of telecommunications). As such, it offers guide-lines for the interpretation and application of these rights, and can be of help particularly in the solution of borderline cases. At this level, privacy thus comes "to urge that substantive rights themselves...exist only for a purpose,...the protection of [an] interest"[82], and to offer itself as one such interest.

5. A Definition of Privacy

The foregoing considerations should have made the issue of the concept of privacy somewhat clearer. Their purpose, however, was not to provide a universal answer to all the problems the definition of privacy entails, nor was it to propose a generally valid definition of that concept. The preceding pages only intended to shed some light upon the confusion which often surrounds references to and discussions about the notion of privacy, as a prior step to giving an ad hoc definition of privacy, suitable to explain the use that will be made of the term in this thesis.

The point of departure for this ad hoc definition of the expressions 'privacy', 'right to privacy' and 'interest in privacy' is the purely descriptive definition of privacy

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[80]Glenn Negley, "Philosophical Views on the Value of Privacy" 31 *Law and Contemporary Problems*, 319 at 325 (1966).

[81]It is perhaps in this sense that the Supreme Court of the United States referred to a general constitutional right to privacy arising from the "'penumbras, formed by emanations from ... [some constitutional] guarantees that help give them life and substance" (*Griswold v. Connecticut*, 381 U.S. 479 (1965), at 484).

[82]K.N. Llewellyn, "A Realistic Jurisprudence ..." at 441.

proposed above. This means that, unless otherwise specified, the term 'privacy' will only refer to the control that an individual has over his area of seclusion and secrecy. The expression 'right to privacy' will usually be used in its purely legal, technical sense and will refer to those areas of control over one's seclusion and secrecy that are actually recognised as a right in a particular system (in general, my references to the right to privacy will concern the right to privacy recognised at the constitutional level). Finally, the expression 'interest in privacy' will refer to the interest in granting individuals control over their personal area of seclusion and secrecy, in as far as this interest underlies certain legal and constitutional provisions.

The decision to restrict the use of the term 'privacy' to the areas of seclusion and secrecy is not only conditioned by my personal opinion on the concept of privacy; to an important extent, it is also the result of an effort to set aside much of the confusion which surrounds the definition of this term. This ad hoc definition of privacy manages to restrict the scope of the right to privacy to areas which respond to a common or at least similar rationale, while at the same time it avoids the most controversial questions concerning the scope of the right to privacy, i.e. whether this right embraces the right to individual autonomy and the right to one's name and likeness. As a result, the expression 'right to privacy' becomes easier to handle and more fruitful to work with. This is not to say that we can skip all the problems of ill definition that the right to privacy entails. As a general, all-embracing right, privacy is necessarily ill-defined; the expression 'control over one's seclusion and secrecy' is not easy to grasp in its full scope and it aims at giving an idea of the content of the right, rather than at drawing its boundaries with any clarity. Yet, although the scope of privacy will continue to be rather unclear, it will at least not be utterly confusing.

Furthermore, by way of restricting the use of the term 'privacy' to the areas of seclusion and secrecy we manage to concentrate on those areas, amongst all the ones that this term is thought to cover, which have some relevance in the recognition of the secrecy of telecommunications as a constitutional right. Therefore, the rights to individual autonomy and to one's name and likeness do not belong to the right to privacy as understood in this thesis, not only because I do not believe that they are not part of the concept of privacy and not only because their inclusion within this right is highly controversial, but also and primarily because they do not at all relate to the right to the secrecy of telecommunications, which is after all the subject matter of this thesis. Only a right to, or an interest in, privacy understood as control over one's seclusion and secrecy can justify the recognition of the secrecy of telecommunications as a right. Thus neither of the neglected areas, whether belonging to privacy or not, is of any interest to the present thesis.

Section 2: Reasons for Protecting Privacy

1. The Protection of Privacy as a Contemporary Concern

Although privacy is nowadays uncontroversially regarded as a value which deserves legal protection, it can still be considered a "relative newcomer to the human rights scene"[83]. The late arrival of privacy in the legal world must be explained on the basis of reasons which, rather than strictly legal, are of a sociological nature. For it is true that the rise of the State provided an adequate political framework to make the protection of privacy possible; additionally, a suitable state of mind for such protection was reached at the end of the eighteenth century, within the context of the Declarations of Rights. Constitutions and constitutional rights, however, are the product of their historical circumstances. They portray the values which are considered worthy of protection at a given time in a particular society; to be more precise, they arise as a response to the particular threats that the public power entails for these values. Rather than mere abstract intellectual claims against the State, constitutional rights are justified by their specific context and intend to meet some specific needs. In the case of privacy, it seems that the importance of the values it enshrines and the need to grant them direct and independent protection have only recently been felt.

Negley writes: "It is a historical commonplace that problems often await acknowledgment until circumstantial developments force them upon our attention. After centuries of failure to recognize privacy as a factor pertinent to moral and political speculation, we suddenly find ourselves concerned with the right of privacy as one of the most critical problems of contemporary political and legal analysis"[84]. Some features of contemporary societies can account for the increasing importance that is nowadays attached to the protection of privacy. In the first place, this century has witnessed the growth of mass, pluralistic societies, no longer controlled by uniform moral values. These societies enshrine some contradictory features. On the one hand, they are dominated by strong individualistic feelings. Members of such societies show a high level of permissiveness towards other individuals' behaviour and at the same time expect their own values to be respected. On the other hand, the anonymity and lack of direct communication among citizens which characterises mass societies also sharpens the natural curiosity of human beings with respect to one another's lives. The

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[83]S.I. Benn, *A Theory of Freedom*, at 264.
[84]Glenn Negley, "Philosophical views ..." at 320.

success of a sensationalist press is the best example of this phenomenon. In the second place, technology has been developed to such an extent that today it stands as an important threat to privacy. By means of technological devices, people's private lives can be easily observed, their private conversations taped, data about their private lives obtained and systematised so that almost complete information about them can be had.

The foregoing considerations give some reasons why privacy ought to be protected today: privacy ought to be protected because contemporary societies pose serious threats to the respect that privacy deserves. Yet this leads to a more fundamental question, however, i.e. why does privacy deserve any respect in the first place? It is my belief that questions of this sort can only be approached in sociological terms: privacy ought to be respected and eventually protected simply because it enshrines certain values that society regards as being worthy of respect and protection. Throughout the twentieth century western societies have developed a feeling that privacy (control over one's seclusion and secrecy) stands for values which are worth protecting, such as an individual's anonymity and independence. One can still go one step further: it has sometimes been argued that privacy must be protected because it is an aspect of an individual's personality, which contemporary western societies regard as a value which deserves respect and protection even over and above the respect and protection that privacy does deserve[85]. I would now like to make some comments on the recognition and protection of an individual's personality as a right.

2. The Right to Personality or "allgemeines Persönlichkeitsrecht"

2.1 The Recognition of a Right of Personality

The so-called "right of personality" dates back to the end of last century in Germany and Switzerland, that is, to the time when the need for a right to privacy was first being discussed in American doctrinal circles. The idea of a 'general right of personality' (*"allgemeines Persönlichkeitsrecht"*) was first dealt with by Otto von Gierke[86], who tried to go beyond the patrimonial conception of certain rights and stressed their personal nature. This conception of a non-patrimonial, general right of personality was soon accepted in Swiss law, where it was placed at the core of the law

[85]See e.g. Roscoe Pound, "Interest of Personality", 28 *Harv. L. Rev.* 343 et seq. (1915) W. Feinberg, Feinberg, "Recent Developments ..." at 717; Ch. Fried, "Privacy" at 486; H.Gross, "The Concept of Privacy" at 34; E. J. Bloustein, "Privacy as an Aspect of Human Dignity: an Answer to Dean Prosser", 39 *New York Univ. L. Rev.* 963 part. at 971 et seq. (1964).
[86]Otto von Gierke, 1 *Deutsches Privatrecht*, pp. 703 et seq. (1895).

of torts[87]. In Germany, on the other hand, the right of personality did not immediately obtain direct legislative protection[88].

The German Civil Code (*Burgerliches Gesetzbuch*, known as the B.G.B.), enacted in 1896, did not include any immediate reference to the right of personality. Such a right was considered to be too wide a general clause, too open a right to fit into the scheme of the B.G.B., the provisions of which were drafted by reference to rather well-defined situations. Some of its articles, however, provided grounds for an implicit protection of a general right of personality. This is the case for arts. 226[89], 823[90] and 826[91]. The most controversial of these provisions is section 1 of art. 823, which is precisely the cornerstone of the German law of torts. This provision contains a catalogue of the rights which are within its scope of coverage. This catalogue, it is true, contains no explicit reference to personality or to personal rights; yet it closes with the open clause "and any similar right". The interpretation of this clause has been controversial. Under a flexible reading, the right of personality could arguably fall within its scope. Yet, during the first half of this century, the leading opinion amongst courts and commentators was that the expression "any *similar* right" was to be put in connexion with the right listed immediately before it, which is the right of property. The above expression was thus thought to cover only rights with the nature of property rights.

Arts. 226, 823.2 and 826 offer more promising paths to the inclusion of the right of personality under their respective scopes of coverage. The terms in which these provisions are drafted are general enough to allow their application to the protection of

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[87]Zivilgesetzbuch, art. 28: "Where anyone is injured in his personal relations by the unauthorized act of some other person, he is entitled to demand that the continuance of the act should be restrained.
A claim for compensation for pecuniary loss or for the payment of a sum of money as moral damages is only admissible in the cases which are specified by the law."
Obligationenrecht, art. 49: " Where anyone is injured in his personal relations owing to the wilful or negligent act of some other person he is entitled to compensation in respect of pecuniary loss, and, where this is justified by the exceptional gravity of the injury or o the wilful or negligent act, he may also claim payment of a sum of money by way of moral damages. The judge may, however, decree some other kind of reparation to be made either in place of or in addition to the award of money by way of moral damages"

[88]It is noteworthy that the right of personality was first conceived of in the sphere of tort law, that is, in the same sphere where privacy was first conceived of as a right in the United States.

[89]Art. 226 "gives a remedy in the case a right has been exercised for no other purpose than to inflict harm on some other person" (H.C. Gutteridge, "Comparative Law of the Right to Privacy" *The Law Quarterly Review*, p. 203, 208 (1931)).

[90]I."One who, intentionally or negligently, wrongfully injures the life, body, health, freedom, property or any similar right of another is obligated to compensate him for damage arising therefrom."
II."One who violates a provision of law intended to protect another incurs the same obligation. If the wording of the provision makes possible its violation without fault, liability for compensation arises only in the presence of fault."

[91]"One who intentionally damages another in a manner violating good morals is obligated to compensate him for such damage".

any aspect of personality, even if these are not explicitly guaranteed by law. This is notably the case for section 2 of art. 823. Courts soon saw in this provision an instrument for the civil protection of the right to honour and they made of it the basis for the civil action of defamation in German law[92]. As a result, personality received some protection, even if indirect and partial, in tort law. The tort-law practice proved much less generous towards personality in the context of arts. 226 and 826. For the first half of the century, in fact, the former was only seldom invoked at all and then only in cases which involved patrimonial rights. The latter, on the other hand, was very often at stake but mainly in such matters as labour disputes and practices in business; it was rarely claimed in cases concerning personality[93]. It thus seems that, during the first half of the century, the right of personality remained for the most part strange to the German law of tort and, more generally, to all of the German legal system.

The consolidation of the right to personality within the German legal system took place at the constitutional level. Art. 2.1 of the German Basic Law for the first time recognised a right to the free development of one's personality[94]. Thereby, the Basic Law provided the grounds for the protection of a general right of personality (*allgemeines Persönlichkeitsrecht*) against acts of public power, upon which, as is known, fundamental rights are binding[95]. Moreover, the enactment of art. 2.1 caused a shift in the position that personality occupied within the German legal system as a whole. In particular, personality grew in importance in the field of the law of torts. On the basis of its constitutional recognition, the Federal Court of Appeals (*Bundesgerichtshof*) started to consider that a general right to personality could be included amongst those "similar rights" alluded to in section 1 of art. 823 of the B.G.B[96].

The example of art. 2.1 of the BVerfG has been followed by other European Constitutions, such as the Italian (art. 2) and the more recent Constitutions of Greece (art. 5.1) and Spain (art. 10.2). Furthermore, the impact of the fundamental right to personality, as interpreted by the Constitutional Court, seems to have transcended Europe and had some influence upon the American concept of privacy, to the extent that

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[92]Note that those who defame violate "a provision of law intended to protect another", since defamation is a crime punishable under the German Criminal Code.

[93]H.C. Gutteridge, "Comparative Law of the Right to Privacy" at 208 (1931).

[94]Art. 2.1: "Everyone shall have the right to the free development of his personality, insofar as he does not infringe the rights of others or offend against the constitutional order or the moral code."

[95]Basic Law, art. 1 (3): "Following basic rights shall be binding as directly valid law on legislation, administration and judiciary".

[96]The first clear decision in this sense was BGHZ, 13, 334 et seq., pronounced as early as 1954. For an account of the vicissitudes of recognising a general right of personality in the context of civil law, see BVerfGE 34, 269 at 270 et seq.

personality has been referred to in the United States as the European "rough equivalent of our 'right to privacy'"[97]. In fact, as pointed out above, the construction of a general constitutional right to privacy that the Supreme Court undertook in the case of Griswold seems inspired by the German fundamental right to personality. It thus seems important at this point to comment at more length on the scope of the right to personality in Germany, in particular on the way it has been interpreted by the German Constitutional Court.

2.2 The Fundamental Right to the Free Development of one's Personality

According to art. 2.1 of the German Basic Law, "everyone shall have the right to the free development of his personality, insofar as he does not infringe the rights of others or offend against the constitutional order or the moral code". When confronted with the wording of this provision, one is tempted to regard it as the constitutional version of the private-law right to personality that the B.G.B. did not recognise. Thus understood, art. 2.1 would appear to recognise a right the point of reference of which is the person[98] and which would cover areas such as one's "life, health, physical and moral safety, personal freedom, honour, privacy (understood as *Geheimnissphäre*), name, portrait (*Bild*), family life, matrimonial relationships, commercial and economic freedom"[99]. These are not however the terms in which art. 2.1 was initially approached by the Constitutional Court; indeed, these are not the terms in which the right to the free development of one's personality was conceived during the preparatory work giving rise to the Basic Law. Rather, the right was then conceived and enacted as a general right of freedom (*allgemeine Handlungsfreiheit*), that is, as a right to act free from public interference within the limits imposed by the moral code, the rights of others and the constitutional order[100]. In the light of this background, the Constitutional Court has stated since its earliest cases on art. 2.1 that this provision recognises a general right to free action within the above-mentioned limits; in other words, art. 2.1 recognises a fundamental right to negative freedom[101].

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[97]Harry D. Krause: "The right to privacy in Germany ..." at 484.

[98]See De Cupis, *I Diritti della Personalità*, vol. I, p. 29, Milano 1959. Mario Are, "Interesse alla Qualificazione ...", at 2169.

[99]See the reference to Oser's *Das Schweizerische Obligationenrecht* in Gutterridge, "Comparative Law of the Right to Privacy" at 211, footnote 37 and accompanying text.

[100]Klaus-Berto v. Doemming, Rudolf Werner Füsslein & Werner Matz, "Entstehungsgeschichte der Artikel des Grundgesetzes" 1 *Jahrbuch des Öffentlichen Rechts der Gegenwart* 1 at 46 (1951).

[101]R. Scholz, "Das Grundredcht der freien Entfaltung der Persönlichkeit in der Rechtsprechung des Bundesverfassungsgerichts" 100 *AÖR* 1975, pp. 80 and 265 at 95; K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 16th ed. Heidelberg 1988, p. 165; Pieroth/Schlink, *Grundrechte Staatsrecht II*, 4th ed. Heidelberg 1988, p. 94. See cases cited in Scholz, "Das Grundredcht der freien Entfaltung ..." at 87, note 49. Against the conception of negative freedom as an all-

However, the recognition of a general right of action within art. 2.1 does not exhaust the potential of this provision; its wording allows and even suggests the recognition of a general right of personality. The Constitutional Court[102] soon developed the doctrine that a general right of personality (*allgemeines Persönlichkeitsrecht*) is indeed included within the right to the free development of one's personality, read in conjunction with the right to human dignity recognised in art. 1.1[103]. A general right of personality and a general right of freedom thus define the scope of art. 2.1 and, although no clear line has ever been drawn between these two rights[104], they can be referred to, respectively, as the passive and the active element of an all-embracing right to the free development of one's personality[105].

The way the Constitutional Court has conceived the general right of personality has not remained unaltered overtime. Initially, as the Court began to regard the right as part of art. 2.1, it also started to divide its scope into three different areas, each of which was thought to deserve a different level of constitutional protection. Two of these areas were made up by the right to the free development of one's personality in private and embraced, first, a sphere of absolute intimacy or seclusion that an individual could enjoy from society (*Intimsphäre*) and, second, a sphere of an individual's privacy from which society was not completely excluded (*Geheimnissphäre*); the third area embraced the right of an individual to develop his personality within society. The idea of the Court was that the first one of these three areas, i.e. the area where the individual develops his personality in complete seclusion from society, deserved absolute protection against the State, so that infringement upon this area could under no circumstances be considered in accordance with the Constitution. On the other hand, both the second and the third areas of the right to personality could be subject to restrictions provided that these pursued interests of overriding importance. The importance of these interests had to be greater the more an individual's privacy was restricted and lower the more restrictions potentially affected the social sphere of an individual's right of personality[106].

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embracing right, see Ronald Dworkin, *Taking Rights Seriously*, Duckworth, London, 1977, pp. 266 et seq.

[102]See BVerfGE 27, 1 at 6; 27, 344 at 350 et seq.

[103]Art. 1.1: "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all State authority".

[104]Scholz, "Das Grundredcht der freien Entfaltung ..." at 82, 89 et seq.

[105]BVerfGE 54, 148 at 153. For this issue, see Jarass, "Das allgemeine Persönlichkeitsrecht im Grundgesetz" (1989) *NJW* 857 at 858, 859.

[106]See R. Scholz, "Das Grundredcht der freien Entfaltung ..." at 265 et seq. In other words, the first of the above-mentioned levels was thought to constitute the 'essential content' of the right to the free development of one's personality, while restrictions of the second and third of these levels were subject to the principle of reasonableness. The requirements that limitations of fundamental rights respect the

Eventually, the Constitutional Court abandoned the doctrine of the three spheres. In fact, dividing the right of personality into fixed categories appeared rather artificial; in addition, it implied that the constitutionality of restrictions of the right of personality could be judged only once it had been decided which one of the above three spheres had been restricted, which is also a rather artificial way of proceeding. Now the Court prefers to regard the right of personality as an undivided whole and simply to rely on the principle of reasonableness whenever it has to judge the constitutionality of a restriction of this right[107]. The Court has not attempted a complete definition of the object of the general right of personality; this is regarded as a general clause where every aspect of an individual's personality is recognised as a right, hence the difficulty of giving an all-embracing definition of its object. Instead of this, the Court has pointed to some of the particular rights of personality covered by art. 2.1, making it clear that the object of the general right of personality goes over and above the object of these particular ones[108]. For example, the Court has pointed to the right to personal honour, to the right to one's image, to the right to one's spoken word and, most important for us, it has pointed to the right to privacy understood both as secrecy and as seclusion[109].

Art. 2.1 thus embraces a right to privacy, understood in terms which coincide with the definition proposed at the end of Section 1: privacy is regarded as a right to seclusion and secrecy; furthermore, it is regarded as a right to *control* over one's seclusion and secrecy. This idea of control has always qualified the definition of the right to privacy by the Constitutional Court, which since its early decisions on this right has depicted privacy, in more or less explicit terms, as a right to self-determination within the area of one's seclusion and secrecy (*Sebstbestimmungsrecht*)[110]. However, the importance of this idea of control has grown greater in more recent years, particularly in the area of privacy as secrecy, in the face of the pervasive collection, storage and use of personal data by the public power. Today, control over one's personal data, that is the possibility of deciding when and within which limits one is to give away information about oneself, is rightly regarded as a crucial aspect of the right to privacy. The importance of this aspect of privacy has been openly acknowledged and

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essential content of these and comply with the principle of reasonableness will be dealt with in detail in chapter 5.

[107]See, e.g., BVerfGE 65, 1; 84, 192 at 195; 84, 239 at 279-280; 87, 153 at 169; 87, 234 at 267; 88, 89, 69 at 82-83; 90, 263 at 271. As already noted, I will address the principle of reasonableness in chapter 5.

[108]BVerfGE 54, 148 at 153; 72, 155 at 170.

[109]See BVerfGE 54, 148 at 154 and cases cited therein.

[110]See, e.g., BVerfGE 27, 1 at 7; 27, 344 at 350; 34, 238 at 246; 54, 148 at 155.

given its due by the Constitutional Court, which in a path-breaking decision, the so-called *Census decision*, referred to a 'right to informational self-determination' (*informationelle Sebstbestimmungsrecht*) as included within art. 2.1[111].

Both the recognition of the right to privacy as part of the general right of personality and the insistence upon the importance of the right to informational self-determination are characteristic of the German approach to privacy. The above-mentioned Census decision of the Constitutional Court added yet another feature to the German constitutional right to privacy, a feature which has also become characteristic of this right. I am thinking of the idea that the right to informational self-determination does not merely exist as a product of democracy, but is also a condition for the very existence of democracy itself[112]. This idea could be sketched as follows. In order that a person can lead an autonomous life, he needs to be aware of what the State knows about him and how this information is being used; otherwise he will always be reluctant to undertake certain actions, for fear that these may reach the State's notice, who may use their knowledge to his disadvantage[113]. He will even be reluctant to exercise his fundamental rights. For example, the suspicion that all members of a certain, say gay, association are being registered by the State might stop some from joining in, which amounts to a clear hindrance of their freedom to associate. The same goes for free speech, freedom of religion, freedom to assemble, the free choice of profession, etc. In order that individuals be able to participate in society freely, even in order that they can exercise their fundamental rights, they must stand in a position of autonomy, which implies, if not that the State be completely ignorant of anything individuals do not wish it to know, at least that this knowledge be limited and that individuals know what the State knows about them and exactly what use is being made thereof. Guaranteeing such a position of autonomy is of importance not only for single individuals; rather, it is something that concerns society as a whole and the democratic order itself, because autonomy is a condition for participation and for the unhindered exercise of fundamental rights. In sum, informational self-determination stands as a requisite for democracy.

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[111]The census decision of 1983 (BVerfGE 65, 1 at 41) was path-breaking in this respect; since then, the expression 'informational self-determination' has become a common-place reference to the right to privacy (see, e.g., BVerfGE 72, 155 at 170; 82, 236 at 269; 84, 192 at 195; 88, 87 at 97; 90, 255 at 260). The relevant aspects of the census decision have been brought to light and commented, amongst others, by Spiros Simitis, "Die informationelle Selbstbestimmung - Grundbedingung einer verfassungskonformen Informationsordnung" (1984) *NJW* 398.

[112]BVerfGE, 65, 1 at 43.

[113]Although I am only referring to the State as addressee of the constitutional right to privacy, this right also has an indirect 'third party effect' or '*Drittwirkung*', which means that it also applies, even if only indirectly, against other members of civil society (in support of this position, see Spiros Simitis, "Die informationelle Selbstbestimmung ..." at 401). The question of the third party effect of fundamental rights will be studied in chapter 7.

The above approach to the right to informational self-determination has become current coinage in the German legal literature. It finds its theoretical basis in a discursive conception of the State[114]. In the Census decision the Constitutional Court seemed to assume, as discourse theory does, that in politics like in any other field truth is the result of consensus. To be precise, discourse theory regards truth as the result of consensus reached through a process of free deliberation among all individuals that want to participate. At the political level, discourse theory looks upon the constitutional democratic State as the system which can best guarantee free debate. Democracy ensures that all individuals can participate in the process of taking political decisions, while, through judicial review, the Constitution and the recognition of constitutional rights ensure that the political majority continue to take decisions in a discourse-theoretical manner and that minorities will not be left out of public debate. From the point of view of discourse theory, therefore, free public deliberation and a constitutional democratic State depend upon each other: free deliberation is ensured by a constitutional democracy, yet a constitutional democracy is only justified in as far as it provides the conditions for free public debate. This means that a constitutional democratic State must guarantee free participation and the free exercise of fundamental rights for the sake of its own preservation. Now, both free participation and the free exercise of fundamental rights require that individuals be placed in a position of autonomy, which in turn requires that individuals enjoy a right to informational self-determination, that is that they know what the State knows about them and how the information is being used. The conclusion is that, under this approach, protecting the right to privacy does not appear as a purely individual interest but as an interest of political character ranking very high on the scale of importance.

The Supreme Court of the United States has not adopted the same participatory approach to privacy as the German Constitutional Court[115]. The American Supreme Court regards privacy as an individual right the protection of which responds to purely

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[114]Discourse theory is discussed at more length in the Introduction to this thesis.

[115]For a comparison between the German and the American way of approaching privacy, see Paul Schwartz, "The Computer in German and American Constitutional Law: Towards an American Right of Informational Self-Determination" 37 *Am. J. of Comp. L.* 675 (1989); see also Paul Schwartz, "Das Übersetzen im Datenschutz: Unterschiede zwischen deutschen und amerikanischen Konzepten der 'Privatheit'" (1992) *RDV* 8. The Court's individualistic approach to privacy is also criticised by Donald L. Doernberg, "'The Right of the People': Reconciling collective and Individual Interests under the Fourth Amendment", 58 *New York Univ. L. Rev.* 259 (1983) and by James J. Tomkovicz, "Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province", 36 *The Hastings L. J.* 645 (1985). See also S.E. Sundby, ""Everyman" 's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?" 94 *Col. L. Rev.* 1751 (1994), where the author's quest for 'trust' in the exercise of the right to privacy appears as a claim that there should be a more participatory approach to this right.

individual interests[116]. Privacy is recognised as a right because single individuals regard it as a value worthy of protection for their own sake, that is for the sake of the development of their own personality as individuals. It is therefore amongst the most individualistic interests guaranteed by the Constitution. Thus conceived, the right to privacy clashes with the interests of society and even with those of democracy. For one thing, the well being and preservation both of society and of the democratic order rely to a great extent on publicity and on the availability of information, while the right to privacy aims precisely at concealing information from the public realm. The right to privacy is thus regarded to be 'undemocratic'. As a result, it is defined in very restrictive terms and, in addition, this right is accorded rather low weight when balanced against interests which are thought to tend towards the social or the political good, that is, when balanced against interests which are regarded more 'democratic'. All this will be studied in depth in chapters 4 and 5.

We have now seen how differently the right to privacy is perceived in Germany and in the United States. In Germany, the right to privacy is regarded as a condition for the free participation of the individual in politics and for the free exercise of fundamental rights, hence it appears as a basic pillar for a constitutional democratic State. In the United States, on the other hand, the right to privacy is regarded as a purely individualistic interest which stands as a potential enemy of democracy, since it aims at concealing information from the public realm. I would now like to note that both these visions of the right to privacy integrate a complete picture of the right. Indeed, the right to privacy is rightly regarded as a condition for constitutional democracy, yet it is just as true that the concealment of information from the public can also entail important threats to democracy. The real difference between the German and the American approach to privacy is that only the former succeeds in taking both these aspects of the right to privacy into account. In Germany, the right to privacy is *primarily* regarded as a condition for constitutional democracy; yet, on account that excessive privacy can *also* endanger democracy, the protection of this right is subject to certain limits, so that in some cases, which are regarded as the exception to the rule, the individual is not entitled to know what information the State has of her - in chapter 5 we will study the restrictions imposed upon the sphere of privacy embraced by the right to the secrecy of telecommunications. The difference with the United States is that here privacy is *only* regarded as an individual interest. The drawbacks of this approach to

[116]Nevertheless, the Supreme Court has hinted at the connection between privacy and the exercise of certain fundamental rights on at least one occasion. The occasion was the case of *Griswold v. Connecticut*, in which the Court argued that the freedom of association recognised in the first amendment (see *NAACP v. Alabama*, 357 U.S. 449 at 462) implies a right to privacy in one's associations, as a result of which "the First Amendment has a penumbra where privacy is protected from governmental intrusion" (*Griswold v. Connecticut*, 381 U.S. 479 at 483 (1965)).

privacy will come to light more clearly as we study the object of the right to the secrecy of telecommunications.

Let us now come back to Germany and to the German rights to privacy and personality. Before closing the present considerations as to these rights, I would like to make some remarks concerning the relationship between them and the right to the secrecy of telecommunications recognised in art. 10 of the Basic Law. As a source of recognition both of a general right of freedom and of a general right of personality, the right to the free development of one's personality of art. 2.1 appears as a general clause where every instance of negative freedom and every aspect of an individual's personality, are embraced. As a result, the German spectrum of freedoms against the State can be considered complete, without gaps. However, art. 2.1 does not come into play in the context of every aspect of negative freedom and personality; rather, it acts as a 'subsidiary' ('fall-back') constitutional provision, that is as a provision which applies only in the context of particular instances of negative freedom or of personality which are not protected within more specific fundamental rights[117]. To be more precise, art. 2.1 covers, first, instances of negative freedom and personality which are covered but not protected as part of a more specific right (*subsidiäres Freiheitsrecht*); second, it covers instances of negative freedom and personality which are close to the area covered by a specific right, but which are not -or not yet- considered as lying within the scope of the coverage of this latter (*supplementäres Freiheitsrecht*); finally, it covers instances of negative freedom and personality neither covered nor protected as part of a more specific fundamental right (*speziales Freiheitsrecht*)[118].

Given the subsidiary character of art. 2.1, it would seem that the general right of personality it recognises, in particular the right to privacy included therein, is hardly relevant in the context of the secrecy of telecommunications, since this enjoys specific recognition and protection as a fundamental right in art. 10 of the Basic Law[119]. Yet there are at least two ways in which this provision can here prove to be of importance. To begin with, it can be of assistance where art. 10 either does not cover (*supplementäres Freiheitsrecht*) or does not protect (*subsidiäres Freiheitsrecht*) the secrecy of a particular example of an act of telecommunication. In addition to this, art. 2.1 can help the interpretation of art. 10: the doctrine of the Constitutional Court on the right to privacy can be a guide-line for the interpretation and specific application of art. 10, particularly helpful for the solution of border-line cases. The extent to which art.

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[117]See, e.g., BVerfGE 34, 269 at 281; 54, 148 at 153; 72, 155 at 170.
[118]See Scholz, "Das Grundredcht der freien Entfaltung ..." at 113.
[119]See BVerfGE 67, 157 at 171.

2.1 is of assistance in the context of the right to the secrecy of telecommunications will come to light in chapter 4.

Section 3: The Constitutional Protection of Privacy and of the Secrecy of Telecommunications Confronted

Despite the growing importance of privacy in western social and legal milieu, privacy is hardly ever accorded straightforward recognition at the constitutional level. This situation contrasts with the protection of the secrecy of telecommunications, an aspect of privacy which, openly or implicitly, is considered a fundamental right in most western constitutions[120]. In this section I will try to find an explanation for this paradoxical sounding situation, that is I will try to answer the question why privacy, unlike the secrecy of telecommunications, is hardly ever overtly and never simply recognised as a right in constitutional texts.

This question will be answered on the basis of two complementary issues, which will be analysed in turn: first, the two values at stake have a completely different juridical background; this is dealt with in point (1) below. Second, their respective conceptual features are just as different as are their juridical backgrounds are; this is considered in point (2) below. As will be seen, these two issues also account for the fact that the United States pays more attention to the protection of privacy than do western European countries. Finally, before closing this section I will also face the issue of why the secrecy of telecommunications is protected in most contemporary western Constitutions and will compare the position of this right in the United States of America and in continental European systems; this will be the object of point (3) below.

1. The Juridical Background

The secrecy of telecommunications can be viewed as one of the classical rights 'against the State' of modern constitutional theory, so that its present recognition as a fundamental right is backed by a long European tradition (see chapter 2). Privacy as an independent value, on the other hand, has only recently been accepted into the world of rights. On this basis, it is possible to argue that the protection of privacy was probably not ripe enough a juridical concern at the time the Constitution of the United States and most contemporary European Constitutions were enacted. Such an argument seems to be supported by the case of the EC countries: only the three youngest of the EC national

[120]See, e.g., footnotes 1 and 2 above and accompanying text.

Constitutions -namely the Constitutions of the Netherlands, Portugal and Spain[121]- include an overt recognition of privacy.

This explanation, however, does not give a fully convincing answer to the original question. The doubt may still arise as to why the 'old' western Constitutions have not been amended to meet the new need to protect privacy. As far as this issue is concerned, the case of the United States has to be distinguished from that of most Constitutions in western Europe; since in the United States such constitutional reform has actually taken place. Yet this constitutional reform has taken place in a very unorthodox way. To be more precise, the wording of the constitutional text has never been altered for the sake of privacy; rather, the amendment has been carried through via the 'creative' interpretation of certain constitutional provisions by the Supreme Court[122]. Let me explain how this has been accomplished.

In order to place privacy amongst the constitutional rights, the Court has acted in two different directions. First, it has interpreted some constitutional amendments as means to the service of the protection of privacy. The amendments in question are mainly the third[123], the fourth[124] and the clause against self-incrimination of the fifth[125]. As a result, a case for the protection of privacy is seen to arise indirectly

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[121]Articles 10 of the Dutch Constitution ("right to respect for privacy"); art. 26 of the Portuguese text ("right to the protection of the intimacy of private and family life") and art. 18.1 of the Spanish one ("right to...personal intimacy"). The original Portuguese term "intimidade", or the Spanish one "intimidad" are taken here as synonyms of "privacy". The *Diccionario Moderno Español-Inglés, Inglés-Español* (1976) translates the Spanish term "intimidad" both as "intimacy" and "privacy" (p. 527), and the English term "privacy" as "intimidad" or "vida privada" (both expressions used in the Portuguese Constitution). The confusion of terms stems from the fact, already referred to above, that there is no such a word as "privacy" either in Portuguese or in Spanish. As for the rest, the conceptual features of the English word "intimacy" lead to the key ideas of "seclusion" and "secrecy", which constitute the core of the uncontroversial concept of privacy (see footnotes 59-60 above and accompanying text).

[122]It is, in fact, characteristic of American constitutionalism -conditioned by the American system of judicial control of constitutionality- that the development of the Federal Constitution has mainly taken place through its judicial interpretation, in such a way that the amending procedures provided ad hoc by Article V of the Federal Constitution have rarely been used: "El desarrollo de la Constitución no se hará tanto por vía de reforma como por vía de interpretación. En la práctica, es ésta la que ocupa el lugar y cumple la función que inicialmente se había pensado para aquélla" (Javier Pérez Royo, "La Reforma de la Constitución" *Revista de Estudios Políticos*, No. 22 -separata-, p. 16). See also M. Shapiro, & Rocco J. Tresolini, *American Constitutional Law*, 5th ed., New York - London, 1979, p. 78.

[123]"No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law". Despite its narrow scope -the amendment rose to prevent situations such as those created by the English Quarterly Act, whereby colonists were made to host King George's troops- the amendment seems thought out to protect the interest in the privacy of one's home. As a matter of fact, the Supreme Court has only referred to the amendment to remark that it is "another facet of...privacy" (*Griswold v. Connecticut*, at 484).

[124]Although somehow the idea of privacy was always behind the judicial interpretation of the fourth amendment, this has only been consistently read as a provision meant to protect privacy since the case of *Katz v. U.S.*, 389 U.S. 347 (1967). This point will be explained at length in chapter 2.

[125]"No person shall... be compelled in any criminal case to be a witness against himself...". Paradoxically, the case usually mentioned for having first interpreted this clause as an aspect of privacy

whenever either of these provisions is at stake. Second, the Court has interpreted the Constitution in such a way that it embodies a general, all-embracing constitutional right to privacy. Ruling on the existence of such a general right was at the core of its -very controversial- decision in the case of *Griswold v. Connecticut*[126]. Incidentally, note that in this case the Court 'created' a general constitutional right to privacy with a view to making it embrace the right to autonomy and that the right to autonomy has been left outside the scope of privacy as defined in this thesis; however, this constitutional right to privacy was 'created' in such all-embracing terms that one can assume that it also covers privacy conceived as control over seclusion and secrecy. The grounds for this general constitutional right to privacy were found in the "relationship lying within the zone of privacy created by several fundamental constitutional guarantees"[127]. Such 'zones of privacy' were identified, not only in the Third, Fourth, and Fifth Amendments, but also in the First[128] and Ninth[129] or, to be sure, in their 'penumbras', formed by 'emanations' of the guarantees contained therein.

As the foregoing paragraphs show, in the United States the right to privacy is granted direct constitutional protection as a fundamental right, even if this protection results from a 'judicial' amendment of the Constitution and privacy is still not explicitly mentioned in the constitutional text. However imperfect this constitutional protection might be, the situation in the United States contrasts with the situation in most western European countries, where no constitutional reform of any kind has been attempted to recognise privacy as a right[130]. It ought to be noted in this context that most western European Constitutions have actually undergone several amendments after their enactment, often in recent years[131]. Concerned with different sorts of problems -some

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(case of *Boyd v. U.S.*, 116 U.S. 616 (1886)), is the case which introduced a reading of the fourth amendment as a means to protect private property, not privacy as such.

[126]381 U.S. 479 (1965).

[127]Ibid., at 485.

[128]Literally, the first amendment protects the freedom of religion, of expression, of assembly and to petition the government for a redress of grievance. Nevertheless, the Court referred to *NAACP v. Alabama* (357 U.S. 449, 462), where the freedom of association had been held a peripheral First Amendment right, and subsequently interpreted that freedom of association implies a right to privacy in one's associations. From this, the Court deduced that "the First Amendment has a penumbra where privacy is protected from governmental intrusion" (*Griswold v. Connecticut*, at 483).

[129]"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people". Despite its suggestive breadth, the Griswold case appears to be the first time that "a majority of the Supreme Court...relied upon the 9th amendment in a serious way" (Thomas I. Emerson, "Nine Justices in search of a doctrine" *The Right of Privacy. A symposium on the implications of Griswold v. Connecticut*, New York, 1971, p. 31).

[130]One must however bear in mind that, as explained above, some European Constitutions recognise the right of personality of individuals, wherein privacy is comprehended.

[131]Take, e.g. the Constitutions of Belgium (last reform in July 7, 1988), Germany (last reform in August 31, 1990), Ireland (last reform in 1987), or Luxembourg (last reform in 1984/5?).

of which touched on the subject at issue here[132]- these amendments have not been taken as occasions for the introduction of a right to privacy. They have thus made it clear that the 'unripeness' of the issue can no longer, at least not exclusively, be claimed to justify the absence of privacy in those constitutional text. A complete explanation of that absence would require the examination of some different issues. These issues relate, in particular, to the conceptual complexities that the term 'privacy' enshrines.

2. The Conceptual Features.

As has been noted above, the conceptual features of "privacy" and "secrecy of telecommunications" are totally different. The difficulties involved in a definition of the former term have already been largely commented on; even if privacy is exclusively conceived as the control over one's seclusion and secrecy, even then its conceptual boundaries continue to be ill-defined. The expression "secrecy of telecommunications", on the contrary, refers to an area narrow enough to be a relatively well defined concept. The same can be said about the right associated to its protection. Problems about the scope of this right certainly arise, but these tend to be concerned with concrete points or with some technical details of its definition. They do not have the basic character of the difficulties affecting the scope of privacy or the right to privacy. In the end, many of those conceptual problems have been solved by virtue of the long tradition of the right.

Indeed, as this last remark points out, some connection exists between the tradition of a term and the level of precision its definition has attained. In the case of privacy, continental Europe offers a good example of this. The strangeness of the concept of privacy and of its corresponding right in the continental European tradition is underlined by the fact that the word 'privacy', as noted above, does not even find accurate translation in most European tongues. Not surprisingly, most western European Constitutions have preferred to concentrate on the autonomous recognition of concrete aspects of privacy, better defined and more solidly rooted in their constitutional history. The secrecy of telecommunications[133], together with the

[132]This is notably the case of the Seventeenth Amendment to the German Constitution (1968) which, among other changes in the system of fundamental rights, included an amendment of art. 10 of the Federal Constitution narrowing the rights of individuals with regard to the interception of their private communications. Similarly, the last reform of the Constitution of Luxembourg included an extension of the protection of private communications (art. 28) from correspondence to telephone conversations.
[133]See footnote 1.

inviolability of one's premises[134], are the most traditional examples. Moreover, some new Constitutions also prefer to guarantee certain particular aspects of privacy which have of recent become particularly endangered, such as the protection of personal data, by way of making them the object of an independent right, without referring to the general right to privacy; this is notably the case of the Constitutions of the new German *Länder*, all of which recognise a right to data protection[135]. Furthermore, even in those European Constitutions where a general right to privacy is actually mentioned, this does not stand as a substitute for the recognition of concrete spheres of privacy as independent rights[136]. Backed by their own tradition and by the importance of their more accurate definition, these rights appear just as if privacy had not previously been mentioned.

Nevertheless, the fact that the right to privacy is mentioned is not without importance. To begin with, it pays homage to the interest in privacy lying behind the specific rights listed above, thus providing an explicit positive criterion for their interpretation. More significantly, a general right to privacy arises as the only source of protection for some of the areas embraced by the concept of privacy. In fact, there are areas of privacy the importance of which has been acknowledged only recently, areas which are therefore not protected as independent rights. In other words, there are new situations and ways whereby privacy may be threatened and against which law has not yet developed particular defensive mechanisms in the form of specific rights. This is today the case with the protection of personal data. The wrongful handling of personal data entails new and powerful forms of menace to individuals' privacy against which the only basis for protection is the direct appeal to privacy as a general right. In fact, the need to respond to such new dangers has often triggered the recognition of privacy as a fundamental right[137].

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[134]As for the EEC countries, see Belgian Constitution, art. 10; Danish Constitution, art. 72; German Constitution, art. 13; Greek Constitution, art. 9; Irish Constitution, art. 40; Italian Constitution, art. 14; Constitution of Luxembourg, art. 15; Constitution of the Netherlands, art. 12; Portuguese Constitution, art. 34; Spanish Constitution, art. 18.2. In the United States, such protection is provided by the Fourth Amendment.

[135]Art. 11 of the Constitution of Brandenburg (20 Aug. 1992); art. 6 of the Constitution of Mecklenburg-Vorpommern (23 May 1993); art. 33 of the Constitution of Sachsen (27 May 1992); art. 6 of the Constitution of Sachsen-Anhalt (17 July 1992).

[136]This is also true in the case of countries where a right of personality is constitutionally recognised. The wideness and indeterminacy of this right also adviced, like in the case of privacy, the parallel recognition of some aspects of personality as independent rights.

[137]The need to protect personal data is stressed in the three EEC Constitutions where privacy is recognised as a fundamental right (Constitution of the Netherlands, art. 10.2; Portuguese Constitution, arts. 26.2 and 35; Spanish Constitution, art. 18.4).

3. The Protection of the Secrecy of Telecommunications as a Fundamental Right

We have now dealt with the first two questions posed at the beginning of this chapter, i.e. the questions as to why privacy should be protected and as to why privacy does not generally receive straightforward recognition and protection in constitutional documents. I would now like to address the third and last one of those questions, i.e. what makes the secrecy of telecommunications worthy of protection as a fundamental right?

In section 2 I argued that the recognition of the right to privacy should be regarded as a result of a combination of two factors: first, this right embraces values which society regards as being worthy of respect; second, society considers that the respect these values deserve is threatened, hence that these values should be protected. This argument also applies to the secrecy of telecommunications. The secrecy of telecommunications is an important aspect of privacy; this means that the value judgement which lies behind the idea that the secrecy of telecommunications should be respected is included within the more general value judgement that privacy should be respected. One can therefore assume that society has been concerned with the respect for the secrecy of telecommunications at least since it started to be concerned with the respect for privacy.

In the case of Europe, the right to the secrecy of telecommunications counts with a much longer tradition than the right to privacy: as will be explained in the next chapter, the secrecy of letters started to be considered a value worthy of independent protection more than two centuries ago, whereas a more general right to privacy has only recently started to be recognised. In the United States the need to protect the secrecy of telecommunications has not been felt since so long. Here the secrecy of letters was explicitly recognised as a right neither in the federal Bill of Right, nor in those Bills of Rights enacted by the states. The importance of protecting this particular area of privacy was only perceived when telecommunications started to play a central role in individuals' lives and technological development started seriously to endanger their secrecy. At that point the secrecy of telecommunications was given protection both at the statutory level[138] and as a constitutional right. Note however that this right has never been made the object of explicit constitutional recognition; rather, it has been considered included within the right against searches and seizures recognised in the fourth amendment to the Federal Constitution. In this sense, the Supreme Court had no

[138]Section 605 of the Communications Act of 1934, 48 Stat. 1064, U.S.C.

problem to state that the right to the secrecy of letters was included within the right against searches and seizures of "papers"[139]; yet other means of telecommunications could only be considered implicit in the fourth amendment from the moment when this started to be interpreted as a provision which aims at the protection of privacy[140].

One can therefore conclude that the secrecy of telecommunications is regarded as a value worthy of respect both in Europe and in the United States, although the need to offer legal protection to this value was felt at a much earlier stage in Europe. This circumstance accounts for the contrast which exists between the constitutional recognition of the right to the secrecy of telecommunications in Europe and its constitutional recognition in the United States. This contrast can be sketched as follows. First, in Europe this right enjoys *explicit* recognition, whereas in the United States it has just arisen by virtue of a certain judicial interpretation of a certain constitutional provision. Secondly, European Constitutions conceive the secrecy of telecommunications as an ***independent*** fundamental right, they conceive it as an autonomous stand-point of opposition to the power of the State, despite the link existing between it and privacy; on the other hand, the U.S. Constitution regards this right as an aspect of the more general right to privacy. Finally, and in connection with the above circumstance, European constitutions define the secrecy of telecommunications in rather *clear terms*, whereas in the U.S. Constitution this right is recognised as part of the ill-defined right to privacy. The implications of these two different approaches to the constitutional right to the secrecy of telecommunications will come to light in their full importance as I will compare in detail the recognition and protection of this right in the ECGR, Germany and the United States.

[139]*Ex Parte Jackson*, 96 US 727 (1877).
[140]*Katz v. US*, 389 US 347 (1967).

CHAPTER 2: THE CONSTITUTIONAL HISTORY OF THE RIGHT TO THE SECRECY OF TELECOMMUNICATIONS

Introduction

Before starting to compare the recognition and protection of the right to the secrecy of telecommunication in the ECHR, Germany and the United States, it seems wise to have a brief look at its historical background in the three respective systems. This brief look at history will bring to light how different are the constitutional traditions in relation to the right to the secrecy of telecommunications in Europe, on the one hand, and in the United States, on the other. In Europe, most particularly in Germany, this right has long enjoyed explicit recognition and protection as a constitutional right, so that there its history is neat and easy to trace. This is far from the case in the United States. Here the secrecy of telecommunications has only recently been recognised as a constitutional right; moreover, it has never been, and still is not, the object of direct constitutional attention. Its constitutional recognition is the result of two circumstances: first, the secrecy of telecommunications is regarded as an aspect of privacy; second, the Supreme Court is now of the opinion that the right against unreasonable searches and seizures recognised in the fourth amendment aims at the protection of privacy. As a result of a combination of these two circumstances, the Court now regards the interception of telecommunications as a case of search and seizure. My study of the history of this right will consist of an analysis of the interpretative steps that have led the Supreme Court to include the right to the secrecy of telecommunications within the ambit of the fourth amendment. This analysis will prove more complex than the review of the constitutional history of the secrecy of telecommunications in Germany; more attention in the present chapter will thus be dedicated to the United States.

Section 1: The European Convention on Human Rights and Germany

1. The Background of the Secrecy of Telecommunications as a Constitutional Right

In Europe, the secrecy of telecommunications has a long and solid history as a constitutional right. One can trace the constitutional history of this right in France as far back as the revolutionary period at the end of the eighteenth century, when the secrecy of the letters entrusted to the postal service was already perceived as a value worthy of constitutional protection. The right to the secrecy of postal letters appeared in a number of drafts of the French *Déclaration des Droits de l'Homme et du Citoyen* of 1789[1] and, although it was not mentioned in the final version of this *Déclaration*[2], this right was explicitly recognised by the *Assemblée Nationale* one year later[3]. Moreover, the fact that the *Déclaration* does not explicitly mention the secrecy of letters does not mean that it did not recognise it as a right: for reasons that will be explained below, it seems likely that the secrecy of letters was considered to be covered within art. 11 of the *Déclaration*, which recognises the freedom of opinion and expression. I will come back to this point later.

The case of revolutionary France thus shows that the protection of the secrecy of telecommunications was a social concern at that time, so imposing that the eyes of the new constitutional order were immediately turned towards it. France was not an isolated case. Also other legal orders in continental Europe reacted to the social demand that the secrecy of letters be guaranteed. This was notably the case for Germany. In

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[1]See Stéphane Rials, *La Déclaration des Droits de l'Homme et du Citoyen*, Hachette 1988; in particular, see: "Le projet de déclaration des droits de Condorcet" (p. 549); "Le projet de déclaration des droits contenu dans le cahier de doléances de la Noblesse des bailliages de Mantes et de Meulan" (p. 556); "Le projet de déclaration des droits contenu dans le cahier de doléances du Tiers état de la prévôté et vicomté de Paris hors les murs" (p. 565); "Le premier projet de déclaration de Sieyès" (p. 603); "Le second projet de déclaration de Sieyès" (p. 616); "Le projet de déclaration de Thouret" (p. 638); "Le projet de déclaration de Custine" (p. 645); "Le projet de déclaration de Rabaut Saint-Étienne" (p. 683); "Le projet de déclaration de Bouche" (p. 688); "Le projet de déclaration de Gouges Cartou" (p. 708); "Le projet de déclaration de Boislandry" (p. 728); "Le projet présenté par Mirabeau au nom du Comité des Cinq" (p. 748).

[2]The absence of a reference to the secrecy of letters in the final text of the *Déclaration*, in disregard of the above-mentioned drafts, raised the criticisms of Rabaut Saint-Étienne during the preparatory work (Rials, *La Déclaration des Droits de l'Homme et du Citoyen*, at 248).

[3]Decree of the *Assemblée Nationale* of 10 of August 1790, *Archives Parlementaires de 1787 à 1860*, Première Série, Tome XVII, Paris, 1984, pp. 695 et seq.

Germany[4], secrecy of telecommunications started to receive legal as early as at the beginning of the eighteenth century, when the first regulations of the post declared that postal authorities ought to respect the secrecy of any letter or any other act of postal sending[5]. However, for the recognition of the secrecy of telecommunications as a constitutional right we would still have to wait over hundred years, namely until the Constitution of Hesse was enacted in 1831. Following the lead of the first system of regulation of the post, art. 38 of the Constitution of 1831 guaranteed that the secrecy of any act of postal sending would be respected by the postal authorities. The right thus defined was literally referred to as the right to 'the secrecy of letters' (*'Briefgeheimnis'*)[6].

The Constitution of Hesse set the trend of using the expression 'Briefgeheimnis' to refer to the right to the secrecy of telecommunications. This terminology was rather inaccurate, however, given that this right covered not only letters but any act of postal sending and that, moreover, it did not cover the secrecy of letters in every circumstance, but only in as far as they had been entrusted to the postal system. Nevertheless, and in spite of this, both art. 142 of the Constitution of 1849[7] and art. 33 of the Constitution of 1850[8] accepted the use of the term 'Briefgeheimnis' to refer to the right to the secrecy of any act of postal sending against interference by postal authorities. Note, however, that art. 142 of the Constitution of 1849 guaranteed secrecy also beyond the framework of the postal service against interference carried out by public authorities not attached to the postal service[9].

The constitutions that followed the one of 1850 and which preceded the enactment of the Weimar Constitution in 1919 did not mention the right to the secrecy of telecommunications[10]. During this lapse of time, this right was only protected by statute, namely in regulations of the postal service and in the Criminal Code[11]. Also in

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[4]For this issue see Badura, *Kommentar zum Bonner Grundgesetz*, Art. 10, Par. 2 et seq., pp. 7 et seq; Maunz-Dürig-Herzog, *Grundgesetzeskommentar*, Art. 10, pp. 7 et seq.

[5]Kap. VIII, § 4 Preußische Postordnung v. 10. 8. 1712; Abschnitt V, § 3 Preußische Allgemeine Postordnung v. 26. 11. 1782.

[6]§ 38 Verfassungs-Urkunde für das Kurfürstentum Hessen v. 5. 1. 1831: "Das Briefgeheimnis ist auch künftig unverletzt zu halten. Die absichtliche unmittelbare oder mittelbare Verletzung desselben bei der Posverwaltung soll peinlich bestraft werden".

[7]§ 142 Verfassung der Deuschen Reiches v. 28. 3. 1849: "Das Briefgeheimnis ist gewährleistet. Die bei strafgerichtlichen Untersuchungen und in Kriegsfällen nothwendigen Beschränkungen sind durch die Gesetzgebung festzustellen".

[8]Art. 33 der Preußischen Verfassungs-Urkunde v. 31. 1. 1850: "Das Briefgeheimnis ist unverletzlich".

[9]Badura, *Kommentar zum Bonner Grundgesetz*, Art. 10, Par. 7, p. 8.

[10]Verfassung des Norddeutsches Bundes v. 26. 7. 1867; Verfassung des Deutschen Reiches v. 16. 4. 1871.

[11]§ 58 Abs. 2 Gesetz über das Postwesen des Norddeutschen Bundes v. 2. 11. 1867 and § 5 Gesetz über das Postwesen des Deutschen Reiches v. 28. 10. 1871. § 299 and § 354 StGB.

these statutes the secrecy of telecommunications was literally referred to as the 'secrecy of letters' or 'Briefgeheimnis'. Yet the Criminal Code started to draw a conceptual distinction between two different rights to the 'secrecy of letters': whereas in one provision the expression 'Briefgeheimnis' referred to a right recognised vis-à-vis postal authorities (*'Briefgeheimnis im engeren Sinne'*), in another it was used in a more comprehensive way to refer to the secrecy of telecommunications beyond the framework of the postal system and protected against violations by any public authority (*'Briefgeheimnis im weiteren Sinne'*)[12]. This was only the first one of a series of conceptual distinctions which would soon prove necessary when referring to the secrecy of telecommunications, for in the second half of the nineteenth century the law-maker had to meet the development of new means of telecommunication, such as the telegraph and the telephone, and the need for the protection of their secrecy[13].

The new variety of means of telecommunication was first reflected in the Weimar Constitution of 1919. The right to the secrecy of telecommunications was recognised in art. 117, which distinguished, first of all, between the protection of this right vis-à-vis postal authorities, on the one hand, and its protection vis-à-vis any public authority, on the other, thus confirming the distinction already announced by the Criminal Code; second, this provision also distinguished the secrecy of letters from the secrecy of other means of telecommunication[14]. With the expression 'secrecy of the postal system' (*'Postgeheimnis'*) art. 117 referred to the right to the secrecy of any act of postal sending vis-à-vis postal authorities; in other words, the expression 'Postgeheimnis' was used as an alternative and more accurate way of referring to the right formerly known as 'Briefgeheimnis'. Also the expression 'Briefgeheimnis' was now used in a more accurate way, since it referred to the right to the secrecy of *letters*, whether or not entrusted to the postal system, vis-à-vis any public authority. Finally, the expression 'secrecy of the telegraph and of telecommunication system' (*'Telegraphen- und Fernsprechgeheimnis'*) was used as an equivalent to the expression 'Briefgeheimnis' in the context of telegraphic communications and telephone conversations, i.e. it referred to the right that the secrecy of telecommunications carried out by means of telegraph and telephone be not infringed upon by any public authority, whether or not attached to the post. It is this conceptual pattern of the right to the secrecy of telecommunication that was finally inherited by art. 10 of the Basic Law of

[12]See § 354 and § 299 StGB, respectively. For this issue, see Badura, *Kommentar zum Bonner Grundgesetz*, Art. 10, Par. 13, p. 11.
[13]§ 8 Telegraphengesetz von 1892; § 5 Postgesetz von 1871; § 355 StGB.
[14]Art. 117 Verfassung des Deutschen Reichs v. 11. 8. 1919: "Das Briefgeheimnis sowie das Post-, Telegraphen- und Fernsprechgeheimnis sind unverletzlich. Ausnahmen können nur durch Reichsgesetz zugelassen werden".

1949, the only difference being that here the expression 'Telegraphen- und Fernsprechgeheimnis' had been replaced by the expression '*Fernmeldegeheimnis*'.

In sum, as the above paragraphs illustrate, the secrecy of telecommunications has a long and tidy history as a constitutional right in Germany. The point of departure is the revolutionary France of the end of the eighteenth century, which triggered off the assertion of the secrecy of telecommunications as a constitutional right. This tradition of the right to the secrecy of telecommunications in Europe has also led to its recognition within art. 8 of the European Convention on Human Rights; moreover, art. 8 of the ECHR has a precedent at a comprehensive international level in art. 12 of the Universal Declaration of Human Rights of 1948[15], by which art. 8 of the European Convention was to a great extent inspired.

2. The Interest in Protecting the Secrecy of Telecommunications: Privacy as the Negative Side of Freedom of Expression

There is one important difference between the historical conception of the right to the secrecy of telecommunications and the way this right is presently perceived. I am thinking of the interest which lies behind the recognition of this right. My approach to the secrecy of telecommunications relies upon one assumption, i.e. that we are facing an aspect of privacy and that this is why the secrecy of telecommunications ultimately deserves protection. That this is the case has seemed to me too obvious even to need justification and is also commonly accepted or even taken for granted by commentators. However, the idea that the secrecy of telecommunications is an aspect of privacy has not appeared so straightforward throughout the history of this right. When the secrecy of telecommunications first arose as a constitutional right it was not openly regarded as an aspect of the right to privacy, but as an aspect of the freedom of opinion and of expression. This is clear upon a reading of the drafts of the French *Déclaration des Droits de l'Homme et du Citoyen* which include a recognition of this right: in all these drafts[16] the secrecy of telecommunications is regarded as an aspect of individual freedom and, in particular, as inherent to the freedom to express one's opinions via the post. This explains why, as noted above, an explicit mention of the secrecy of telecommunications was finally considered redundant and thus excluded from the final

[15]"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation".
[16]See footnote 1 above.

version of the *Déclaration* of 1789: this right was seen implicit in the recognition in art. 11 of the freedom to express one's opinion in writing[17].

In the late eighteenth century, the confidentiality of the post and the freedom of expression were thus tied together under a common rationale. At first sight, such a close tie strikes one as being in contradiction with our present conception of these two rights, according to which they respond to completely opposite rationales: today, the secrecy of telecommunications is approached as an aspect of privacy, whilst freedom of expression is heavily dependent upon the idea of publicity, in the sense that it covers the free expression of opinions made in public[18]. The connection between secrecy and free expression, however, is far from ill-founded and on a second look proves to be perfectly coherent with the distinction between privacy and publicity. For one thing, freedom of expression covers not only the freedom to choose when, how and about what we want to speak in public; it also covers the freedom to choose *whether* we want to speak in public at all. In other words, freedom of expression does not only cover the freedom actually to speak one's mind in public, but also the freedom *not* to speak one's mind in public, either because one wants to speak in private or simply because one wants to remain silent. It is to this negative aspect of the freedom of expression that the right to the secrecy of telecommunication relates.

Seen in the light of the above considerations, the connection between freedom of expression and the secrecy of telecommunications, on the one hand, and the connection between this latter right and privacy, on the other, no longer appears as contradictory; rather, the one is a confirmation of the other. As a negative aspect of freedom of expression, secrecy of telecommunications guarantees that thoughts and opinions can be expressed in secret, something which is the realm of privacy. Indeed, free expression and the secrecy of telecommunications relate as publicity relates to privacy, the dividing line between them being the right to informational self-determination discussed in chapter 1, that is, the right to decide whether or to what extent information about oneself is to be made public or to remain private (i.e. secret). Therefore, the fact that the drafts of the French *Déclaration* placed freedom of expression and secrecy of telecommunications in a close relationship does not imply that the interest in the protection of privacy did not underlie the recognition of this latter

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[17]Art. 11: "La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme: tout citoyen peut donc parler, *écrire*, imprimer *librement*, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi" (emphasis added).

[18]Defining the term 'public' as used in connection with freedom of expression (i.e. how public must a speech be in order that freedom of expression be involved?) is by no means easy. The difficulties of this definition, and of the borderline cases it gives rise to, has been analysed by Frederick Schauer, "'Private' Speech and the 'Private' Forum: *Givhan v. Western Line School District*", (1979) *The Supreme Court Review* 217.

right. The interest in privacy did underlie the right to the secrecy of telecommunications. If it was not explicitly mentioned it is simply because at that time the legal world had not yet started to think of privacy as such as an interest worthy of protection, as we saw in chapter 1.

The approach to the right to the secrecy of telecommunications as the negative aspect of freedom of expression has survived until recent times[19]. It lies, for example, behind the enactment of art. 10 of the German Basic Law. During the constituent debates that gave rise to the Basic Law, in particular when the order in which order the different fundamental rights would be recognised was being discussed, the idea was put forward that the right to the secrecy of telecommunications should come immediately after freedom of expression, given (and this point was very much taken for granted) the immediate relationship between the two[20]. Although this order of fundamental rights did not prevail in the final draft of the Basic Law, the fact that it was proposed shows the extent to which post-war Germany continued to link secrecy of telecommunications to freedom of expression, instead of relating it directly to privacy. This should not come as a surprise since, as was argued in chapter 1, the idea that privacy is an independent value worthy of protection had not yet found fertile soil in Europe at the time the German Basic Law was enacted. Even the right 'to the free development of one's personality' recognised in art. 2.1 was not enacted as a general right to personality (*allgemeines Persönlichkeitsrecht*), which, as noted in chapter 1, embraces a right to privacy; rather, it was enacted as a general right of freedom (*allgemeine Handlungsfreiheit*), that is as a right to act free from the interference of the public power[21]. This background explains that the drafters of the Basic Law turned to the most traditional justification of the right to the secrecy of telecommunications and regarded it as part of the negative freedom to express one's opinions. Of course, since 1949 things have changed in the German legal order. Since then the Constitutional Court[22] has developed the doctrine that art. 2.1 embraces a general right to personality and explicitly regards privacy as an aspect of this right. Within this new theoretical framework, the secrecy of telecommunications has been connected to art. 2.1, in particular to the right to privacy contained within this right[23].

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[19]Also the right to privacy has been referred to as the negative aspect of freedom of expression. See C.-E. Eberle, "Datenschutz durch Meinungsfreiheit" (1977) *DÖV* 306.

[20]"Brief- und Postgeheimnis und Lehrfreiheit 'stehen ja unmittelbar im Zusammenhang mit der Freiheit der Meinungsäußerung'" (Klaus-Berto v. Doemming, Rudolf Werner Füsslein & Werner Matz, "Entstehungsgeschichte der Artikel des Grundgesetzes" 1 *Jahrbuch des Öffentlichen Rechts der Gegenwart* 1 at 46 (1951).

[21]Ibidem at 54 et seq (1951).

[22]See BVerfGE 27, 1 at 6; 27, 344 at 350 et seq.

[23]See BVerfGE 67, 157 at 171. Still today, however, the Constitutional Court continues to acknowledge the character of the right to the secrecy of telecommunications as the negative aspect of the freedom of expression. See BVerfGE 90, 255.

The conception of the secrecy of telecommunication as the negative aspect of the freedom of expression also underlies the recognition of this right within the ECHR. In this document, the secrecy of telecommunications and freedom of expression are recognised in art. 8 and in art. 10 respectively, that is they are recognised as fully independent rights; yet art. 8 includes within a single right (the right to respect for correspondence) both the *secrecy of* telecommunications and the *freedom to* engage in telecommunications. Rightly understood, the freedom to engage in telecommunications can only be approached as an aspect of the right to privacy, hence it can only cover the freedom to engage in telecommunications held in secret. For one thing, as has already been mentioned the freedom to engage in communications held in public (freedom of expression) is already recognised in art. 10 of the ECHR; moreover, privacy is the rationale behind the rest of art. 8, which also recognises the rights to private life, family life and home. Regarding privacy as the rationale behind the freedom to engage in telecommunications thus responds, first, to the need to draw a clear line between the scope of art. 8 and the scope of art. 10 and, second, it responds to a demand for coherence when reading art. 8 as a whole (the importance of respecting the internal coherence of art. 8 and of keeping the line between arts. 8 and 10 clear will be discussed at length in chapter 4). In the light of the above considerations, we can assert that art. 8 recognises the freedom to engage in telecommunications only in as far as these are held in secret. What I would like to point out is that the joint recognition of this freedom and of the secrecy of telecommunications within a single right results from and reinforces the view that the secrecy of telecommunications is part of the negative aspect of the freedom of expression: the secrecy of telecommunications is placed hand in hand with the freedom *not* to express one's opinions in public, to be precise, with the freedom to express one's opinions through means which guarantee that the communication is being held in secret.

Section 2: The United States

Introduction

In the United States, as already touched upon, the constitutional history of the right to the secrecy of telecommunications is far more complex than it is in Germany. In fact, this right does not enjoy straightforward constitutional recognition; rather, its existence is the result of the interpretation of a certain constitutional provision: to be precise, it is the result of an interpretation of the fourth amendment as a provision which aims at the protection of privacy. This circumstance indicates that in the United States secrecy of telecommunications has always been regarded, unlike in Europe, as an aspect of privacy. It also indicates that analysing the constitutional history of the right to the secrecy of telecommunications must consist of analysing how the interpretation of the fourth amendment has evolved to lead to the coverage of this right. This will be the purpose of the present section.

1. The Historical Background of the Fourth Amendment.

In the United States secrecy of telecommunications has been recognised as a constitutional right within the framework of the fourth amendment to the Federal Constitution. The amendment reads as follows:

> "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized".

The wording of the fourth amendment strikes one as being unusually precise for the recognition of a constitutional right[24]. It does not protect the security of people in the abstract; rather, the fourth amendment is concerned with security only in as far as this may be endangered in some very specific circumstances, namely in searches and

[24]Think, e.g., of the general terms of the freedoms recognised in the first amendment (freedom of religion, of expression, of assembly and to petition the government for a redress of a grievance) or even of the due process guarantees recognised in the fifth to the eighth amendments, although these are already so precise that they have been considered closer to "a miniature code of criminal procedure" than to a set of constitutional guarantees (Lawrence M. Friedman, *A History of American Law*, New York, 1973, p. 103).

seizures carried out (by public officials, as we must understand it) on persons, houses, papers, and effects, if they do not fulfil certain requirements. Indeed, to repeat this level of precision is unusual in the recognition of constitutional rights, yet it also characterises other amendments to the Constitution of the United States, notably the second[25] and the third[26]. The inclusion within the U.S. Bill of Rights of provisions so narrow in scope can only be explained by reference to the social and political context of the time in which they were enacted. The America of the late eighteenth century was confronted with specific problems that had arisen during British domination and to a great extent conceived the Bill of Rights as an instrument for the solution of such problems, at least of those which were thought to deserve a constitutional answer. Both the second and the third amendments[27] responded to this approach to the Bill of Rights. So did the fourth amendment, which was enacted with the very specific purpose of eradicating the pervasive issue of "general search warrants permitting officers to search where they please for smuggled goods"[28].

The evils of general search warrants or similar instruments had been experienced both in England and in the British colonies in America. Unknown in the early common law, general search warrants were first allowed in England with respect to stolen property; thereafter they developed to allow search for any property the possession of which was not permitted, such as contraband goods and the means or instruments of a crime[29]. In practice, however, general warrants were often issued and used with a view to finding evidence among the papers of political suspects[30]. General search warrants were not long-lived in England, however. Soon courts started to condemn as trespass the searches accomplished on the basis of general search

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[25]"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed".

[26]"No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be described by law".

[27]The right of the people to keep and bear arms of the second amendment expressed the insistence of Americans after the Independence war that they should be able to defend themselves from foreign invaders and ambitious leaders and, eventually, against one another in their just born country. For its part, the third amendment arose to prevent situations such as those created by the English Quarterly Act, whereby colonists were made to host King George's troops.

[28]John Kaplan, "Search and Seizure: A No-Man's Land in the Criminal Law" 49 *Cal. L. Rev.*, pp. 474, 476 (1961).

[29]Ibidem, p. 475.

[30]See Osmond K. Fraenkel, "Concerning Searches and Seizures" 34 *Harv. L. Rev.*, 361 at 362 (1920-1921).

warrants[31], until these were declared illegal by the House of Commons[32]. At the same time, the British colonies in America were also being exposed to instruments similar to general search warrants, i.e. writs of assistance, relied on by British revenue officers to ransack Americans' houses in search of smuggled goods[33]. Also Americans undertook a legal struggle against such instruments, which they regarded as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book"[34]. Unlike in England, this struggle was not successful; yet it has been praised as "the first scene of the first act of opposition to the arbitrary claims of Great Britain"[35].

The enactment of the fourth amendment is a fruit of the background described above. On account of this, the risk existed that the fourth amendment would remain a precept narrow in scope and most probably of short-lived application. Indeed, it would have been coherent to understand it simply as a ban on general search warrants or similar instruments, a ban which would have diminished in significance as the issue of such search warrants would have been discarded in practice. From the beginning, however, it was clear that the fourth amendment also allowed scope for a more ambitious interpretation, notably on account of the term 'unreasonable'. Indeed, the fourth amendment does not only prohibit searches and seizures based on general search warrants but, more generally, all *unreasonable* searches and seizures. American courts had to decide whether the expression 'unreasonable searches and seizures' was a synonym with the expression 'searches and seizures carried out under general warrants' or whether, on the other hand, the former expression was somewhat wider. In other words, American courts had to decide whether or not the fourth amendment ought to be given life beyond the very particular circumstances that had conditioned its enactment. They did not hesitate to do this[36].

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[31]Fraenkel ("Concerning Searches and Seizures" at 363) refers to the cases of *Huckle v. Money* (1763), *Money v. Leack* (1765) and the most important case of *Entick v. Carrington and Three Other King's Messengers* (1765). The opinion delivered by Lord Camden in this last case has been celebrated as a "monument of English freedom, and (...) the true and ultimate expression of constitutional law" (*Boyd v. U.S.*, 116 U.S. 616, 626 (1886)).

[32]*Common Law Journal*, April 22 and 25 (1766). Reference from Fraenkel, "Concerning Searches and Seizures" at 363, note 17.

[33]O.K. Fraenkel, "Concerning Searches and Seizures" at 364; J. Kaplan, "Search and Seizure: A No-Man's Land ..." at 476.

[34]These words are James Otis's, attorney general of Massachussets, who led the legal struggle referred to above and resigned as a consequence of his lack of success (quotation from *Boyd v. U.S.* at 625).

[35]These are words of John Adams quoted in Fraenkel, "Concerning Searches and Seizures" at 365, note 26.

[36]This has also been the case for the second amendment, now regarded as the recognition of a right to bear arms. The third amendment, on the other hand, has been condemned to a very short life; in fact, it has only once been invoked in a serious lawsuit (case brought in 1979 by New York prison guards protesting against the occupation of their state-provided housing by the national Guard) and has only been referred to by the Supreme Court to remark that it is "another facet of...privacy" (*Griswold v. Connecticut*, 484).

In sum, the historical background of the fourth amendment provides useful information for the better understanding of this provision -in fact, both commentators[37] and the Supreme Court itself[38] sometimes like to refer to this background in support of some point of view or other-, yet courts' decisions have had the effect of greatly detaching the fourth amendment from the background of its enactment. By means of this detachment, courts have placed the definition of the scope of the fourth amendment in their own hands and have made this definition primarily dependent on the way the term 'unreasonable' is interpreted. Looking at the judicial interpretation of the fourth amendment will be the objective of the rest of this Section.

2. The Judicial Interpretation of the Fourth Amendment.

2.1 A Basic Scheme of the Fourth Amendment.

The rest of this Section will be devoted to studying how the judiciary, or to be precise how the Supreme Court, has interpreted the fourth amendment. In particular, I will try to depict what has been the evolution of the Supreme Court's interpretation of this provision and how the right to the secrecy of telecommunications has finally been included therein. To this end I will draw up a scheme of the fourth amendment which, I believe, offers interesting insights into the different interpretative trends of the fourth amendment. In particular, this scheme will show that these trends belong to more general trends of legal philosophy successively at issue in the United States.

The scheme I propose for my analysis is a combination of two different patterns to approach to law and legal provisions. These patterns have been proposed, respectively, by Roscoe Pound[39] and by Karl Llewellyn[40]. Pound suggested that the

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[37]A good example is the article by Akhil Reed Amar "Fourth Amendment First Principles", 107 *Harv. L. Rev.*, 757 (1994).

[38]See, e.g., *Boyd v. U.S.*, 116 U.S. 616 (1886); *Burdeau v. U.S.* 256 U.S. 465 (1920); *Marron v. U.S.*, 275 U.S. 192 (1927); *Harris v. U.S.*, 331 U.S. 145 (1947); separate opinion of Justice Fortas and the Chief Justice in *Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

[39]Roscoe Pound was one of the leading prophets of sociological jurisprudence. He led a revolt against the juridical formalism prevalent at the turn of the century, providing much of the basis for the legal realism developed in the 1920s and 1930s: the conception of law as social engineering, the emphasis on interdisciplinary cooperation, the need of factual data about the law in action, the concern about the nature of judicial decision, etc. Yet Pound failed to carry his ideas to their last consequences and never shared the more radical views of legal realists (Pound, "The Call for a Realist Jurisprudence", 44 *Harv. L. Rev.* 697 (1930-31); see also William Twining, *Karl Llewellyn and the Realist Movement*, Univ. of Okla. Pr., 1985, pp. 22 et seq.). Among Pound's leading articles, see "Do we Need a Philosophy of Law?" 5 *Col. L. Rev.*, 339 (1905); "Mechanical Jurisprudence" 8 *Col. L. Rev.*, 606 (1908); "Liberty of Contract", 18 *Yale L. Rev.*, 454 (1908-09); "Common Law and Legislation" 21 *Harv. L. Rev.*, 383 (1907-08); "The Scope and Purpose of Sociological Jurisprudence": I 24 *Harv. L. Rev.*, 591 (1910-11);

whole of what we call law is made up by three different elements: "(1) a number of legal precepts more or less defined (...); (2) a body of traditional ideas as to how legal precepts should be interpreted and applied and causes decided (...); (3) a body of philosophical, political and ethical ideas as to the end of law and as to what legal precepts should be in view thereof (...)"[41]. For his part, Llewellyn offered an interesting insight into the evolution of the traditional approach to law, which he drafted in terms of an "interests -rights/rules -remedies" analysis[42]. Note that at least the last two elements of this pattern for analysis -i.e. rights/rules and remedies- and maybe even the first one -interests[43]- could be couched within the first element mentioned by Pound, i.e. 'legal precepts'[44].

II, 25 *Harv. L. Rev.* 140 (1911-12); III, ibid. at 489; "Judge Holmes's Contributions to the Science of Law" 34 *Harv. L. Rev.*, 449, 451-452 (1920-21); "The Theory of Judicial Decision": I, 36 *Harv. L. Rev.*, 641 (1922-23); II, ibid. at 802; III, ibid. at 940.

[40]Karl N. Llewellyn is one of the main representatives of the American 'realist movement' of the first third of the century. Although American legal realism never constituted a coherent 'school' of thought, one could describe it as a movement the focal point of which was the actual recording of things as they are. In the words of Twining, "[a] realist is one who, no matter what his ideological or philosophical views, believes that it is important regularly to focus attention on the law in action at any given time and to try to describe as honestly and clearly as possible what is to be seen" (W. Twining, *Karl Llewellyn....* at 74). Among Llewellyn leading articles, see "A realistic Jurisprudence -The Next Step" 30 *Col. L. Rev.*, 431 (1930); "Some Realism about Realism - Responding to Dean Pound" (44 *Harv. L. Rev.* 1222 (1930-31); "The Constitution as an Institution", 34 *Col. L. Rev.* 1 (1934); "The Normative, the Legal and the Law-Jobs: the Problem of Juristic Method", 49 *The Yale L. J.* 1355 (1940).

[41]R. Pound, "The Theory of Judicial Decision, I. -The Materials of Judicial Decision" at 645). Here Pound explicitly set aside the controversial question of the nature of law and concentrated instead on the "three quite distinct things (...) included in the idea of law" (ibidem) and which have been reproduced in the text. Pound believed that "much of the controversy as to the nature of law turns on which one of these [three things] is to be taken as the type and as standing for the whole" (ibidem).

[42]This pattern appeared in K.N. Llewellyn's article: "A realistic Jurisprudence ...". Here Llewellyn developed a theory of law which relied on two main ideas. First, any attempt to define law must be discarded: "A definition both excludes and includes ... And the exclusion is almost always rather arbitrary" (p. 432); instead, Llewellyn concentrated on "the focus of matters legal, ... a point of reference...to which ... all matters legal can most usefully be referred, ... a focus ... with the bearing and boundaries outward unlimited" (ibidem). Second, closely linked to the above idea, all "the traditional precept-thinking" approach to law (i.e. any approach that is fixed on words, on "merely verbal formulae: precepts") must be rejected (p. 434); instead, Llewellyn focused on behaviour, particularly on the relations of law and society as reflected in judicial behaviour. Llewellyn offered his "interests -rights/rules -remedies" pattern for the analysis of law from the new standpoint he put forward. He gave these three terms a particular meaning: the term "interests" was read as "groupings of behaviour claimed to be significant" (p. 445); rights/rules were regarded as verbal formulations of the desire to produce a certain behaviour which, in order to have any actual importance, had to take account of "the relevant prevailing practices and attitudes of the relevant persons" (p. 452); remedies were descriptions of "the actual doings of the judges and the actual effects of their doings on the data claimed to represent an interest" (p. 446).

[43]See e.g. Pound, "Interests of Personality" at 344 et seq. and "Judge Holmes's Contributions to the Science of Law" at 451-452.

[44]Pound's and Llewellyn's respective approaches to law remained substantially different: whereas Pound remained partially faithful to the traditional precept-thinking, Llewellyn broke off with it to focus directly on behaviour. This difference is illustrated in their debate in Pound's "The Call for a Realist Jurisprudence" and Llewellyn's "Some Realism about Realism ...".

A combination of the two patterns described above results in the following scheme: [1] Law consists first of all of a set of legal remedies, provided as instruments for the effectiveness of legal rules and rights. [2] Behind the legal remedies are the legal rules and rights, which play a double role. On the one hand, they are substantive values, they act as the substantive point of reference for legal remedies, thus making sense of the existence of these remedies. On the other hand, legal rights and rules are also instruments; they stand as means to protect some higher and more abstract values, which can be called "interests". [3] Legal interests thus are the third element of law. [4] Interests, however, are not determined haphazardly, but by the "philosophical, political and ethical ideas as to the end of law" at issue at a given time. [5] Finally, the extent to which the influence of these ideas can be felt in law is greatly conditioned by the "traditional ideas as to how legal precepts should be interpreted and applied and causes decided". Let me now apply this scheme to an analysis of the fourth amendment.

[1] - [2] Legal Remedies and Rights

In a first approach to the fourth amendment one can draw two immediate conclusions: first, security against unreasonable searches and seizures is recognised as a constitutional right; second, there must be some legal remedy against unreasonable searches and seizures. This second conclusion is (at least it should be) as immediate on a reading of the fourth amendment as is the first one; for, following Llewellyn's view on this point, substantial right and legal remedy are two complementary aspects of a single conceptual unit. Indeed, it is certain that remedies cannot stand by themselves: they are not independent aims, but mere instruments the purpose of which "is to be protections of something else"[45]; conversely, it is just as certain that the recognition of a legal right (if this is to be considered to be such and not a mere form of words) necessarily requires that there is some remedy against its violation, if not "a description of an available remedy, at least an official recognition that some kind of remedy could be had"[46]. For, however well defined in shape and scope, legal rights remain something "which you cannot see"[47], hence considerations about their real existence and actual scope must concentrate on the remedies ("which you can see"[48]) provided against their violation, i.e. on the scope of actual protection accorded them by law. In sum, in a first approach the fourth amendment appears to be two-folded in nature or, as

[45]K.N. Llewellyn, "A Realistic Jurisprudence ...", at 437.
[46]Ibidem, p. 440.
[47]Ibidem, p. 438.
[48]Ibidem.

Llewellyn would put it, it acts in a double way in the legal world[49]: first, it recognises a constitutional right against searches and seizures; second, it indicates that there must be some remedies against violations of this right; better, the fourth amendment makes the recognition of the right against searches and seizures dependent upon the existence of some remedies against its violations. Note that the fourth amendment does not point to or mentions any particular remedy at all. In fact, the question of which remedies there ought to be has been a most controversial point in the interpretation of this provision.

[3] Legal Interest

The recognition and actual protection of the right to be secure against unreasonable searches and seizures is not the final aim of the fourth amendment, but merely a means. "Substantive rights themselves, like remedies, exist only for a purpose. Their purpose is now perceived to be the protection of [some] interest"[50]. This means that the prima facie protection of the right to be secure against unreasonable searches and seizures is merely a means for the protection of some interest and that it is the aim of protecting this interest which ultimately controls the interpretation of that right. Two interests have controlled the interpretation of the fourth amendment since its enactment. Initially, this interest was thought to be the protection of private property, yet in the 1930s the Supreme Court gradually started to substitute privacy for property, something which it only fully accomplished in the 1960s. Today, the interest in the protection of privacy controls the interpretation of the fourth amendment right against searches and seizures.

[4] 'Ideas as to the End of Law'

Nor is the protection of a particular interest through the recognition of a constitutional right fortuitous or self-justified[51]. Whether constitutional protection is accorded to one particular interest as opposed to some other is conditioned by the trends in ideas which control legal thought, that is, by the "body of philosophical, political and

[49]In Llewellyn's view, speaking of the "nature" of rights or rules does not make much sense, unless one is referring to the way rights and rules act in the legal world, i.e. to the way they actually influence people's behaviour.

[50]K.N. Llewellyn, "A Realistic Jurisprudence ...", at 441.

[51]The important role of the 'ideas as to the end of law' is also acknowledged by Llewellyn: "The conception of society [is] in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs reexamination to determine how far it fits the society it purports to serve" (Llewellyn, "Some Realism about Realism ...", at 1236).

ethical ideas as to the end of law", envisaged by Pound as "the third element that goes to make up what we call 'the law'"[52]. In the case of the fourth amendment, the choice of either a property or privacy rationale has responded to very specific ideal pictures "as to the end of law" brought about by very specific social orders.

The choice for property belongs to the rural agricultural society that dominated the early History of America, a society where social contacts were few and individualist feelings strong[53]. The law-of-nature theory and the common law came to offer legal support to this sense of individualism and ensured that the sanctity of property and the individual liberty attached to it were at the centre of legal attention[54]. These living conditions changed with the rise of industrialism, which made social and economic relations much more complex. Soon private property and the individual freedom it provided started to lose its importance as expressions of individual personality and emphasis began to be put on more social considerations. In this context, it no longer made sense to read the fourth amendment as an instrument for the protection of private property. For not only did this accord private property a predominant role that it was no longer thought to deserve; in addition, reading the fourth amendment as a means for the protection of property deprived the right against searches and seizures of the flexibility it required to meet the new social needs. Privacy started to appear as a sound alternative to property. For one thing, privacy arose as a social concern along with industrialism; moreover, as a new legal notion, privacy lacked the firm legal elaboration that property had and appeared, by contrast, as an ill-bounded, flexible concept. Thus the fourth amendment, understood in accordance with this flexible concept of privacy, had found the scope it needed for interpretation and evolution in an era of transformation, especially at the turn of the century.

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[52]R. Pound, "The Theory of Judicial Decision, I ..." at 651. The scope of this third element of Law remains somewhat unclear. On its basis, Pound could be according a legal nature to moral and philosophical trends since they are taken account of by the judiciary, as seems to have been the position of many realists (see Robert S. Summers, "Pragmatic Instrumentalism" 66 *Cornell L. Rev.* 861 at 897 (1981)). Pound did not seem to go this far, however, for he relied on a certain process of translation of these "ideal pictures" into law, a process consisting of the acquisition of "a certain fixity in the judicial and professional tradition" (Pound, "The theory of Judicial Decision, I ..." at 654). Moreover, Pound even argued that if any "fixed" picture should be disregarded by a judge in any particular case, then the decision in question "is not law" (ibidem at 655).

[53]See L. M. Friedman, *A History of American Law*, at 100; Edward S. Corwin, "The 'Higher Law' Background, III" 42 *Harv. L. Rev.*, 365, 394 et seq. (1928-29).

[54]The rise of American law under the influence of natural law philosophy and the case law tradition has been analysed in detail by R. Pound on several occasions, especially in "A Theory of Judicial Decision, II". See also his "Do We Need a Philosophy of Law"; "Liberty of Contract"; "Common Law and Legislation". See also Edward S. Corwin, "The 'Higher Law' Background, III" at 394 et seq.

[5] Ideas as to the Interpretation and Application of Law.

Although supported by the "ideas as to the end of law" at issue at the time, the passage from property to privacy as the interest behind the fourth amendment did not prove easy to accomplish. In order to understand why this was the case we must move a step forward in our analytical scheme and refer to the "traditional ideas as to how legal precepts should be interpreted and applied and causes decided".

As noted above, legal development in nineteenth-century agricultural America was backed by natural law theories and by the common law tradition, both of which provided the background of substantial law, suitably liberal in character, that young America lacked. Natural law theories and the common-law tradition did much more than this, however: they also furnished the American system with techniques concerning the interpretation and the application of law. The common law supplied its tradition of judge-made law, where statutes are exceptional, ad hoc solutions to special situations and accordingly require strict interpretation; the common law thus granted judges an instrument with which it might disregard written law when its content was not considered reconcilable with judge-created legal patterns. For its part, natural law evolved to give rise in the late nineteenth century to the so-called analytical theory of judicial decision. This theory postulated "a wholly mechanical process of finding prescribed legal precepts definitely laid down by the state in advance and (...) an equally mechanical application of the precepts when found"[55]. On this basis, cases were solved according to a "method of deduction from predetermined conceptions"[56], so that facts were made to fit pre-existing rules, which were mechanically applied to them. To express the point with the words of Pound, for analytical jurisprudence "[legal] conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body or rules"[57].

Conditioned by the background described above, courts were bound to concentrate on the application of old legal standards and to remain fundamentally closed to considerations coming from outside of the settled law. As a result, pieces of legislation that, in an effort to meet new social or economic demands, did not follow these standards were systematically struck down[58]. Law had become a reality

[55]R. Pound, "The Theory of Judicial Decision, I", at 652.
[56]R. Pound, "Mechanical Jurisprudence", 8 *Col. L. Rev.* 605, 610 (1905).
[57]Ibidem, p. 612.
[58]In the late nineteenth-century and early twentieth-century years, the Supreme Court was repeatedly confronted with new legal standards introduced by the law maker and tended to consider them

completely closed in itself, hence it could only serve the "ideas as to the aim of law" lying behind their liberal legal sources, whereas the ones imposed by the new social environment remained completely alien to it. The struggle of legal theorists at the turn of the century was to make courts develop different "ideas as to the application and interpretation of law", in particular the ideas inherent to a sociological approach to law, so that they could take account of the new social and economic needs and of the "ideas as to the aim of law" attached to these new needs. Only this fundamental change in approach to law could allow privacy to emerge as the interest behind the fourth amendment right against unreasonable searches and seizures. This change started to take place in the 1930s, when the Supreme Court started to accept the patterns of reasoning of sociological theories of law and abandoned the formal application of old legal patterns. Only then could privacy take over from property as the interest behind the fourth amendment.

I have now developed the theoretical background which will help us to understand how the fourth amendment was interpreted by the Supreme Court and how this interpretation has evolved over time. It is to the fourth amendment that we now turn.

2.2 The Fourth Amendment as seen by the Supreme Court.

During the nineteenth century, fourth amendment cases at the Supreme Court were rare[59]; the Supreme Court only started to deal at length with some of the issues this provision entails around the turn of the century[60], at the time when American living conditions were being deeply transformed by the rise of industrialism. In most early decisions on the fourth amendment, the Court did not specify the interest guiding their reading of this provision. Sometimes the issue was plainly ignored[61]; on other occasions the Court referred to values which the fourth amendment sought to protect and which from the beginning could be identified with either property or privacy; yet the Court tended to avoid any explicit choice between the two. Property and privacy

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unconstitutional. Examples of such decisions of the Court on social and labour legislation dating from this period are put forward by R. Pound in "Do We Need a Philosophy of Law?", at 345.

[59]Cifr. Note, "Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments" 90 *Harv. L. Rev.*, 945 at 952, note 42 (1977). The lack of jurisdiction of the Supreme Court to hear appeals by criminal defendants until 1891, together with the fact that the government could not appeal criminal cases until 1907, are offered as (at least partial) explanations.

[60]The first fourth amendment case commented on at length by the Supreme Court was *Ex parte Jackson*, 96 U.S. 727 (1877).

[61]See e.g. *Ex parte Jackson*, 96 US 727 at 733; *Adams v. N.Y.*, 192 U.S. 585 at 597 (1904); *Hale v. Henkel*, 201 U.S. 43 at 74 (1906); *Wilson v. U.S.*, 211 U.S. 361 at 376 (1911); *Weeks v. U.S.*, 232 U.S. 383 at 395 (1913); *Silverthorne v. Lumber Co. v. U.S.*, 251 U.S. 385 at 392 (1919).

were often put forward together, in what seemed to be a mere illustration of the aims that the fourth amendment intended to achieve[62]. Nevertheless, cases arose in which the Supreme Court did have to opt for either property or privacy. This choice was to have the widest consequences in the understanding of the amendment.

2.2.1 The Property Reading of the Fourth Amendment.

The first choice made by the Supreme Court was for property and was made in *Boyd v. U.S.*[63], where the Court developed what would remain as the key-points for the property reading of the fourth amendment. Before coming to these points, it will prove illuminating to look at the legal background of *Boyd*. This case was brought against Section 5 of an "Act to amend the customs revenue laws, and to repeal moieties", of 22 of June 1874, intended to prevent attempts to import merchandise in violation of the revenue laws. Its Section 5 provided that if in a case brought under this Act the attorney representing the government believed that "business books, invoice or paper belonging to, or under control of, the defendant or claimant, will tend to prove any allegations made by the United States", then he may make a written motion to the court where the proceeding is pending asking it to "issue a notice compelling the defendant or claimant to produce such book, invoice, or paper in court"[64]. If upon judicial notice and without reasonable justification the papers were not produced, Section 5 provided that "the allegations stated in the said motion shall be taken as confessed"[65]. The Supreme Court decided that Section 5 violated both the fifth amendment right not to hold witness against oneself and the fourth amendment right against unreasonable searches and seizures. I will concentrate on the latter.

The considerations of the Court as to the fourth amendment rested on two key points: first, the fourth amendment was a means to protect private property; second, compelling someone to produce her private papers is tantamount to having public officers seize these papers after a search on her private dwelling. As will now be explained, both these points of departure derive from the "ideas as to how law should be interpreted and applied" characteristic of the turn of the century, that is, they derive

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[62]Even after it had clearly opted for property in the case of *Boyd v. U.S.*, the Court referred, e.g., to the prevention of "violations of private security in person and property" (*Adams v. N.Y.*, 192 US 585 at 598); to the protection from "invasions of the home and privacy of the citizens and the seizure of their private papers"(*Weeks v. U.S.*, 232 US 383 at 390); to the "security and privacy of the home or office and of the papers of the owner" (*Gouled v. U.S.*, 255 U.S. 298, 305 (emphasis added).

[63]*Boyd v. U.S.*, 116 U.S. 626 (1886).

[64]Quoted in *Boyd v. U.S.*, 116 US 616 at 619-620.

[65]Ibidem.

from the application of analytical jurisprudence and from the predominance of the common law.

The first point offers an example of analytical jurisprudence. The Supreme Court relied upon one of the liberal conceptions it was bound to apply, i.e. the idea that the right to private property deserves absolute protection against public power, indeed that the protection of private property sets an absolute limit to the scope of action of public power. On this basis, searches and seizures were thought unreasonable whenever private property was their object; conversely, searches and seizures were thought reasonable only when they were addressed to goods over which the holder had no property rights. Reasoning on these grounds, the Court found that private papers fall outside the power to search and seize that public officials may be accorded. "Papers -said the Court- are the owner's goods and chattels (...) his dearest property; and (...) they will hardly bear an inspection"[66].

The second point (that is, the idea that the compulsory production of private papers equals their forcible seizure by public officers) reflects the common-law view that statutes are exceptional elements in a judge-made law system and must thus be subject to strict interpretation. Let me explain why I believe this to be the case. In its decision in the case of *Boyd*, the Supreme Court had a glance at the history of Section 5 of the Act of 22 of June 1874. This Section had come to replace Section 2 of an Act of 2 March 1867, which in turn had replaced Section 7 of an Act of 3 March 1863. The object of these two Acts was similar to that of the Act of 1874; furthermore, their respective Sections 2 and 7 also regulated the possibility for the court to have access to the defendant's or the claimant's private papers in order to examine them at trial. There was, however, a crucial difference between the Acts of 1863 and 1867, on the one hand, and the Act of 1874, on the other: unlike this latter, the two former Acts authorised access to the defendant's or claimant's private papers *via search and seizure* pursuant to a judicial warrant. The risk then existed that these two Acts could give rise to constitutional objections under the fourth and the fifth amendments. It was in order to avoid this risk that Section 5 of the Act of 1874 was enacted in the terms explained above (it does not allow for searches and seizures of private papers for the mere purpose of obtaining evidence, but instead authorises the Court to oblige the holder of these papers to produce them at trial). The Supreme Court saw this as a skilful manoeuvre of the law-maker and thought it its duty to react against it, so as to preserve the spirit of the Constitution against attempts at its indirect violation[67]. This was

[66]Ibidem, pp. 627-628.

[67]However, as the Supreme Court admitted, previous "decisions in the Circuit and District Courts [had] sustain[ed] the constitutionality of the law under consideration, as well as that of the prior laws of

particularly important because the fourth amendment, both as a prohibition of unreasonable searches and seizures and as protection of the right to property, was deeply rooted in common law. It is to preserve the spirit of the Constitution that the Supreme Court equated the compulsory production of private papers to its forcible search and seizure.

2.2.2 Implications of the Property Reading of the Fourth Amendment

Thus the Supreme Court initially regarded the fourth amendment as an instrument for the protection of private property. This conditioned the reading of the fourth amendment in at least three ways. First, it imposed a particular interpretation of the term 'unreasonable'; second, the protection against 'seizures' was considered more relevant than the protection against 'searches'; third, certain remedies against violations of the amendment were provided for.

[A] 'Unreasonable'

The property reading of the fourth amendment imposed a very specific notion of the searches and seizures that were to be considered 'unreasonable': the term 'unreasonable' referred to any search and seizure carried out 'against private property', so that these could under no circumstances be held to be constitutional. The question of what searches and seizures are unreasonable was thus answered by reference to another question, i.e. what are searches and seizures undertaken against private property. In *Boyd* the Supreme Court ruled that no private property could be claimed upon "stolen goods or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof"[68] (later the Court would add the means and instrumentalities of a crime to this list[69]); for "it is unlawful for a person to have [such goods] in his possession"[70] and, in addition, "the government is entitled to [their] possession"[71] even if it is only to return them to their lawful owner. The *Boyd* Court thus ruled that reasonable searches and seizures were only those addressed against goods upon which the government had some possessory title, and that searches and seizures of any other goods carried out on the mere grounds that they might possibly be used as evidence at a trial ought to be automatically considered unreasonable ('mere-evidence rule').

1863 and 1867" (*Boyd v. U.S.* at 635); yet the Court declared the above-mentioned decisions unconvincing: "we find nothing in the decisions to change our views in relation to the principal question at issue" (*Boyd v. U.S.* at 638).

[68] *Boyd v. U.S.* at 623.

[69] See *Weeks v. U.S.*, 232 US 383 at 392 (1913); *Carroll et al. v. U.S.*, 2647 US 132 (1925).

[70] *Boyd v. U.S.* at 624.

[71] Ibidem, at 623.

This interpretation of the term 'unreasonable' according to an interest in the protection of private property gives rise to a problem: it does not account for a formal requirement explicitly imposed by the fourth amendment upon searches and seizures. The fourth amendment requires that searches and seizures not rely upon a warrant unless validly issued according to standards that it itself sets and which aim at precluding the issue of general search warrants[72]. The interest in the protection of privacy offers no justification for this formal requirement of reasonableness; yet it could not be disregarded by the Court, since it is explicitly imposed by the fourth amendment itself. The Supreme Court thus had to accept that 'unreasonable' searches and seizures where also those carried out under an invalid warrant, yet it confined this formal meaning of the term 'unreasonable' to searches and seizures otherwise considered 'reasonable', that is to searches and seizures addressed to private property upon which the holder has no legitimate possessory claim[73]. In other words, the formal requirement of reasonableness imposed by the fourth amendment (i.e. that searches and seizures be not carried out under an invalid warrant) only played a secondary role with respect to the material requirement of reasonableness developed by the Supreme Court itself (i.e. that searches and seizures be not undertaken against private property legitimately held). Even within this framework, however, the need to comply with this formal requirement of reasonableness is at odds with the property interpretation of the fourth amendment, which thus proves unable to account for the wording of this provision.

[B] Searches versus Seizures

Property, at least material property[74], is more greatly endangered by seizures than by searches. Accordingly, the fourth amendment was thought to offer protection mainly against 'unreasonable seizures', i.e. against seizures of private property. As far as the protection of private property was concerned, 'unreasonable searches' could only be defined *indirectly*, i.e. as searches intended to accomplish an 'unreasonable seizure'. The factual circumstances of the case of *Boyd* are a good example of the marginal attention accorded to searches within this framework: the Court found a violation of the fourth amendment in a case where papers had been compulsorily produced by their owner, that is in a case where papers had been seized, yet not searched for. 'Unreasonable searches' were the object of *direct* attention only within the formal meaning of the term 'unreasonable', that is, only in as far as the term referred to

[72]"The entry upon premises...by virtue of a judicial writ...is not within the prohibition of the fourth or the fifth amendment" (*Boyd v. U.S.*, at 624).
[73]Cifr. *Boyd v. U.S.* at. 624.
[74]Deprivation of intellectual property raises different problems of which no account will be taken here, since to my knowledge the fourth amendment has only been applied in relation to material property.

searches carried out without valid warrant when no legitimate possessory rights were at stake.

[C] Remedies against Violations of the Fourth Amendment: the So-Called 'Exclusionary Rule'.

As announced above, the *Boyd* Court reached the conclusion that there had been a violation not only of the fourth amendment but also of the fifth amendment clause against self-incrimination. It ought to be added now that the Court placed these two provisions and their respective violation in a close relationship: property unreasonably seized, reasoned the Court, may not be used at trial against its lawful holder, for this would be tantamount to forcing the latter to declare against herself. From the combination of the fourth amendment and the self-incrimination clause of the fifth amendment the Court drew a very singular remedy against unreasonable seizures: pieces of evidence thus unreasonably seized could not be admitted at trial, a remedy henceforth referred to as the 'exclusionary rule'[75].

2.2.3 The Position of Privacy in the Subsequent Case Law

The position of the majority in the case of *Boyd* did not remain uncontested. In a separate opinion, Justice Miller joined by Chief Justice Waite offered a completely different interpretation[76]. First, they rejected the material reading of the term 'unreasonable' defended by the majority, according to which unreasonable searches and seizures are those directed against private property legitimately held; instead, they advocated that 'unreasonable' ought to be read exclusively in the formal terms proposed by the wording of the fourth amendment, according to which unreasonable searches and seizures are those carried out upon an invalid warrant (i.e. under too general a warrant). Second, they viewed the amendment as directed mainly against searches, rather than against seizures. Finally, they rejected the equation of the compulsory production of private papers with forcible searches. In other words, the dissenting Justices disagreed on every point upon which the property interpretation of the fourth amendment relied. Indeed, as will be seen below, their approach already provided the key points for a privacy reading of this provision, although the idea that privacy ought to replace property as the only interest behind the fourth amendment was not even suggested.

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[75]Note that the above considerations only concerned seizures of private property. The question of which remedies ought to be provided against searches and seizures carried out under an invalid warrant had not yet been raised before the Court at the time *Boyd* was decided.

[76]*Boyd v. U.S.* at. 641 et seq.

This dissenting opinion would not long remain disregarded by the majority of the Court. It is true that, in subsequent cases, the Court still chose to follow the key-points of the doctrine developed in *Boyd*. Soon, however, the Court started to rely also on the concept of privacy in its interpretation of the fourth amendment. Initially, the presence of privacy did not alter the original scheme of the fourth amendment as structured in *Boyd*, yet privacy slowly changed this original scheme. The influence of privacy upon the reading of the fourth amendment became increasingly important, until the Court finally considered privacy the only interest behind this provision.

The circumstance that privacy was placed next to property as an interest behind the fourth amendment and that it finally replaced property can be explained, first of all, as the result of a quest for coherence in the interpretation of this provision. For, as was argued above, the interest in the protection of privacy could offer justification to the formal requirement of reasonableness, according to which searches and seizures may not be based upon invalid warrants (i.e. upon warrants too sweeping in scope). The need for such theoretical justification proved most urgent, since in most fourth amendment cases the Supreme Court had to decide on the formal rather than on the material reasonableness of searches and seizures[77].

A second and yet more powerful explanation of the increasing importance of privacy lies in the evolution of the "ideas as to how law should be interpreted and applied, and cases decided" that began in the 1930s. This evolution was the result of two circumstances. First, the attitude of the Supreme Court towards written law changed significantly. The Court started to show greater respect for innovations introduced into the common law by statutes and started to deal with these innovations from a position of self-restraint. Second, the old mechanical jurisprudence was replaced by mechanisms proposed by the sociological theories of law that had arisen as we have seen in the first third of the century as a reaction against it. These theories, as we have touched on, emphasised the need to take account of the social circumstances surrounding cases, of seeking the help of different social sciences for the interpretation of law, of stressing the importance of factual data about the law in action. The Supreme Court gradually accepted these new ideas. Already in 1931 it stated that "each case is to be decided on its own facts and circumstances"[78] by means of balancing the importance

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[77]See, e.g., *Weeks v. U.S.*, 232 U.S. 383 (1914); *Gouled v. U.S.*, 255 U.S. 298 (1921); *Carroll et al. v. U.S.*, 267 U.S. 132 (1925); *Agnello et al. v. U.S.*, 269 U.S. 20 (1925); *Marron v. U.S.*, 275 U.S. 192 (1927); *U.S. v. Lefkowitz et al.*, 235 U.S. 452 (1932); *Harris v. U.S.*, 331 U.S. 145 (1947); *Johnson v. U.S.*, 333 U.S. 10 (1948); *Trupiano et al. v. U.S.*, 334 U.S. 145 (1948); *McDonald et al. v. U.S.*, 335 U.S. 451 (1948); *U.S. v. Rabinowitz*, 339 U.S. 56 (1950).

[78]*Go-Bart Importing Co. et al. v. U.S.*, 282 U.S. 344, 357 (1931).

of the different interests at stake[79]. This change of attitude had immediate consequences upon the interpretation of the fourth amendment. The openness towards social factors made the Court take account of the actual "ideas as to the end of law" at issue at the time[80], which necessarily led to increase the importance of privacy as an interpretative criterion of the amendment[81]. This process of evolution ended when the Court proclaimed that privacy is the only point of reference for the interpretation of the fourth amendment.

2.2.4 Implications of the Privacy Reading of the Fourth Amendment: the Recognition of a Constitutional Right to the Secrecy of Telecommunications

As a provision aimed at the protection of privacy, the fourth amendment started to be depicted by features that were the complete opposites to the ones it had previously been seen as having. The word 'unreasonable' started to be interpreted exclusively in formal terms; searches started to be regarded at the centre of the prohibition of the fourth amendment, since they entailed a greater danger for privacy than seizures; the relationship between the fourth amendment and the fifth amendment clause against self-incrimination started to be loosened and finally abandoned (note, however, that the so-called exclusionary rule has been preserved under the privacy reading of the fourth amendment, something which will be discussed at length in chapter 6). Finally, and most importantly for us, only regarding privacy as the interest behind the fourth amendment has permitted that the right to the secrecy of telecommunications be included within the coverage of this provision and can thus receive constitutional protection. Let me now dwell on this last point.

In the United States, the question of the constitutional protection of the right to the secrecy of telecommunications has always been approached within the framework of the fourth amendment. Cases of interception of telecommunications, both written and oral, have been brought before courts as cases of unreasonable searches and seizures. Yet so long as property remained the interest behind the fourth amendment the Supreme Court firmly held that the interception of telecommunications other than

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[79]See, e.g., *Harris v. U.S.*, 331 U.S. 145 (1947); *Johnson v. U.S.*, 333 U.S. 10 (1948); *McDonald et al. v. U.S.*, 335 U.S. 451 (1948).

[80]In *U.S. v. Classic et al.* (313 U.S. 299 (1941)) the Court stressed the flexibility of the Constitution to evolve and thus cover the protection of new situations unknown to the founding fathers.

[81]In *Jones v. U.S.* (362 U.S. 257, 266 (1960)) the Court declared that the constitutional right recognized in the fourth amendment ought to be considered free from "subtle distinctions, developed and refined by the common law in evolving the body of private property law" (see also *Chapman v. U.S.*, 365 U.S. 610 (1961)).

written ones fell outside the scope of the right against unreasonable searches and seizures[82], unless there had been "physical invasion of the petitioner's premises", i.e. trespass[83]. In other words, under the property reading of the fourth amendment the Supreme Court denied that the mere interception of wire telecommunications (wiretapping) could be regarded as a case of search and seizure.

This position was sustained even as privacy started to gain in importance as an interpretative criterion of the fourth amendment. As has already been mentioned, it took the Court some time to substitute privacy for property as the only interest controlling the interpretation of the fourth amendment. This step proved particularly difficult in the context of the issue whether the fourth amendment covered the secrecy of telecommunications, to the extent that this issue remained the last aspect of the fourth amendment controlled by the interest in private property[84]. For one thing, even if one admits that interceptions of telecommunications infringe upon individual privacy and that the protection of privacy is a final aim of the fourth amendment, even then regarding such interceptions as instances of searches and seizures requires a certain degree of flexibility in the interpretation of these two terms. For a long time the Supreme Court was not willing to be as flexible as that. The Court must also have felt that such flexibility would be difficult to avoid if the fourth amendment prohibition of unreasonable searches and seizures was to be regarded exclusively as a means for the protection of privacy; hence the reluctance of the Court to make privacy the only interest behind the prohibition.

Only as late as 1967 did the Supreme Court proclaim that privacy is the only interest behind the fourth amendment[85] and only then did the Supreme Court appear willing to read the terms 'searches' and 'seizures' with the flexibility required for then to could cover cases of interception of telecommunications. Some months after this step had been taken, the Court finally went the last step further and declared that the secrecy of oral communications was covered by the fourth amendment[86]. The secrecy of all telecommunications has since been regarded as part of the fourth amendment right against unreasonable searches and seizures.

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[82]See *Olmstead et al. v. U.S.*, 277 U.S. 433 (1928) and *Ex parte Jackson*, 96 U.S. 727 (1877).

[83]*Silverman v. U.S.*, 365 U.S. 505 at 510. See also *Olmstead v. U.S.*, 277 U.S. 438 at 457; *On Lee v. U.S.*, 343 U.S. 747 at 751-752; *Goldman v. U.S.*, 316 U.S. 129.

[84]This position met the opposition of some members of the Court, however. As very telling examples, see the dissenting opinions of Justices Brandeis, Homes and Butler in *Olmstead v. U.S.* (227 US 438 at 471 et seq. (1928)) and those of Justices Murphy, Frankfurter and Chief Justice Stone in *Goldman v. U.S.* (316. US 129 at 136 et seq. (1942)).

[85]*Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

[86]*Katz v. U.S.* 389 U.S. 347 (1967). In this case the Court stated that the fourth amendment covers the secrecy of telephone conversations, even if these are held from a public booth.

In sum, in the United States, the secrecy of telecommunications owes its recognition as a constitutional right to the fact that the interest in the protection of privacy has become an object of constitutional attention. The secrecy of telecommunications was thus born to the world of constitutional rights as an aspect of privacy. Of course, the fact that the right to the secrecy of telecommunications enjoys constitutional recognition and protection, even if this is not direct and explicit, ought to be celebrated. Yet depending on privacy for constitutional recognition also has the important drawback that the scope of this right will suffer from the ill-definition of privacy; for even if privacy is approached exclusively as the control over one's seclusion and secrecy, even then the boundaries of privacy and of the right to privacy are considerably more unclear than the boundaries of (the right to) the secrecy of telecommunications. Good though the recognition of a constitutional right to the secrecy of telecommunications is, it would have been better to recognise it as a right autonomous from privacy in the way it is recognised in Germany, even if this would have required a real constitutional amendment.

CHAPTER 3: THE OBJECT OF THE RIGHT TO THE SECRECY OF TELECOMMUNICATIONS: ITS STRUCTURE

Introduction

I have already mentioned at previous stages of this thesis that the recognition of fundamental rights is rooted in the liberal tradition. Fundamental rights were first recognised as rights of defence against the State, that is as rights to the non-interference of the State with the freedoms kept by individuals, and were thought to deserve the widest possible protection against such interference. This was the case with the right to the secrecy of telecommunications. I would now like to take up this argument and insist upon the idea that fundamental rights were and still remain for the most part the fruit of liberal thinking; moreover, I would like to develop the idea that, indeed, it is best for fundamental rights that this still be the case. In this chapter, I will argue that fundamental rights are best protected if they are basically regarded as negative rights of defence against the State. At the same time, I do encourage the recognition of positive obligations on the State with respect to these rights, yet my contention is that the recognition of a positive dimension of fundamental rights ought not to alter the *basic* negative dimension of such rights[1].

I will try to develop this argument throughout the following section, while considering the structure of fundamental rights, in general, and of the right to the secrecy of telecommunications, in particular. In fact, the consequences of approaching fundamental rights basically as negative rights against the State come to light with particular clarity when addressing the structure of these rights. In section I, I will try to show that the structure of fundamental rights generally corresponds to a liberal approach to rights and will argue that this 'liberal structure' entails considerable practical advantages in the actual protection of fundamental rights. Sections II, III and IV deal with the structure of the fundamental right to the secrecy of telecommunications in the ECHR, the German Basic Law and the Constitution of the United States, respectively. In each one of these sections I will study the extent to which the structure of this right corresponds to liberal patterns; this analysis will show the concrete implications that both the compliance and the non-compliance with such patterns has in the case of the secrecy of telecommunications.

[1]Note that I am referring to rights which *are* fundamentally liberal in character, hence to rights which were conceived of as imposing negative obligations upon the State.

Section 1: The Structure of Fundamental Rights

1. The Two-Step Structure of Fundamental Rights

Constitutions usually recognise rights in two step manners. The first step is the recognition of a right in its full conceptual scope; the second step is the placing of limitations on the part of that right to which protection is granted. In other words, Constitutions make a distinction between the *scope of coverage* and the *scope of protection* of rights[2]. The scope of each relates to the other like a principle relates to a rule[3]. The definition of the coverage of a fundamental right lays down a constitutional *principle* in the sense that it imposes a *prima-facie* constitutional command that the right in question be protected. This prima-facie command becomes a constitutional *rule*, that is a command of immediate, *definite* application, only within the scope of protection of rights. Now note that principles are commands to optimalise[4], that is they command "that something must be realised to the highest degree possible"[5]. This means that the recognition of a right (principle) implies the command that the scope of protection actually accorded to this right (rule) be as wide as possible. Looking at this relationship between the coverage and the protected scope of fundamental rights, one can conclude that this two-step structure of fundamental rights corresponds to a liberal approach to rights, according to which individuals enjoy freedom as a matter of principle and this freedom may be interfered with by the State only under certain -more or less exceptional- circumstances. I would now like to say a few more words about the expressions 'scope of coverage' and 'scope of protection' of fundamental rights.

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[2]As is to be expected, the two-step structure of fundamental rights has been depicted in various different terms by commentators. To begin with, German commentators often refer to what I here call 'scope of coverage' as '*Schutzbereich*' (which unfortunately translates into 'scope of protection') (see e.g. W. Heyde, "Regelungsspielraum des Gesetzgebers bei Grundrechten" *Festschrift für Wolfgang Zeidler*, Band 2, p. 1429 at 1432. Walter de Gruyter, Berlin - New York, 1987). In addition, the two-step structure of fundamental rights is usually depicted by way of opposing this *Schutzbereich* (also referred to as *Normbereich, Tatbestand, Grundtatbestand* or *Reichweite*) to the limits (*Schranken*) of fundamental rights. I however find it clearer to depict the structure of rights by way of dividing it into two *spheres*, i.e. the sphere of the coverage and the sub-sphere of the protection of fundamental rights. Also in this context, Robert Alexy (*Theorie der Grundrechte*, Nomos Verlagsgesellschaft, Baden-Baden, 1985, p. 296) speaks of a two-sphere model (*Zwei-Bereiche-Modell*), spheres which he calls the *potential* (i.e. the coverage) and the *actual* (i.e. the scope of protection). In the English speaking world, Ronald Dworkin prefers to refer to the *range* and the *force* of rights (see, *Taking Rights Seriously*, Duckworth, London, 1977, p. 261).

[3]I here rely on a distinction between principles and rules such as the one drawn by R. Dworkin (*Taking Rights Seriously*, at 22 et seq.) and by R. Alexy (*Theorie der Grundrechte*, at 71 et seq.).

[4]See Alexy, *Theorie der Grundrechte*, at 75.

[5]Robert Alexy, "Rights, Legal Reasoning and Rational Discourse", (1992) *Ratio Juris* 143 at 145.

The *scope of coverage* of a constitutional right is the area of reality that is limited by the conceptual boundaries of the right in question. It is, therefore, the result of defining the right. For example, the coverage of a right recognised as the 'secrecy of telecommunications' is defined by the conceptual boundaries of the terms 'secrecy' and 'telecommunications'. It seems a matter of course that in order that a right can be called constitutional its conceptual boundaries must be drawn out in a Constitution. The problem with this is, however, that Constitutions do not usually offer detailed definitions of the rights they recognise: the complexity that the definition of a right entails makes it beyond the reach of constitutional texts to undertake such a task. All they actually do is to provide certain indications, more or less explicit, more or less precise, as to the concept of each right. A definition of fundamental rights must be attained by way of interpreting (or, as some prefer to say, by way of concretising[6]) such constitutional indications, a task which must be accomplished by the law-maker and by the judiciary. Interpreting the Constitution is certainly not easy; nor does interpretation necessarily lead to a single, pre-established result. Indeed, it is only too normal that different interpreters have different and equally plausible views as to the scope of a constitutional provision. In spite of this, the Constitution appears as the only possible source of the definitions of constitutional rights in the sense that the interpreter of the Constitution cannot contribute to defining a fundamental right, but can merely express her opinion about what is implicit in the Constitution

The *protected scope* of a constitutional right is the area within the coverage of the right which a Constitution is willing to protect. As was mentioned above, the liberal approach to fundamental rights implies that these have as wide a scope of protection as possible[7]. This circumstance helps us to understand why this scope is normally defined from the outside: rather than define the area of a right which is protected, Constitutions prefer to define the area of a right that may go unprotected, that is the area of a right which can be lawfully encroached upon. However narrow, such an area of non-protection usually exists. The reason is that the exercise of constitutional rights is likely to collide with the exercise of other such rights or with other constitutional principles,

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[6]The expression 'concretising a legal provision' has two different meanings: first, it can be used as a synonym for the act of 'interpreting' a provision; second, 'concretising' can be the act of choosing among the different alternative solutions which are made available by a provision. The first meaning describes the task of the law-maker within the context of the coverage of fundamental rights; the second meaning describes the task of the law-maker within the context of the protected scope of rights, where as will be explained below the law-maker can choose among alternative possibilities in the application of the Constitution (in this context, see Manuel Medina Guerrero, ***La Vinculación Negativa del Legislador a los Derechos Fundamentales*** -Trabajo de investigación presentado en concuso para provisión de plaza de Profesor Titular, Universidad de Sevilla, España, 1992- pp. 18 et seq.).

[7]As Dworkin has put it, "[f]or a true liberal, any constraint upon freedom is something that a decent government must regret, and keep to the minimum necessary to accommodate the other rights of its constituents" (*Taking Rights Seriously*, at 268).

so that when such constitutional conflicts arise some of the principles at stake must, at least to some extent, remain unprotected. Conflicts among constitutional principles must be solved by way of striking a balance. In this context one can look at the protected scope of a constitutional right as the result of a balance having been struck between that right and other constitutional principles which conflict with its exercise.

As was argued above, the conceptual boundaries of a fundamental right are drawn out in Constitutions, from which they must be inferred by way of interpretation. This is not necessarily the case for the protected scope of a right. This is defined by Constitutions only in as far as these strike a balance between a right and other constitutional principles or at least as they give indications as to how to strike a balance. Constitutions strike a balance when they subordinate the protection of a right to the protection of other constitutional principles, or when they subject restrictions of a right to conditions which aim at the protection of other principles[8]. Most often however Constitutions do not strike a balance but merely provide guide-lines for balancing rights, that is they set out the general conditions under which conflicts among constitutional rights must be solved. In such cases, the law-maker and the judiciary are called to play an active role in the definition of rights; for their task is not only to interpret the above-mentioned guide-lines: they must actually decide how these guide-lines apply in the solution of a particular case, that is, they must strike the actual balance among fundamental rights. In other words, in the context of the protected scope of rights the law-maker and the judiciary are often called upon not only to interpret the Constitution but also to make a choice among the different definitions of the protected scope of a right allowed by the Constitution[9].

The criteria of how to strike a balance are inevitably influenced by policy considerations. For decisions on the worth of different and colliding principles, when these are compared with one another, are to a great extent policy decisions, that is, they greatly rely on the standards that set out the goals of the community, generally consisting of some economic, political or social improvement[10]. As observed above, such decisions are to some extent taken by Constitutions but they are mostly left in the hands of the law-maker and of the judiciary, in as far as case-by-case considerations are

[8]See, e.g., arts. 5,1; 8,2; 9,2; 10,2; 11,2 of the ECHR; arts. 2.1, 5.2, 9.2, 10.2.2, 11.2 of the GG; or the fourth amendment to the US Constitution. The constitutional definition of the protected scope of a right is sometimes formulated in such terms that it risks being mistaken for an element of the definition of the very coverage of the right in question (think of the "right to assemble *peaceably and unarmed*" recognised in art. 8.1 of the German Basic Law).

[9]In other words, the law-maker is called upon to 'concretise' the constitutional text, in the second one of the two meanings of this word (see footnote 6 above).

[10]Cifr. in R. Dworkin, *Taking Rights Seriously*, at 22.

needed in the application of balancing criteria. What I would like to stress is that all the policy questions that balancing entails remain outside the scope of coverage of constitutional rights. Certainly, the recognition of a particular right in some particular terms might be regarded itself as the result of a particular policy (e.g. the decision that rights such as privacy or free speech exist and have certain conceptual features results from a certain picture of the social and political goals of the community); yet this is the very policy that led to the enactment of the Constitution itself, hence it is a policy which played its role at a pre-constitutional stage and, moreover, a policy the results of which have been accorded an important degree of stability. The policy questions involved in the actual application of rights via the striking of a balance do not affect rights at the level of their recognition, but only at the level of their application. In other words, rights are not balanced on the basis of their intrinsic worth but on the basis of how they relate to other rights and values when they have to be applied in a particular case[11].

2. Alternative Ways to Structure a Fundamental Right

As was mentioned above, the distinction between the coverage and the protection of a fundamental right derives from a liberal conception of fundamental rights and is the prevailing approach to fundamental rights in positive constitutional law. Even though this distinction finds wide support amongst commentators[12], it is not accepted in all theoretical camps in all cases. Justifications of alternative views have been couched within institutional or social theories of fundamental rights. Before going into the main analysis of this chapter it will be useful to look at the main alternatives to the two-step structure of fundamental rights so that we can best appreciate the implications that different structures of fundamental rights have upon the protection of these rights.

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[11]See in this context H. Schneider, *Die Güterabwägung des Bundesverfassungsgericht bei Grundrechtskonflikten*, Nomos Verlagsgesellschaft, Baden-Baden 1979, pp. 221-223; K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 16. ergänzte Auflage, C.F. Müller, Heidelberg 1988 Par. 306 et seq. p. 121; R. Wendt, 'Der Garantiegehalt der Grundrechte und das Übermaßverbot', 104 *AÖR* 414 at 433 et seq.

[12]See, e.g., W. Heyde, "Regelungsspielraum des Gesetzgebers ..." at 1432 et seq.; Konrad Hesse, *Grundzüge des Verfassungsrechts* ..., Par. 306 et seq. p. 123 et seq; Albert Bleckmann, *Staatsrecht II, Allgemeine Grundrechtlehren*, Carl Heymanns Verlag, Köln-Berlin-Bonn-München, 1985, p. 265; Christian Starck (ed.) *Rights, Institutions and impact of International Law according to the German Basic Law*, Nomos Verlagsgesellschaft, Baden-Baden, 1987, pp. 25, 28. A more lengthy and sophisticated defence of the two-step structure has been made by Robert Alexy, *Theorie der Grundrechte*, at 249 et seq.

2.1 Institutional Theories of Fundamental Rights

A classical rejection of the distinction between the scope of coverage and the scope of protection of rights is the one formulated by Friedrich Müller[13]. According to Müller, the definition of fundamental rights must be based on *all* the factual circumstances that they embrace. In order to identify such circumstances, account must be taken of *all* the norms where these rights are recognised and regulated, independently of whether they affect their scope of coverage or their scope of protection; for it does not make any sense to say that a right covers areas which, as a matter of fact, it does not protect.

Similar positions are often sustained in the framework of institutional theories of fundamental rights, that is in the framework of theories which stress that, over and above their subjective dimension, fundamental rights are objective elements of the constitutional order, so that their subjective dimension derives from their objective one[14]. These theories conceive the Constitution as a complete organic system in which the whole legal order is integrated. In the context of fundamental rights this means that the Constitution appears as the only source of definition not only of the coverage of these rights, but also of their protected scope. It also means that limitations on rights are inherent in the Constitution, so that they cannot really be considered (external) 'limits' or 'restrictions', but must simply be regarded as part of the conceptual boundaries of fundamental rights as defined by Constitutions. As a result, the coverage and the protected scope of rights becomes identical. This result is heavily dependent on the idea that Constitutions are perfectly integrated systems which do not allow for conflicts among fundamental rights or other constitutional principles. At most, there can be situations which *look like* conflicts, but these can be solved by reference to the conceptual boundaries of the rights or principles at stake, that is by way of making an adequate reading of such boundaries. As a result, fundamental rights only exist in as far as they do not collide with other rights and principles, i.e. in as far as they enjoy constitutional protection.

Equating the scope of coverage with the scope of protection relies on an assumption that fundamental rights are not a combination of *constitutional rules and*

[13]See Friedrich Müller, *Die Positivität der Grundrechte. Fragen einer praktischen Grundrechtsdogmatik*, Duncker & Humblot, Berlin 1969, esp. pp. 17 et seq.
[14]The most characteristic example undoubtedly is Peter Häberle, *Die Wesensgehaltgarantie des Art. 19 Abs. 2 Grundgesetz*, C.F. Müller, Heidelberg, 1983. See also Fr. Klein, in *Das Bonner Grundgesetz*, Bd 1 XVI, p. 122.

principles, but are exclusively *constitutional rules*[15]. Equating the coverage with the protected scope of rights thus implies that rights do not have a prima-facie aspect, but are provisions which contain definite solutions for every case which falls within their coverage. In other words, fundamental rights are not regarded as provisions the actual application of which comes as a result of balancing, but as provisions which can be directly applied in an all-or-nothing manner. At the purely theoretical level, this approach to fundamental rights might appear attractive. In practice, however, it negatively influences the protection of fundamental rights as subjective rights of the individual in at least three different ways.

[1] In the context of a single-level approach to fundamental rights, the requirements with which limitations on these rights must generally comply do not apply: the imposition of limitations on rights requires no particular justification, nor must they fulfil any requirements, respect any limits or be subject to strict interpretation. The reason is that restrictions on fundamental rights are considered inherent in the concept of each right, to the extent that, strictly speaking, rights cannot be subject to 'restrictions' or 'limits' but simply to the definition of their 'conceptual boundaries'. Under these circumstances, the danger is great that the scope of coverage/protection of fundamental rights be minimised[16].

Admittedly, the point of departure for the definition of fundamental rights is the Constitution, so that in principle the law-maker is merely called upon to identify all the limits and restrictions imposed upon these rights (now regarded as part of their conceptual boundaries) by way of interpreting the constitutional text. The truth is however that to a great extent restrictions of fundamental rights are imposed on the basis of policy considerations, considerations which cannot be (and indeed they should not be) identified in the Constitution and which are generally made by the law-maker itself. This implies that under a one-level approach to fundamental rights, the conceptual definition of these is to a great extent left in the hands of the law-maker, so that, in order to identify it, account must be taken of all the norms in which these rights are recognised and regulated[17]. Even courts have something to say in this regard, for whenever a court decides whether or not a right has been violated it is actually contributing to defining the right in question.

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[15]For the application of the distinction between rules and principles to the present discussion, see R. Alexy, *Theorie der Grundrechte*, at 249 et seq.

[16]See A. Bleckmann, *Staatsrecht II. Allgemeine Grundrechtslehren*. München 1984, pp. 265 et seq.

[17]In fact, F. Müller defined coverage ('*Normbereich*') as "der Sachbestandteil von [*allen*] Rechtsvorschriften" (F. Müller, *Normbereiche von Einzelgrundrechten in der Rechtsprechung des Bundesverfassungsgerichts*, Duncker & Humblot, Berlin 1968, p. 9).

[2] Note that under the one-level approach to fundamental rights balancing occurs within the scope of the coverage of these rights. This implies that the subordination of certain rights to certain others does not take place at the functional level, that is independently of the recognition of rights. Rather, it appears as a feature inherent in the definition of rights, so that the specification of the particular relative position of rights within the Constitution is a conceptual issue. This circumstance influences the coverage of rights in two complementary ways. On the one hand, if balancing occurs within the scope of the coverage of rights, then the definition of every right appears to be in some sense less stable, to the extent that it is shaped by the case-by-case considerations which are made whenever a balance is arrived at. On the other hand, courts are likely to develop some more or less fixed rules concerning the relative position of certain rights with respect to certain others. In as far as this is so, constitutional rights would appear conceptually ordered according to their worth, so that each of them would occupy a fixed relative position within a fixed constitutional scale. The result of this would probably be a progressive disregard of the factual circumstances of particular cases, so that the balancing activity would be deprived of any flexibility and rights and values would risk becoming rigid, ordered concepts to be applied mechanically.

[3] Finally, the fact that fundamental rights are balanced within the scope of their coverage influences the allocation of the so-called 'burden or reasoning' (*'Argumentationslast'*) in the context of violations of fundamental rights. The burden of reasoning can be defined as the obligation of one of the parties in a judicial case to argue that a particular situation either falls or does not fall within the scope of the application of a particular rule. In the context of violations of fundamental rights, the allocation of the burden of reasoning amounts to deciding which party must argue that a particular action falls or does not fall within the coverage of a fundamental right and, additionally, that it falls or does not fall within the scope of protection of this right[18].

Within the framework of a two-step structure of fundamental rights, someone who complains of the violation of a right must argue that the right in question has been infringed, whereas it is for the authorities accused of the violation to argue that the

[18]The so-called 'burden of reasoning' ought not to be mistaken for the 'burden of proof', which refers to the obligation of one of the parties in a judicial case to prove controversial facts. The burden of proof in constitutional cases is allocated on the basis of more complex and detailed rules than the burden of reasoning (particular rules are, for example, that the burden falls on the party closer to the fact in question or on the party seeking to alter the status quo). In Germany, the allocation of both the burden of proof and the burden of reasoning in constitutional litigation has been analysed by Heinrich Weber-Grellet, *Beweis- und Argumentationslast im Verfassungsrecht unter besonderer Berücksichtigung der Rechtssprechung des Bundesverfassungsgerichts*, Nomos Verlagsgesellschaft, Baden-Baden, 1979.

infringement in question did not affect the protected scope of this right[19]. This allocation of the burden of reasoning respects two considerations: first, the burden of reasoning should concern positive facts (the person who complains of an interference must reason that this *did* take place, whereas the public authority must reason that the interference in question *did* comply with the constitutional requirements for such interferences); second, each of the parties at trial should reason on the basis of the facts to which it is closer (the person who complains of an interference must direct her arguments to the fact that she has been prevented from exercising one of her rights, whereas the public authority accused of the interference must direct its arguments to the way this interference has been carried out)[20].

If the borderline between scope of recognition and scope of protection disappears, the above allocation of the burden of reasoning is altered. For one thing, if a right only exists within its scope of protection, the person who complains that one of her rights has been infringed must argue that the action complained of interferes with the right in question *to the extent that it is protected.* This means that someone who claims that she has been the victim of a violation of a right must argue, first, that the interference complained of occurred and, second, that this interference was contrary to the Constitution (i.e. that it did not comply with certain requirements or, more generally, that it was not the result of a due balance between the different interests at stake)[21]. Reasoning in such terms might prove rather difficult: for one thing, it concerns negative facts, i.e. the fact that certain actions of the public powers did *not* comply with certain requirements; moreover, it concerns issues which for the most part remain beyond the control of private individuals, in particular in as far as balancing criteria have not been clearly settled by written norms.

The three reasons given above argue against equating the scope of coverage with the scope of protection of fundamental rights. Not surprisingly, law-makers, courts and commentators generally approach these two issues as two different concepts, so that the coverage of fundamental rights is defined on a solid basis and their

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[19]For a similar opinion, see B. Schlink, *Abwägung im Verfassungsrecht*, Berlin 1976, pp. 195 et seq.; Klein in Benda/Klein, *Lehrbuch des Verfassungsprozeßrechts*, C.F. Müller Juristischer Verlag, Heidelberg, 1991, p. 102. A question different from that of the allocation of the burden of reasoning is the question of the scope of this burden, that is, the question of the extent to which public authorities must argue in order to satisfy the judge in question or the Constitutional Court that they have not infringed the protected scope of a right. This issue has been dealt with by H. Weber-Grellet (*Beweis- und Argumentationslast* at 55 et seq.), who defends the idea that the scope of the burden of reasoning of the public powers is directly proportional to the importance of the right they attempt to restrict.

[20]H. Weber-Grellet (*Beweis- und Argumentationslast* at 36) regards the closeness to the controversial fact as a factor for the allocation of the burden of *proof* in constitutional litigation.

[21]This position is explicitly sustained by F. Müller (see Manfred Stelzer, *Das Wesensgehaltsargument und der Grundsatz der Verhältnismäßigkeit*, Springer-Verlag, Wien - New York, 1991, p. 95).

protected scope is subject to policy considerations. Nevertheless, it is not so infrequent amongst courts and commentators[22] to assume that certain fundamental rights are subject to certain limitations which are implicit in their coverage, even though these limitations go beyond the purely conceptual definition of the right in question. In other words, despite the general tendency to separate the coverage from the protection of fundamental rights, the idea is sometimes accepted that certain non-conceptual limitations do not limit the scope of protection of these rights but, rather, that they define their scope of coverage. The consequence of this idea is that the scopes of these two notions are equated, even if only up to a point.

This equation of the coverage with the protected scope of fundamental rights has two immediate consequences. First, in as far as external limitations of fundamental rights are thought to be inherent in the recognition of these rights[23], such limitations apply automatically, that is they need not comply with the requirements with which limitations of the protected scope of rights must generally comply. Second, since inherent limitations are thought to shape the coverage of fundamental rights, victims of the violation of a right subject to inherent limitations must argue not only that their right has been interfered with but also that the interference in question cannot be justified as being an 'inherent limitation' to the right in question.

So far we have dealt with the alternative to the two-level structure of fundamental rights which derives from an institutional theory of fundamental rights. Let me now turn to the second alternative to this structure that I planned to comment on. I am referring to the structure of fundamental rights which is inherent in various social theories of these rights.

2.2 Social Theories of Fundamental Rights

The two-level structure of rights is also contested within the framework of social theories of fundamental rights, that is within the framework of theories which consider that fundamental rights imply positive claims that the State make their exercise possible. This is true in the context of the three possible variations of positive claims

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[22]See A. Bleckmann, *Staatsrecht II*, pp. 265 et seq., for examples of authors who defend different 'inherent- limitations' theories. See also footnotes 44, 57, 62 et seq. and 86 et seq. and accompanying text below.

[23]Referring to such limitations both as "inherent" and as "external" should not appear as contradictory. They are "inherent" because they determine the scope of the recognition of a right, that is, they define the boundaries of a right as it is recognised by the Constitution. At the same time, they are "external" because they are not imposed by the conceptual features of a right, but by circumstances which are alien to those features.

against the State; these are, first, positive claims that the State ensure the actual protection of traditional liberal rights against third parties, second, positive claims that the State develop an adequate organisational and procedural apparatus for the actual protection of such liberal rights against the State itself and, finally, positive claims in the context of social rights in the narrow sense. In these three instances, positive subjective rights have a completely different structure from rights conceived as negative claims[24]. Let me explain why this is the case.

Conceived as rights of defence against the State, fundamental rights require that, in principle, the State refrains from *every* interference with these rights, that is that it refrains from *every* act which interferes with these rights as conceptually defined; only as a second step may an act of interference be justified on the basis that it does not encroach upon the protected scope of the right in question. Conceived as positive claims, on the other hand, fundamental rights do not require that the State takes every possible measure which might enable the exercise of all rights. The State is certainly obliged to render the exercise of rights possible and to this end it must take adequate measures; yet the State enjoys a certain margin of appreciation to decide which particular measure it wants to adopt. This could not be otherwise, for the extent to which the State facilitates or even enables the exercise of rights is, as all positive decisions of the State, is conditioned by policy issues and, furthermore, constrained by financial considerations. In other words, in the definition of the coverage of positive subjective rights States are accorded a certain margin to find a balance between the interest in the protection of the particular right at issue and other conflicting interests.

The balance referred to above appears to be similar to the one which is usually sought after in the context of rights as negative claims. There is however one crucial difference between the two: the balance reached in the context of rights as negative claims defines the protected scope of these rights, whereas the balance described above defines the *coverage* of rights as positive claims. This means that considerations which usually define the protected scope of rights now come to define the coverage of positive rights. The result is that these rights appear to have a one-step structure.

The consequences of this one-step structure of rights as analysed in the context of rights as institutional guarantees are equally applicable in the context of rights as positive claims. To begin with, first, the requirements with which limitations of fundamental rights must generally comply do not apply in the context of positive rights,

[24]See Alexy, *Theorie der Grundrechte*, at 420 et seq. Although Alexy is only referring to positive claims for protection against third parties, this distinction in the structure of negative and positive claims can be applied to all three categories of the latter.

the limitations of which partly constitute their conceptual boundaries. Second, the fact that positive rights need to be defined in the context of a balance might make the conceptual boundaries of these rights shake under the pressure of case-by-case considerations; conversely, this fact can also lead to a conceptual ordering of positive rights according to their worth within a fixed constitutional scale. Finally, the allocation of the burden of reasoning is altered, so that a complaint of a violation of a positive right must show not only that no action has been taken to enable the exercise of the right in question but also that an omission to take action was unlawful.

It ought to be noted, however, that in the context of positive subjective rights the consequences of the single-step structure must be considered less serious and, in any case, more tolerable than in the context of rights as institutional guarantees. This statement is based on two considerations. First, the recognition of rights as positive claims against the State does not come to replace but merely to complement the recognition of the traditional negative dimension of the same rights, thus enlarging the range of the subjective dimension of fundamental rights. As a result, the consequences of a single-level structure in the context of subjective rights are limited to the positive aspect of the right in question, so that a two-step structure of these rights as negative claims remains unaltered. Second, the fact that rights have a subjective positive dimension, even if they have a single-step structure, already has positive consequences for the individual, whose position vis-à-vis the State is thereby strengthened. This is particularly true, as pointed out above, since positive claims are usually constrained by policy and financial considerations; it has even been affirmed[25] that allowing for individual claims in this context would amount to granting the individual direct entrance into the political process. Thus according the State a certain margin to set the coverage of the positive dimension of rights seems a fair price to pay for the recognition of such a dimension.

The above considerations give us the necessary background to understand the structure of the right to the secrecy of telecommunications in the ECHR, Germany and the United States, which will be studied in the following sections. Here we will see that, as a traditional right of defence against the State, the right to the secrecy of telecommunications is recognised in a two-step manner in the three systems under

[25]See Böckenförde, "Grundrechtstheorie und Grundrechtsinterpretation" (1974) *NJW*; 1529; Ossenbühl, "Die Interpretation der Grundrechte in der Rechtsprechung des Bundesverfassungsgerichts", (1976) *NJW*, p. 2100 at 2104 et seq.; Hesse, "Bestand und Bedeutung der Grundrechte in der Bundesrepublik Deutschland" (1978) *EuGRZ*, p. 427 at 433 et seq.

consideration, yet that these three systems tend to regard certain non-conceptual limitations to this right as inherent in its coverage. In addition, we will see that the right to the secrecy of telecommunications is sometimes recognised with a positive subjective dimension -in particular within the ECHR-, that in the context of its positive subjective dimension this right has a single-level structure and that this circumstance does not affect the two-level structure of its negative subjective dimension.

Section 2: The European Convention on Human Rights

Introduction

Article 8:
"I. Everyone has the right to respect for his private and family life, his home and his correspondence.
II. There shall be no interference by a public authority with the exercise of his right except such as is in accordance with the law and is necessary in a democratic society in the interest 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 way the ECHR approaches the recognition and protection of rights is rooted in the liberal tradition. The right to respect for correspondence (art. 8) is a clear example of this[26]. To begin with, the use of the terms "respect" and "interference" suggests that art. 8 recognises rights which only have a negative subjective dimension, that is, it suggests that art. 8 only requires that States refrain from any active behaviour against the exercise of the right it recognises. In addition, these rights appear to have a two-step structure. Art. 8, in fact, is structured in two paragraphs: paragraph 1 enunciates the ensemble of rights it recognises (among which is the right to respect for correspondence) thus defining the scope of coverage of the provision, whereas paragraph 2 establishes the conditions under which the exercise of these rights may be lawfully interfered with and may therefore remain unprotected, that is paragraph 2 defines the boundaries of the protected scope of art. 8 rights. Finally, the wording of art. 8 clearly suggests that paragraph 2 relates to paragraph 1 as the exception to the rule: only exceptionally may the protected scope of art. 8 rights be limited beyond their scope of coverage.

This 'liberal' reading of the structure of art. 8 rights strikes me as being the most obvious. Yet the Convention's organs have not always agreed with it. To begin with, they have affirmed that these rights have not only a negative but also a positive dimension and have interpreted this latter as a single-level structure. Moreover, the Convention's organs have not always respected the two-step structure of art. 8 rights even within the context of the purely negative dimension of these rights. To be sure, the

[26]See also arts 5, 9, 10 or 11. All these provisions have a structure similar to that of art. 8. They all refer in the first place to the coverage of the right or rights they protect and then describe their protected scope from without, that is, they set some conditions under which interference with the exercise of those rights may be considered lawful.

fact that paragraph 2 limits the protected scope of the rights recognised in paragraph 1 has never been questioned. In spite of this, however, in their early case-law the Convention's organs took the following position: first, they accepted the idea that certain external, i.e. non-conceptual, limitations to art. 8 rights could affect the scope of the coverage of these rights as well as their scope of protection, thus blurring the border-line between the scope of both; second, they took the view that limitations to the protected scope of art. 8 rights did not need to be exceptional. These early views, however, had a limited life. In the 1970s, they were revised by the Convention's organs, which finally rejected them. As a result, the initial interpretation of the structure of art. 8 was replaced by the opposite interpretation: the idea that there could be limitations inherent in the recognition of art. 8 rights was rejected, further the limitations to the protected scope of art. 8 rights were regarded as exceptional.

This section will deal with the structure of the right to respect for correspondence in the context of its positive and of its negative dimension. In this latter context, I will concentrate on the change in the position of the Convention's organs dealing, first, with the issue of the 'inherent limitations' and, second, the exceptions provided for by art. 8.2, in as far as the interpretation of the right to respect for correspondence has been thereby affected; subsequently, I will try to place this double change in the context of the general evolution of the case-law of the Convention's organs.

1. The Structure of Art. 8 Rights in their Positive Dimension

The idea that art. 8 might recognise subjective rights with a positive dimension seems to be discarded by the inclusion of the terms "respect" and "interference" in its wording. The term "respect" is used in paragraph 1 to define the coverage of art. 8 rights and denotes an idea of 'refraining from acting'[27]; the term "interference", for its part, is used in paragraph 2 to describe the scope of non-protection of these rights and denotes an idea of active behaviour against the exercise of rights[28]. Thus perfectly coupled, these two words literally suggest that only passive behaviour ("respect") is imposed upon the addressees of art. 8 rights and that only active behaviour ("interference") is exceptionally allowed, hence generally forbidden. As a result, the

[27]Respect: "4.c. To treat with consideration; to refrain from injuring or interfering with; to spare" (*The Oxford English Dictionary*, 2nd Ed. Clarendon Press, Oxford, 1989, Vol. XIII, p. 733)
[28]Interfere: "4.a. (of things) To come into collision or opposition, so as to affect the course of; 4.b. (of persons) To meddle with; to interpose and take part in something, esp. without having the right to do so" (*The Oxford English Dictionary*, Vol. VII, p. 1102)

scope of recognition and the scope of protection of art. 8 rights appears to have the same dimensions. Nevertheless, in spite of the literal meaning of these two terms, the Convention's organs hold the view that the subjective rights recognised in art. 8 also have a positive dimension. The scope of this new dimension of the art. 8 right, and in particular of the right to respect for correspondence, will be studied in detail in the following chapter. For now, I will concentrate on the structure of this dimension.

As was commented on in Section 1, positive subjective rights are recognised with a single-level structure and, as we will now see, art. 8 is not an exception to this rule. In this context, the Convention's organs have declared the existence of positive subjective rights on the basis of a re-interpretation of the term "respect". In particular, they have stated that "there may be positive obligations inherent in an effective respect for private or family life"[29]. The problem is that the Convention's organs have not made a similar re-interpretation of the term "interference", whereby they have broken the symmetry between both terms. As a result, the scope of coverage of art. 8 no longer has the same dimensions as its scope of protection, because the former embraces art. 8 rights both as positive and as negative rights, whereas the latter only embraces them in their negative form. This implies that the protected scope of the right to correspondence is limited beyond its recognition only when it appears as a negative right, that is only when positive interferences with its exercise are at stake. In other words, the art. 8 right to correspondence has a two-level structure only in as far as it is a negative right. As a positive right, its recognition and its protected scope coincide.

The negative consequences of the single-level structure of a right have been discussed in Section 1, where it was also seen that in the context of positive subjective rights these consequences must be considered less serious and even tolerable. I would like to point out now that in the case of art. 8 these consequences have thus far been avoided in practice. Let me explain.

As is known, the exercise of rights with a single-level structure can only be limited at the level of the coverage of these rights, not at a functional level. This means that the scope of art. 8 positive rights, i.e. the scope of a State's positive obligations deriving from them, must be assessed exclusively within the context of art. 8.1[30]. As will be seen in the following chapter, the Contracting Parties have been accorded a wide

[29] *Marckx v. Belgium*, judgment of 13 July 1979, Series A, vol. 31, Par. 31, p. 15; *Airey v. Ireland*, judgment of 9 Oct. 1979, Series A, vol. 32 , Par. 32, p. 17.
[30] In this sense, see *Marckx v. Belgium* judgment, Series A, vol. 31, Par. 31, p. 15; *Airey v. Ireland* judgment, Series A, vol. 132., Par. 32, p. 17; *Van Oosterwijck v. Belgium*, Op. Com. of 1 March 1979, Series B, vol. 36, Par. 52, p. 26.

'margin of appreciation' to set the limits of their own positive obligations. This 'margin of appreciation' is however subject to the ultimate control of the Convention's organs, a control, and this is the interesting point, which they exercise on the basis of the following criterion: "In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual ... In striking this balance the aims mentioned in the second paragraph of Article 8 may be of a certain relevance, although this provision refers in terms only to 'interferences' with the right protected by the first paragraph -in other words is concerned with the negative obligations flowing therefrom"[31]. It thus seems that the criteria which define the functional limits of art. 8 negative rights are also invoked to define the coverage of art. 8 positive rights, so that the negative and the positive obligations of the States arising from art. 8 coincide.

This strong parallel between the negative and the positive dimensions of art. 8 rights shows that the consequences of the single-level structure of the latter have thus far been avoided. In fact, the Convention's organs have relied on this parallel in order to avoid the point that in their positive dimension art. 8 rights have a single-level structure[32] and have also drawn a line here between coverage and protection: whereas the coverage of art. 8 positive rights is limited on the basis of the criterion of responsibility of a State, the scope of protection of these rights is limited by the functional limits contained in art. 8.2. In line with this structure is also the approach of the Convention's organs to the burden of proof. That is, they have ruled that applicants must only show that their rights are not or have not been 'respected' by a State and that the State in question must be held responsible for it, whereas it is for a State to show that the situation complained of is justified on the basis of art. 8.2.

This line of argument has been developed and followed by both the Commission and the Court. The case-law of the Commission is, however, much clearer in this regard. In its decisions on art. 8 positive rights, the Commission usually relies on a distinction between their coverage and their protection[33]; it has even started

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[31] *Rees v. U.K.*, judgment of 17 Oct. 1986, Series A, vol. 106, Par. 37, p. 15; *Gaskin v. U.K.*, judgment of 7 July 1989, Series A, vol. 160, Par. 42, p. 17.

[32] A good example of this is the case of *Powell and Rayner v. U.K.* , judgment of 21 Feb. 1990, Series A, vol. 172. Here, the issue of whether the case involves positive or negative obligations for the State is explicitly considered irrelevant and ignored in the judgment of the Court.

[33] See *Rees v. U.K.*, Op. Com. of 12 Oct. 1984, Series A, vol. 106, pp. 24 et seq.; *W. v. U.K.*, Op. Com. of 4 Dec. 1985, Series A, vol. 121, pp. 44 et seq.; *Gaskin v. U.K.*, Op. Com. of 13 Nov. 1987, Series A, vol. 160, pp. 28 et seq.; *Powell and Rayner v. U.K.*, Op. Com. of 19 Jan. 1989, Series A, vol. 172,. pp. 26 et seq. See also Ap. No. 9310/81, Dec. Adm. Com. of 16 July 1986, 47 *D&R* p. 5; Ap. No. 10153/82, Dec. Adm. Com. of 13 Oct. 1986, 49 *D&R* p. 67; Ap. No. 11366/85, Dec. Adm. Com. of 16 Oct. 1986, 50 *D&R* p. 173; Ap. No. 11468/85, Dec. Adm. Com. of 15 Oct. 1986, 50 *D&R* p.199; Ap. No. 13728/88, Dec. Adm. Com. of 17 May 1990, 65 *D&R* p. 250; Ap. No.

to refer to violations of a State's positive obligations as "interferences", within the meaning of art. 8.2[34]. The Court, on the other hand, has up to now been more careful not to make such explicit distinctions, as if it were trying to keep an appearance of coherence with the single-level structure that such rights theoretically have[35]. On one occasion (which however has remained an isolated case) it has even made the applicants bear the burden of proving that art. 8, taken as a whole, had been violated[36]. Whether or not expressed in more or less explicit terms, the case-law of the Convention's organs has directed towards the harmonisation of the positive and negative rights contained in art. 8 on the assumption that they both had a two-level structure. As a result, the scope of all obligations (positive and negative) that art. 8 imposes upon the Contracting Parties is subject to the functional limits contained in art. 8.2. For the reasons given in Section 1, this line of evolution must be considered beneficial for art. 8 positive rights.

2. The Structure of Art. 8 Rights in their Negative Dimension

2.1 The Question of 'Inherent Limitations'

Initially, the Convention's organs or, more precisely, the Commission[37], stated that the coverage of the art. 8 negative right to respect for correspondence had limitations other than those imposed by its conceptual boundaries. In particular, lawful imprisonment and detention were often regarded as conditions which affected the scope of coverage of the right to the secrecy of telecommunications, rather than their protected scope.

The Commission was initially of the opinion that "the ordinary control of a prisoner's correspondence is to be considered as an inherent feature of

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13756/88, Dec. Adm. Com. of 12 March 1990, 65 *D&R* p. 265; 15817/89, Dec. Adm. Com. of 1 Oct. 1990, 66 *D&R* p. 251.

[34]Ap. No. 9310/81, Dec. Adm. Com. of 16 July 1986, 47 *D&R*, p. 5 at 12;
Ap. No. 13728/88, Dec. Adm. Com. of 17 May 1990, 65 *D&R* p. 250 at 263; Ap. No. 13756/88, Dec. Adm. Com. of 12 March 1990, 65 *D&R* p. 265 at 277; Ap.No. 15817/89, Dec. Adm. Com. of 1 Oct. 1990, 66 *D&R* p. 251 at 255.

[35]Compare, e.g., the judgments to the cases of *X and Y v. The Netherlands* (Series A, vol. 91, Par. 23, p. 11), *Rees v. U.K.* (Series A, vol. 106, Par. 37, p. 15), *W. v. U.K.* (Series A, vol. 121, Par. 60, p. 27), *Gaskin v. U.K.* (Series A, vol. 160, Par. 42, p. 17), *Powell and Rayner* (Series a, vol. 172, Par. 41, p. 18), *Cossey v. U.K.* (Series A, vol. 184, Par. 36, p. 15), with the respective Opinions of the Commission to these cases.

[36]*W. v. U.K.* judgment, Series A, vol. 121, Par. 61, p. 27.

[37]As will be explained below, this early approach to art. 8.2 was mainly developed in the Commission's Decisions of Admissibility.

imprisonment"[38]. Taken alone, this statement does not necessarily imply a limitation to the coverage of the right. The fact that only 'ordinary' or 'normal' control is allowed suggests rather the opposite, that is, that only the protected scope of the right is at stake: the right to correspondence does not seem to automatically disappear in cases of imprisonment; it only yields to 'ordinary' controls. It must only be decided which controls can be deemed 'ordinary' or 'normal', something which one would expect to be decided on the basis of the particular circumstances of the individual case at stake: the circumstances of the prison in question and its security needs should be balanced against the importance accorded to the right to correspondence and the conditions under which it is to be exercised in that particular case. It seems, therefore, that lawful imprisonment could easily have been interpreted as a limitation to the *exercise* of the right to correspondence and hence as a limitation subject to paragraph 2 of art. 8.

In several instances[39], the Commission decided on a prisoner's right to respect for correspondence in line with the above interpretation, since they judged that restrictions to this right were violations of art. 8 (1) and only questioned whether or not they could be justified under art. 8 (2). Most of its decisions, however, did not follow this pattern of reasoning[40]. The reason is that restrictions imposed on prisoners' telecommunications were *consistently* considered to be 'normal', that is, they were consistently justified as being part of a 'normal' or 'ordinary' control. This circumstance encouraged the belief that, more often than not, the deprivation of liberty was thought to impose an automatic limit to the right to respect for correspondence, regardless of any consideration as to the circumstances of the case. In fact, in most cases of lawful deprivation of liberty, this right was plainly not considered to be at stake, hence its violation was not thought to amount to an 'interference'. As a result, imprisonment most often amounted to an inherent limitation of the coverage of the right to respect for correspondence as recognised in art. 8.1; the coverage of this right was

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[38]Ap. No. 2291/64, Dec. Adm. Com. of 1 June 1967, 24 *Coll. Dec.*, p. 34; Ap. No. 2375/64, Dec. Adm. Com. of 7 Feb. 1967, 22 *Coll. Dec.*, p. 47; Ap. No. 2749/66, Final Dec. Adm. Com. of 11 July 1967, 24 *Coll. Dec.*, p. 112; Ap. No. 3717/68, Dec. Adm. Com. of 6 Feb. 1970, 31 *Coll. Dec.*, p. 105; Ap. No. 4144/69, Dec. Adm. Com. 16 March 1970, 33 *Coll. Dec.*, p. 30; Ap. No. 4133/69, Dec. Adm. Com. of 13 July 1970, 36 *Coll. Dec.*, p. 64; Ap. No. 4351/70, Dec. Adm. Com. of 5 Oct. 1970, 36 *Coll. Dec.*, p. 86; Ap. No. 4445/70, Dec. Adm. Com. of 1 Apr. 1970, 37 *Coll. Dec.*, p. 122.

[39]Ap. No. 1983/63, Dec. Adm. Com. of 13 Dec. 1965, *YB* VIII, p. 228, 262; Ap. No. 3717/68, Dec. Adm. Com. of 6 Feb. 1970, 31 *Coll. Dec.*, p. 105; Ap. No. 5265/71, Dec. Adm. Com. of 18 Dec. 1973 (unpublished), *Digest of Strasbourg Case-Law*, Council of Europe, Vol. 3. p. 196.

[40]Ap. No. 2291/64, Dec. Adm. Com. of 1 June 1967, 24 *Coll. Dec.*, p. 34; Ap. No. 2375/64, Dec. Adm. Com. of 7 Feb. 1967, 22 *Coll. Dec.*, p. 47; Ap. No. 2749/66, Final Dec. Adm. Com. of 11 July 1967, 24 *Coll. Dec.*, p. 112; Ap. No. 4144/69, Dec. Adm. Com. of 16 March 1970, 33 *Coll. Dec.*, p. 30; Ap. No. 4133/69, Dec. Adm. Com. of 13 July 1970, 36 *Coll. Dec.*, p. 64; Ap. No. 4351/70, Dec. Adm. Com. of 5 Oct. 1970, 36 *Coll. Dec.*, p. 86; Ap. No. 4445/70, Dec. Adm. Com. of 1 Apr. 1970, 37 *Coll. Dec.*, p. 122.

thus made to coincide with the protected scope of the right to personal freedom under art. 5 of the Convention[41].

As has been mentioned already, the position of the Convention's organs with respect to the issue of 'inherent limitations' changed in the 1970s, when the Court took the view, which it still holds today, that the coverage of the right to respect for correspondence is only limited by its own conceptual boundaries, with no room for inherent limitations. This view was introduced in the context of the freedom to communicate, yet it is also applicable to the secrecy of telecommunications. As a result, imprisonment has no longer been considered to affect the scope of recognition of this right. Rather, deprivations of liberty which are lawful under art. 5 are in a functional relationship with art. 8 rights: the former may be a limit to the exercise of the latter, provided that art. 8.2 requirements are met[42].

2.2 The Exceptional Nature of the Restrictions Contained in Art. 8. 2

The initial interpretation of the role of art. 8.2 was based on two points. First, the Commission judged[43] that the Contracting Parties had a *right* to impose the limitations contained in art. 8.2, so long, of course, as the conditions imposed in that provision were respected. The Contracting Parties were thus granted a right to limit the rights recognised in art. 8.1, that is they enjoyed a right which prevailed over the rights recognised in art. 8.1. On the basis of these premises, art. 8.2 could no longer be held exceptional, since the possibility to interfere with art. 8.1 rights was a right itself and thus had to be the object of a wide and favourable interpretation. A significant consequence of this is the presumption of lawfulness that the Contracting Parties enjoyed in the exercise of their 'right to interference', since national authorities did not need to prove that limitations of art. 8 rights were lawful; their lawfulness was presumed. The burden of arguing to the contrary was relegated to the victims of such limitations, who were obliged to show not only that an art. 8 right was at stake -which included showing the absence of inherent limitations- and had been restricted in its exercise, but also that this restriction had not complied with the conditions of art. 8.2 of

[41]Art. 5.1: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (...)"
[42]See *Golder v. U.K.*, judgment of 21st Feb. 1975, Series A, vol. 16, Par. 44-45, p. 21. For more recent cases, see, e.g., Chester v. U.K., Report Com. of 17 May 1990, 68 *D&R* p. 65 at 79.
[43]Ap. No. 1628/62, Dec. Adm. Com. of 12 Dec. 1963, 12 *Coll. Dec.*, p. 68. Ap. No. 2413/65, Dec. Adm. Com. of 16 Dec.1966, 23 *Coll. Dec.*, p. 9.

the Convention[44]. Victims of art. 8 limitations thus bore the burden of reasoning (the Commission calls it the 'burden of proof') not only within the scope of art. 8.1 but also within the scope of art. 8.2.

Second, the Commission adopted a rather detached attitude with respect to the interpretation of art. 8.2, in the sense that it considered the interpretation of art. 8.2 to be for the most part a matter of national concern. Accordingly, the Contracting Parties were granted "a certain margin of appreciation in determining the limits that may be placed on the exercise of the rights in question"[45]. This, of course, did not amount to an absolute absence of control by the Convention's organs, yet the Convention's organs showed great respect for that margin of appreciation and restricted their control over it to a minimum[46]. As a consequence, the national authorities did not only enjoy the right to limit the exercise of the rights contained in art. 8.1; in addition to this, they enjoyed a significant margin in the interpretation of the very requirements that they had to fulfil when exercising their right. In other words, the Contracting Parties could, to a great extent, settle the scope of their right to limit art. 8.1 rights.

As a result of points one and two above, the protected scope of the rights recognised in art. 8.1 was, initially, minimised dramatically. In the 1970s, however, the Convention's organs replaced their original views on art. 8.2 by their complete opposites (which are still held today): first, the Contracting Parties are no longer thought to have a *right* to interfere with art. 8 rights. The only rights arising from art. 8 are those recognised in its first paragraph. It follows that only art. 8.1 rights have to be interpreted favourably and that the possibility (regulated in art. 8.2) that restrictions be imposed on their exercise must, on the contrary, be the object of a narrow interpretation and an exceptional application[47]. In this context, the "presumption of lawfulness" now

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[44]Ibid. See also Ap. No. 793/60, Dec. Adm. Com. of 21 Dec. 1960, 5 *Coll. Dec.*, p. 3. Ap. No. 1307/61. Dec. Adm. Com. of 4 Oct. 1962, 9 *Coll. Dec.*, p. 56. Ap. No. 4004/69, Dec. Adm. Com. of 16 March 1970, 33 *Coll. Dec.*, p. 21. Ap. No. 4623/70, Partial Dec. Adm. Com of 19 July 1971, 39 *Coll. Dec.*, p.65. Ap. No. 4622/70, Dec. Adm. Com. of 22 March 1972, 40 *Coll. Dec.*, p. 18. Ap. No. 4960/71, Dec. Adm. Com. of 19 July 1972, 42 *Coll. Dec.*, p. 57; Ap. No. 12976/87, Dec. Adm. Com. of 9 Oct. 1991, 71 *D&R* p. 45 at 48.

[45]Ap. No. 1628/62, 12 *Coll. Dec.* p. 68; Ap. No. 2413/65, 23 *Coll. Dec.*, p. 9. See also Ap. No. 4623/70, 39 *Coll. Dec.* p. 23 and Ap. No. 4960/71, 42 *Coll. Dec.* p. 57.

[46]Ap. No. 1449/62, Dec. Adm. Com. of 16 Jan.1962, 10 *Coll. Dec.*, p. 1 at 3; Ap. No. 1329/62, Dec. Adm. Com. of 7 May 1962, 9 *Coll. Dec.*, p. 28 at 32; Ap, No 2648/65, Dec. Adm. Com. of 6 Feb. 68, 26 *Coll. Dec.*, p. 31; Ap. No. 2699/65, Dec. Adm. Com. of 1 Apr. 1968, 26 *Coll. Dec.*, p. 33 at 39; Ap. No. 2792/66, Dec. Adm. Com. of 6 Oct.1966, 21 *Coll. Dec.*, p. 48 at 50; Ap. No. 2822/66, Dec. Adm. Com. of 6 Feb. 1968, *YB* XI p. 406 at 410; Ap. No. 4284/69, Dec. Adm. Com. of 1 Feb. 71, 37 *Coll. Dec.*, p. 74; Ap. No. 4396/70, Dec. Adm. Com. of 14 Dec. 1970, 36 *Coll. Dec.*, p. 88 at 89; Ap. No. 5132/71, Dec. Adm. Com. of 12 July.1972, 43 *Coll. Dec.*, p. 57 at 61; Ap. No. 5486/72, Dec. Adm. Com. of 9 July 1973, 44 *Coll. Dec.*, p. 128 at 129.

[47]See the judgment to *Klass and others v. Germany*, Series A, vol. 28, Par. 42, p. 21; see also, e.g., *Funke v. France*, *Crémieux v. France* and *Miailhe v. France*, judgments of 25 Feb. 1993, Series A, vol. 256, Par. 55, p. 24, Par. 38, p. 62 and Par. 36, p. 89, respectively.

affects the exercise of art. 8.1 rights, that is applicants no longer have to provide evidence that the proscribed interferences do not respect the Convention's requirements. They must only put forward what they believe is an interference with one of the rights contained in art. 8[48]. Once the Convention's organs are satisfied that art. 8.1 was violated, the national authorities in question have to prove that such a violation was nonetheless justified under art. 8.2[49].

Second, the Convention's organs have accorded themselves a more important role in the interpretation of art. 8.2. Of course, the Contracting Parties still enjoy some 'margin of appreciation' in the reading art. 8.2, yet this margin is less wide and less flexible than it used to be. Restrictions of the Convention's rights are more and more subject to the increasing number of rules and interpretative standards set out by the Convention's organs and must submit to the control that the Convention's organs exert over the way such rules and standards are applied; moreover, this control seems ever more rigourous[50]. Thus, although both the Contracting Parties and the Convention's organs still participate in the interpretation of art. 8.2, there has been a shift in roles: the latter have taken over the guiding role in the interpretative process.

Studying art. 8.2 and the particular rules and standards the Convention's organs have given for its interpretation will be amongst the objectives of chapter 5. Let me however jump ahead so that the extent to which art. 8.2 ensures the exceptional nature of the lawful restrictions on art. 8 rights can be best appreciated. According to the Convention's organs, art. 8.2 is to be interpreted on the basis of a principle of proportionality, which requires a case-by-case analysis of whether restrictions of the right to correspondence and the aim pursued by these restrictions are being kept in proportion. In principle, such a test of proportionality does not grant an advantageous position to either of the elements confronted, that is, both the right and the aim which are being balanced against each other depart from a position of equality so that neither the protection of the one nor the pursuance of the other stands as either the rule or the

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[48]Thus, the Commission can declare an application inadmissible if it "cannot find any substantiation in support of [the applicant's] contention" that there has been an infringement upon his right to the secrecy of telecommunications (*T.V. v. Finland*, Ap. No. 21780/93, Dec. Adm. Com. of 2 March 1994, 76-A *D&R* p. 140 at 155).

[49]The cases mentioned in the previous footnotes are clear examples of the new allocation of the burden of reasoning; see also, e.g., *Keegan v. Ireland*, judgment of 26 May 1994, Series A, vol. 290, Par. 55, p. 21.

[50]This point of view is shared by R.St.J. Macdonald, "The Margin of Appreciation", *The European System for the Protection of Human Rights*, Martinus Nijhoff Publishers, Dordrecht-Boston-London, p. 83 at 84: "[I]t is apparent that the Court is endeavouring to develop a more rigourous application of its guidelines, with the result that there has probably been a narrowing of an originally expansive concept of the margin of appreciation". The issue of the margin of appreciation will also be the object of attention in chapter 5.

exception. Nevertheless, the Convention's organs have tended to favour the position of the right to respect for correspondence and, as was noted above, have subjected restrictions to this right to a narrow interpretation and an exceptional application. A good, probably the best, indicator of this is that, as part of the proportionality test, the Convention's organs have imposed the requirement that restrictions prove 'necessary', that is, they have imposed the requirement that any restrictions must prove to be the least intrusive means to achieve the pursued aims. In other words, limitations on the right to respect for correspondence have been considered disproportionate with their aims, hence unlawful, if these aims could be equally achieved by other means which are less intrusive upon that right -and no more intrusive upon any other[51]. The requirement that restrictions to art. 8 rights be 'necessary' thus accounts for the exceptional nature of these restrictions.

2.3 The Historical Background

The case law of the Convention's organs on the structure of art. 8 and the exceptions in the context of lawful interferences with the exercise of art. 8.1 rights has suffered a radical shift. Initially, the two-level structure of art. 8 was blurred in the context of imprisonment, since this was regarded as an 'inherent limitation' to the coverage of the provision; additionally, restrictions to the exercise of art. 8 rights were not regarded as exceptional. Since the 1970s, however, the Convention's organs have clearly held both to the two-level structure of art. 8 and to the exceptional nature of restrictions to the exercise of the rights recognised in its paragraph 1, thus complying with a more liberal approach to fundamental rights as rights of defence against the State. This shift can be better understood if it is seen as part of a more general change in the policy of the Convention's organs concerning the role of the Convention and the position of the Member States.

The initial approach to these two issues was developed by the Commission in its Decisions of Admissibility. In fact, until the 1970s the Commission considered all applications concerning the right to respect for correspondence inadmissible, hence neither the Committee of Ministers nor the Court were given a chance to express their views on matters concerning this right. This period of self-granted freedom was used by the Commission to impose its own views, which were strongly influenced by the

[51]Thus, the "prior ventilation restriction" -contained in some of the Standing Orders regulating the management of prisons in the United States- has been considered disproportionate since its aims could also be attained with a "simultaneous ventilation rule" (case of Silver and others, Op. Com. Par. 302, p. 78. See also Par. 314 and 340-341, pp. 80 and 84).

idea that the powers of national authorities should be respected as much as possible. The Commission's prime concern was to guarantee wide scope of action to the Contracting Parties, by way of respecting their discretion and minimising the duties inflicted upon them by the Convention. This tendency inevitably resulted in the position of the national authorities vis-à-vis the holders of Convention rights becoming over strong. The case of the right to respect for correspondence is a telling example of this. Such a result was not necessarily intended by the Commission; it was, however, tolerated.

The present approach to the structure of art. 8 came as the result of a change in the general policy of the Commission. The origins of the approach date back to the early 1970s, when a case involving the violation of the right to correspondence was, for the first time, admitted by the Commission and subsequently submitted to the Court. The case or, rather, the cases in question were the so-called "Vagrancy" cases[52]. The double circumstance of their admission and subsequent submission to the Court are evidence of a more open approach of the Commission towards the protection of the rights recognised in the Convention[53]. This is confirmed in the Opinion of the Commission in this case, where it denied that confinement for vagrancy entailed the deprivation of the right to respect for correspondence, that is, that it amounted to an inherent limitation of that right. For its part, the Court did not consider that art. 8 had been violated; yet, it solved the question of its violation within the framework of art. 8.2. Therefore, although neither the Commission nor the Court spent much time over the issues concerning art. 8, the "Vagrancy" cases are at the origin of the shift in doctrine concerning the article's structure[54]. Some years later, the *Golder* case gave the Commission and the Court an opportunity to consolidate this new approach and to develop its implications further. Since then, this new approach has been consistently followed by all the Convention's organs[55].

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[52]*De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A, vol. 12.

[53]It has been remarked that "[a]u depart, en effet, la Commission a eu tendance à préférer porter les affaires devant le Comité des ministres, dont elle avait remarqué qu'il suivait pratiquement toujours l'avis qu'elle lui donnait. Sensible aux critiques que cette attitude lui valut, la Commission redressa cette situation en saisissant davantage la Cour européenne et moins systematiquement le Comité des ministres" (Jean-Louis Burban, *Le Conseil de L'Europe*. Presses Universitaires de France. Collection "Que sais-je?". 1985, p.73). An example of this change of attitude is the fact that, from the Vagrancy cases onwards, all the cases on the right to correspondence that have arrived at the Court have been submitted to it by the Commission -with the only exception of the Golder case, submitted by the Government of the United Kingdom.

[54]It is also significant that, in this case, individuals were for the first time allowed to be a party to the procedure at the Court, together with the Government involved and the Commission (Jean-Louis Burban, *Le Conseil de L'Europe*,.at 75).

[55]*Golder v. U.K.*, Op. Com. of 1 June 1973, Series B, vol. 16 Par. 122, p. 61; judgment of 21 Feb. 1975, Series A, vol. 12, Par. 44-45, p.21. *Klass and others v. Germany*, judgment of 6 Sep. 1978, Series A, vol. 28, Par. 42, p. 21. *X v. U.K.* Ap. No. 7215/75, Report by the Commission of 12 Oct. 1978, 19 *D&R*, Par. 127, p. 73. *Dudgeon v. U.K.*, Op. Com. of 13 March 1980, Series B Vol. 40

Section 3: Germany

Introduction

Article 10:
"1. Privacy of correspondence, posts and telecommunications is inviolable.
2. Restrictions may only be ordered pursuant to a law. Where a restriction serves to protect the free democratic basic order or the existence or security of the Federation or a *Land* the law may stipulate that the person affected shall not be informed of such restriction and that recourse to the courts shall be replaced by a review of the case by bodies and subsidiary bodies appointed by parliament."[56]

Art. 10 of the German Basic Law is another clear example of a two-step approach to the structure of the right to the secrecy of telecommunications. To begin with, this provision uncontroversially recognises the secrecy of telecommunications as a negative right of defence against the State, yet it is not at all clear whether this right also has a positive subjective dimension. The German Constitutional Court has not yet had a chance to decide on the issue; moreover, it has not yet given a clear answer to the more general question whether German fundamental rights have a positive subjective dimension at all. All this will be discussed in detail in the next chapter. At this point I would just like to stress that the two-level structure of the right to the secrecy of telecommunications need not (or not yet) be questioned on the grounds that this right has a positive subjective dimension.

In addition, art. 10 is divided into two paragraphs, the first one limits the coverage of art. 10 rights and the second one the scope of its protection. To be more precise, art. 10.1 recognises the right to the secrecy of the postal service, letters and telecommunications, whereas art. 10.2 sets the conditions under which this right may go unprotected, that is, it limits from outside the protected scope of this right.

Par. 97-98, p. 36; judgment of 22 Oct. 1981, Series A vol. 45, Par. 40-41, 42 et seq., pp. 18-19. *Malone v. U.K.*, Op. Com. of 17 Dec. 1982, Series B, vol. 67, Par. 115, pp. 46-47; judgment of 2 Aug. 1984, Series A, vol. 82, Par. 64-65, pp. 30-31. Some of the clearest statements made by the Convention's organs confirming art. 8 as a liberal provision with a two-step structure, with all the implications analysed above, were made within the context of art. 10 (see the *Handyside case v. U.K.* Op. Com. of 33 Sep. 1975, Series B, vol. 22, Par. 137-138, p.43; Judgment of 7 Dec. 1976, Series A, vol. 24, Par. 43, p. 21. The *Sunday Times case v. U.K.* Op. Com. 18 May 1977, Series B, vol. 28, par. 177, p. 60; Judgment of 27 Oct. 1978, Series A, vol. 30). The apparent parallelism in the structure of articles 8 and 10 render these statements relevant also for the former.

[56]The translation of this and other provisions of the German Basic Law in this thesis has been taken from the collection *Constitutions of the Countries of the World*, ed. by Albert P. Blaustein & Gisbert H. Flanz, Oceana Publications Inc., Dobbs Ferry, New York. Issued August 1994.

The following paragraphs will analyse the extent to which this structure underlies the decisions of the German Constitutional Court on the right to the secrecy of telecommunications. This will involve a study of the way the Constitutional Court has approached, first, the structure of this right and, second, the issue of the exceptional nature of the limitations imposed on its protected scope on the basis of art. 10.2.

1. The Structure of the Right to the Secrecy of Telecommunications

Even though a two-step structure is apparent in the wording of art. 10, several commentators have not read this provision in such a way. A two-step structure has first of all been questioned by commentators who take the view that no distinction can be drawn between the scope of coverage and the scope of protection of a right, as was explained in the introduction to this chapter. Second, the structure of art. 10 has been the object of less radical attacks: it has often been argued[57] that the coverage of this provision is subject to certain 'inherent limitations' ('immanente Schranken'), that is to limitations which, even if they go beyond the mere conceptual boundaries of art. 10 rights, do not act upon the protected scope of this right but upon its coverage. Such limitations have been identified, in particular, in the control over telecommunications which is implicit in and absolutely necessary for the normal functioning of telecommunication services (*betriebsbedingte* or *dienstlich notwendige Schranken*[58]). Such control has been interpreted as including, e.g., taking notice of the details of the telecommunication, checking that the norms regulating telecommunications are duly respected or even opening closed letters which are to be sent back to the sender if the sender could not be identifiable otherwise[59]. In relation to the above instances of control, art. 10 right has simply been considered non existent.

Such views have not been accepted by the German Constitutional Court. To begin with, the Court has stated that all constitutional rights, in general, and the right to the secrecy of telecommunications, in particular, are recognised in two steps, that is that the Basic Law distinguishes between their recognition and their protected scope[60]. Moreover, the Court has gone a step further to affirm that a two-step structure of fundamental rights implies that these may not be subject to 'inherent limitations', since in its view the coverage of fundamental rights is exclusively limited by their conceptual

[57]See, e.g., Maunz/Dürig, *GG-Kommentar*, Art. 10, Rdnr. 66; Badura, *Kommentar zum Bonner Grundgesetz*, Art. 10, Rdnr. 49; OLG Köln, (1970) *NJW*, p. 1857; BVewGE 32, 129 (1932), (1969) *NJW*, 1637; BVerwGE v. 15. 3. 1984, (1984) *NJW*, p. 2112.
[58]See Maunz/Dürig and Badura, *Kommentar zum Bonner Grundgesetz*, Art. 10, Rdnr. 49.
[59]§ 61 PostO.
[60]See BVerfGE 33, 1 at 10-11; 85, 386 at 397.

boundaries. Any limitation going beyond these conceptual boundaries can only be of a functional character, that is it can only be related to the exercise of rights and affect their scope of protection.

It ought however to be noted that in the context of telecommunications the Court has not yet confronted certain situations, generally referred to as 'inherent limitations' but which actually imply conceptual restrictions to the coverage of art. 10 rights. I am referring to instances of control over circumstances surrounding an act of telecommunication[61] when these circumstances are not secret. This is for example the case with the control that postal employees exercise over telecommunications when they take notice of the details of the communicating parties, in as far these details lie open to their view. Although the Court has not yet had to decide on any such instance of control, it seems safe to affirm that they do not fall under the coverage of art. 10 rights for the simple reason that this right covers the *secrecy* of telecommunications and that here no secrecy is involved.

At the theoretical level, the view that art. 10 rights have a two-level structure has been held by the Constitutional Court with clarity and determination. This position is also confirmed by the Court's implicitly allocating the 'burden of reasoning' in art. 10 cases: the claimant is expected to argue that there has been an infringement upon the rights recognised in art. 10.1 whereas the state is expected to argue that this infringement was justified under art. 10.2. Nevertheless, the Court has not always been consistent in these theoretical views in finding the solution to concrete cases, since it has sometimes imposed 'inherent limitations' to the right to the secrecy of telecommunications. The following paragraphs will be devoted to the analysis of the decisions where these inconsistencies occur. These decisions will be divided into two groups: attention will be focused, first, on cases where the imposition of 'inherent limitations' to the secrecy of telecommunications is merely implicit in the reasoning of the Court and, second, on cases where 'inherent limitations' to this right have been imposed in explicit terms.

[61] As will be seen in the next chapter, these surrounding circumstances are covered within the scope of art. 10 rights to the secrecy of the post and to the secrecy of telecommunications.

1.1 An Implicit 'Inherent Limitation': the Condition of Imprisonment

The German Constitutional Court has plainly and systematically denied the right to the secrecy of telecommunications to prisoners[62]. In fact, in most cases involving the opening and stoppage of letters sent by or addressed to prisoners, the Constitutional Court has not even considered that art. 10 of the Basic Law could be at stake. Much more startling is the fact that, in most such cases, a violation of art. 10 rights has not been claimed by the applicants. Both Court and applicants have preferred to focus their attention on other constitutional rights, namely the freedom to engage in telecommunications (protected as part of the freedom of speech -art. 5), the right to receive private telecommunications (protected as part of the right to the free development of one's personality -art. 2). Even the right of prisoners to the secrecy of their telecommunications with their partners has been claimed in this context, although this right has been regarded as part of the privacy of marriage, which the Court conceives as an aspect of the right to the development of one's personality (art. 2).

It must be pointed out, however, that not all the telecommunications of prisoners have been placed beyond the coverage of art. 10. There is one exception to this rule (that is, one case in which imprisonment is not an 'inherent limitation' of art. 10), namely, the case of telecommunications between prisoners and their lawyers, as long as the former are not convicted for crimes connected with terrorism, as listed in § 129a of the German Criminal Code. The secrecy of such privileged communications is the object of statutory protection[63]; yet, the relevance of this case for present purposes lies not so much in the fact that such privileged communications are actually protected but in the fact that they have been considered to be within the coverage of art. 10 of the Basic Law[64].

With respect to prisoners, the right to the secrecy of telecommunications thus only has a two-step structure in the case of telecommunications between prisoners and their lawyers. Ignoring this case, the Court regards the condition of lawful imprisonment so inherent a limitation to the coverage of art. 10 right that this right is generally not even thought to be at stake in this context.

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[62]See BVerfGE 34, 384 at 400 et seq.; 35, 35 at 39 et seq.; 35, 311 at 315 et seq; 42, 234 at 236; 56, 170 at 177. All these cases concern prisoners on remand (*Untersuchungshaft*) but they could very well concern also convicted prisoners.

[63]§ 148 of the *Strafprozeßordnung* (StPO) for prisoners on remand and § 29 of the *Strafvollzugsgesetz* (StVollzG) for written telecommunications of convicted prisoners. For a detailed analysis of this issue, see chapter 5 below.

[64]See BGHSt 36, 205 esp. 207.

1.2 'Inherent Limitations' Explicitly Admitted

On two occasions, the Constitutional Court has explicitly subjected art. 10 rights to 'inherent limitations'. Even more than the implicit inherent limitations analysed above, the decisions to be analysed now bring to light the contradiction between theory and practice in the position of the Court on this issue. This contradiction appears so much more startling since, at the theoretical level, the existence of 'inherent limitations' to fundamental rights was rejected even in the very decisions where such limitations were actually applied. In order to make some sense of such inconsistencies, it is imperative to pay attention to the particular circumstances of the two cases under consideration.

In the first one of these cases, the correspondence of the applicant, a convicted prisoner, had been opened and censored on the mere basis of a norm which lacked legal force[65]. In the second case, the applicant had been accused of telephone harassment, something which had been made possible by the surveillance of the circumstances surrounding the calls received by the person who had complained of harassment; the surveillance had been carried out by the public telephone service (*deutsche Bundespost*) upon request of the person harassed, but lacked any legal basis[66]. Despite their very different factual circumstances, the legal circumstances of these two cases are nearly identical. Both of them concerned the kind of restrictions to the secrecy of telecommunications that tend to be regarded as 'inherent limitations', i.e. restrictions imposed either upon convicted prisoners or by the normal functioning of the public telecommunication service. Additionally, in both of these cases the Constitutional Court was confronted with restrictions which lacked any legal basis, since, at the time they were adopted, the corresponding law had not yet been enacted; in other words, in both cases the restrictive measures in question violated art. 10.2.1, which subjects them to a 'reserve of law' (*Gesetzvorbehalt*)[67]. Given these characteristics, the cases at stake admitted only two possible solutions: either the limitations in question were considered

[65]BVerfGE 33, 1. The norm in question was Nr. 153 Abs. 1 of the *Dienst- und Vollzugsordnung* of 1 Dec. 1961.

[66]BVerfGE 85, 386.

[67]The missing legal provisions were subsequently enacted as, respectively, the *Strafvollzugsgesetz* (16th of March 1976) and § 30 of the *Postverfassungsgesetz* (8th of June 1989), developed by the *TELEKOM-Datenschutzverordnung* (24th of June 1991). It ought to be noted that the first law sets the basis for restrictions not only of the right of convicted prisoners to the secrecy of telecommunications, but of all their rights. Not surprisingly, before the enactment of this law, the Constitutional Court faced cases similar to the one under consideration (that is, to BVerfGE 33, 1) but dealing with different rights of convicted prisoners, cases which were all dealt with in similar terms (see BVerfGE 40, 276; 41, 329; 42, 229).

unconstitutional, i.e. against art. 10.2.1, or they were considered inherent to the coverage of art. 10 rights.

Neither of these two solutions was accepted by the Constitutional Court. On the one hand, the Court denied that the measures at stake could be considered instances of inherent limitations; moreover, as advanced above, the Court took this chance to explicitly reject the theory that fundamental rights can be subject to inherent limitations at all. On the other hand, the Court subsequently decided that art. 10.2.1 had not been violated. Its point of departure in this respect was that the requirement that restrictions on art. 10 rights have a legal basis can be dispensed with for the sake of protecting more valuable interests. It reasoned as follows: nothing in the German Basic Law suggests that the law-maker had a duty to enact the legislation in question immediately after the Basic Law was enacted; on the contrary, it continued, it is much more reasonable to conclude that the law-maker was accorded a certain amount of time to this end. In some cases, should the circumstances demand it, this lapse of time need not be considered expired. Nonetheless, the Court admitted that the temporal margin granted to the law-maker should not extend for ever and pointed out that it is the duty of the law-maker to enact the legislation in question as soon as possible[68]; in the case dealing with the secrecy of correspondence of convicted prisoners, the Court even gave the law-maker a short dead-line -the end of the running legislative period- to provide an adequate law[69].

Thus far, however debatable these decisions might be, nothing in the reasoning of the Constitutional Court indicates that it imposed 'inherent limitation' to the coverage of art. 10. Its reasoning, however, went a step further still. The Court seems to have taken this step simply because it felt ill at ease about disregarding the wording of the Basic Law and needed to offer some dogmatic justification for its position. Guided by this feeling the Court continued to argue that, after all, the limitations in question were not at all to be judged according to art. 10.2 standards; for one thing: such limitations did not even amount to a violation of art. 10.1. The Constitutional Court thus admitted that the exercise of art. 10 had been interfered with and that this was unconstitutional on the basis of art. 10.2; yet, in order to justify that the interference in question should be upheld, it reasoned within the scope of coverage of art. 10. In other words, the Court justified the interference by way of labelling it as 'inherent limitation'.

[68]BVerfGE 85, 386 at 402.
[69]BVerfGE 33, 1 at 14.

Incidentally, note that this last step has been taken by the Court only in the two cases under study, but not in other cases (cases which concern articles other than art. 10) where similar judgments have been made in the context of violations of a 'reserve of law'[70]. In all these other cases, the Court simply argued that, given certain circumstances, compliance with the 'reserve-of-law' requirement may be transitorily exempted. Hence, its reasoning remained bounded within the scope of protection of the rights in question; the two-step structure of these rights thus remained untouched. This difference in treatment can be explained by the fact that, as was mentioned above, the two cases under consideration concerned restrictions that tend to be regarded as 'inherent limitations', i.e. restrictions to the secrecy of telecommunications imposed either upon convicted prisoners or by the normal functioning of the public telecommunication service. In these cases it thus seemed easy for the Court to rely on the doctrine of the 'inherent limitations' as a way to justify that lawless restrictions to the secrecy of telecommunications could be upheld. It is however regrettable that it did so. For the doctrine of 'inherent limitations' has not helped to justify the Court's decisions but has merely increased their lack of dogmatic rigour and has additionally raised the problems that such limitations entail.

One should, however, bear in mind that, as has been repeatedly noted, at the theoretical level the Constitutional Court has never defended the existence of 'inherent limitations': on the contrary, it has openly rejected it. In practice it has made explicit use of inherent limitations not because it approves of them, but because, and only insofar as, these limitations appeared as a useful and dogmatically neat way to justify the constitutionality of lawless restrictions on art. 10 rights, that is of restrictions that would be unconstitutional under art. 10.2. Not surprisingly, the Court has sought to minimise the impact of the admission of 'inherent limitations'. In this way, it has held that lawless restrictions may not be imposed automatically; they are subject to all the other requirements that functional limitations of rights must fulfil (art. 19.2; principle of proportionality), the 'reserve of law' being the only exception. Moreover, in one of the two cases the Court ruled that the authorities that carry out the restriction bear the burden of reasoning (the Court calls it the 'burden of proving') that these requirements have been fulfilled[71]. Yet in the other case the Constitutional Court made the victims of a lawless limitation bear the burden of reasoning that the limitation in question could not be justified as being inherent, thereby complying with the rationale of 'inherent limitations'[72].

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[70]See BVerfGE 33, 303 at 347-348; 41, 251 at 267; 45, 400 at 420; 48, 29 at 38.
[71]See for all BVerfGE 33, 1 at 13-14.
[72]See BVerfGE 85, 386 at 402.

We can now summarise the position of the Constitutional Court vis-à-vis the structure of the right to the secrecy of telecommunications. The Court takes the view that fundamental rights in general and the right to the secrecy of telecommunications in particular have a two-level structure and theoretically rejects any sign of a single level structure, namely that there can be 'inherent limitations' to those rights. Nevertheless, in practice the Court has imposed 'inherent limitations' to the right to the secrecy of telecommunications in two particular types of cases, namely in the context of lawful imprisonment and in the context of restrictions to the secrecy of telecommunications imposed without a legal basis. This circumstance however has not altered the Court's theoretical views on the matter. In cases of lawless restrictions to the secrecy of telecommunications, the Court has relied on the 'inherent-limitation' doctrine for purely instrumental purposes, that is in order to justify its upholding of such lawless restrictions. In cases of imprisonment, the imposition of 'inherent limitations' is a consequence of the thoughtless automatism with which surveillance of prisoners' telecommunications is justified. This is confirmed by the fact that when the Court has been made to consider the issue more closely it has decided against considering imprisonment an 'inherent limitation': the Court has for example ruled that interference with prisoners' telecommunications must comply with the reserve-of-law requirement If here it has nevertheless applied the 'inherent-limitation' theory it has been for the instrumental reasons pointed out above.

Let me now go on to the second element of this analysis, namely to the issue whether infringements upon the right to the secrecy of telecommunications have been considered exceptional by the Constitutional Court.

2. The Exceptional Nature of Restrictions Contained in Art. 10.2

As was pointed out in the introduction to this chapter, a two-step structure of fundamental rights generally implies that restrictions to the protected scope of these rights must be exceptional. The requirements these restrictions must comply with must thus be subject to strict interpretation, so that fundamental rights can enjoy as wide a protected scope as possible. In the case of the secrecy of telecommunications, however, and despite the clarity of its two-step structure, the wording of art. 10 does not offer any indication as to the exceptional nature of restrictions to their exercise: art. 10.2, in fact, merely requires that restrictions to that right be made pursuant to a law. Grounds for their exceptional nature must thus be sought elsewhere.

The Basic Law offers some basis to sustain the exceptional nature of limitations of fundamental rights, namely the two substantive limits such limitations are subject to: [1] the rule contained in art. 19.2 of the Basic Law that restrictions on fundamental rights may not infringe their 'essential content' (*Wesensgehaltgarantie*) and [2] the -implicit- constitutional principle that such restrictions must be reasonable (*Verhältnismäßigkeitsprinzip*). Both these substantive limits will be studied in detail in chapter 5. The following paragraphs will comment on them only in as far as it proves relevant to our present purposes. Let us deal with the first point first.

[1] Art. 19.2 of the Basic Law seems to take a step towards asserting the exceptional nature of restrictions on fundamental rights by way of setting an absolute limit to the restricting activity of the law-maker, so that restrictions can only be held constitutional in as far as they do not overstep such a limit. In order fully to appreciate the extent to which this area of absolute protection accounts for the exceptional nature of restrictions to rights, one should consider how this area of absolute protection is interpreted, in particular whether it is interpreted in more or less flexible terms.

In this context, it ought to be noted that the Constitutional Court has not taken it upon itself to develop a consistent doctrine on the essential content of individual fundamental rights. The Court has simply decided, on a case-by-case basis, whether or not a particular restriction amounted to a violation of the essential content of the right at stake and has avoided any more general statements. As will be explained in chapter 5, this rule used to find an exception in the general right of personality recognised in art. 2.1 when the Court used to divide its object into three spheres: a sphere of intimacy or total seclusion from society, a sphere of privacy wherein society was allowed certain participation and a sphere of personality which is developed within society (all this was explained in chapter 1); of these three, the sphere of intimacy used to be regarded as the essential content of the right of personality[73]. What matters at this point is that even this area of absolute protection used to be the object of strict interpretation, so that it was never considered to be at stake[74]. Even in all other instances, that is in instances where the essential content has been approached on a case-by-case basis, the Court has hardly ever considered that the essential content of the right at issue has been infringed

[73]See, e.g., BVerfGE 6, 32 at 41; 6, 389 at 433; 27, 1 at 6; 27, 344 at 350; 32, 373 at 379; 34, 238 at 245; 35, 35 at 39; 35, 202 at 220. See also G. Herbert, "Der Wesensgehalt der Grundrechte" (1985) *EuGRZ*, 321 at 327.
[74]See, e.g., BVerfGE 6, 389 at 433; 27, 1 at 7; 27, 344 at 351; 32, 373 at 379; 34, 238 at 245; 35, 35 at 39; 35, 202 at 220.

upon[75]. This is also so in the context of the secrecy of telecommunications. Moreover, in the context of this right the Court has never even thought it necessary to raise the issue of the violation of its essential content. It thus seems that the 'essential content' of fundamental rights cannot be regarded as a basis upon which the exceptional nature of limitations to their exercise can be sustained.

[2] Let us now turn our attention to the principle of reasonableness. This principle consists of three conditions, namely that restrictions on fundamental rights be 'suitable' (*geeignet)* to achieve their aim, 'necessary' (*erforderlich*) to the achievement of that aim and 'proportionate' (*verhältnißmäßig im engeren Sinne*) to the aim they want to achieve. The characteristics of these conditions will be carefully studied in chapter 5. Yet some of these characteristics will be mentioned here, since they provide an indication of the extent to which the principle of reasonableness is a basis for the exceptional nature of restrictions. In the following paragraphs it will be argued that the conditions of proportionality and of necessity offer such a basis.

The condition of 'suitability' taken by itself, does not imply that restrictions upon fundamental rights must be exceptional. A limitation is 'suitable' if it is appropriate to achieve the aim that justifies it, so that 'suitability' is merely intended to avoid arbitrariness in the imposition of restrictions on rights. Moreover, the Constitutional Court tends to interpret this requirement in rather flexible terms, that is in terms which tend to favour the restricting task of the law-maker. It has for example ruled that in order to be suitable a limitation need not achieve its aim completely: it suffices that it achieves it *partially*; it does not even need to actually achieve it at all: it suffices that it can *potentially* achieve it; moreover, when judging on the suitability of limitations the Court accords much importance to the subjective point of view of the law-maker.

The condition of proportionality implies a certain sense of the exceptional nature of restrictions, though of a very limited scope. This condition aims at keeping a balance between the restriction of a fundamental right and the interest that this restriction pursues. In this respect, it imposes three requirements upon the interest. First of all proportionality controls the selection of this interest (and this is the only condition which does), that is, it decides whether a particular interest may justify a restriction to a particular fundamental right. In particular it requires (1) that the interest in question be legitimate -that it be not unconstitutional- and (2) that it be of greater importance than

[75]G. Herbert, "Der Wesensgehalt der Grundrechte" at 328 singles out only one case (BVerfGE 30, 47 at 53) in which the Court admitted that the essential core of a right (the art. 2.2.2 right to personal freedom) had been infringed.

the aspect of the right to which protection is denied. Subsequently, once the interest in question has been justified in this way, the condition of proportionality controls the extent to which this interest can justify a restriction, in particular it requires (3) that interest and restriction (aim and means) stay in proper proportion. Of the three requirements imposed by the condition of proportionality imposes, only the first one implies that restrictions on fundamental rights must be to some extent exceptional. The other two are to be decided by way of reaching a balance between the fundamental right in question and its limiting measure and, in principle, the limited right and its limiting measure relate as two independent conflicting interests, not as a rule relates to an exception. A rule-exception relationship can of course be established, yet this is not inherent in the balance itself but is simply an option of the authority (whether judicial or legal) which strikes it. The extent to which the condition of proportionality supports a finding of the exceptional nature of restrictions to fundamental rights greatly depends on the way it is actually applied.

Finally, the condition of 'necessity' is the one that most clearly implies the exceptional nature of restrictions on fundamental rights. On the basis of this condition, such restrictions may only be imposed in the absence of alternative measures to achieve the same end, measures which, being equally effective, are less intrusive upon the right in question. In other words, fundamental rights may only be restricted to the extent that is absolutely necessary to achieve the aim that justifies their restriction. This condition does not question however the selection of the aim itself. It must also be pointed out that the ex-ante judgment made by the law-maker on the basis of the elements that were at its disposal is accorded much importance.

Both the condition of necessity and the condition of proportionality therefore offer some basis to sustain the exceptional nature of restrictions to fundamental rights. The extent to which this is so (particularly in the case of the condition of proportionality) cannot fully be grasped however before a look is taken at how they are applied in practice in the context of art. 10. The Constitutional Court has not developed a particular doctrine concerning the application of the principle of proportionality in this context. Such a doctrine exists however with respect to the right to privacy understood as secrecy, a right recognised within the scope of art. 2.1 and of which the secrecy of telecommunications is only a particular instance. As was explained in chapter 1, this doctrine has been favourable to the protection of privacy, hence to the exceptional nature of its restrictions, in the sense that in this context the principle of proportionality has been applied in particularly strict terms. It remains uncertain whether this doctrine will be applied in the context of art. 10. All one can say is that in the very few cases on

this provision decided on proportionality grounds, the Court has upheld the restricting measure at stake, sometimes in very controversial terms.

To summarise, restrictions on the right to the secrecy of telecommunications can be considered exceptional in the sense that [1] they can only affect its non-essential scope -a scope, however, which has not been defined and which, in any case, would most likely be subject to strict interpretation; [2] they can only be imposed for the protection of an interest which is legitimate and [3] to the extent that is absolutely necessary for the protection of this interest. Yet the particulars of the relationship between the secrecy of telecommunications and the interest with which it is confronted (that is, whether the interest in question is more important than the right to the secrecy of telecommunications and the extent to which it is justified that this right should yield to the interest in question) remain outside a rule-exception rationale.

Section 4: The United States

Introduction

Fourth Amendment
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In the case of the United States a two-step structure does not seem to underlie the constitutional protection of the secrecy of telecommunications. The secrecy of telecommunications is recognised as part of the fourth amendment, a provision which does not make any explicit distinction between the coverage of the right it recognises and the extent to which this right must be protected. Rather, the coverage is made to coincide with the scope of protection since "the right to be secure" recognised in the fourth amendment is -conceptually- defined not as a right against *all* searches and seizures, but as a right against *those* searches and seizures which are *unreasonable*. Since, as will be explained in chapter 5, unreasonable searches and seizures are those searches and seizures carried out against the protected scope of the fourth amendment right it seems that the fourth amendment identifies the concept of the right with its protected scope.

The purpose of the following pages is to analyse whether and, if so, to what extent the Supreme Court has identified the coverage of the fourth amendment with its protected scope, thus respecting the literal wording of this provision. To this end I will first of all consider the issue of how the Court has interpreted the structure of the fourth amendment; following this I will look at the extent to which lawful interference with the amendment's rights have been considered exceptional by the Court. This latter point will include an analysis of the issue of the burden of proof. When analysing these two issues I will compare the property and the privacy interpretations of the amendment. This mode of analysis appears the most effective way of bringing out the extent to which the fourth amendment (and the right to the secrecy of telecommunications recognised therein) has been influenced by the interest in privacy. Recall however that, as was explained in chapter 2, a sharp distinction between a property and a privacy period in the history of the amendment cannot always be drawn, since for the most part the property interpretation was only gradually replaced by the privacy interpretation. Only with respect to certain issues did this replacement take place in an all-or-nothing

manner, namely in the case of the so-called 'mere-evidence' rule and the 'non-physical-infringement' rule, the last vestiges of the property reading of the amendment[76].

The following analysis will bring out that: [1] in general, the Court has followed the most common trend in the constitutional recognition of rights, that is, it has drawn a line between coverage and protection and has interpreted lawful non-protection as exceptional; [2] since the time when privacy started to be regarded as the underlying interest of the fourth amendment the Court has imposed 'inherent limitations' on the coverage of this provision and [3] ever since this time the exceptional character of reasonable searches and seizures has no longer been consistently held; [4] only the interest in privacy has provided grounds for clear rules concerning the burden of reasoning.

1. The Structure of the Fourth Amendment: Coverage versus Protection

1.1 The Interest in the Protection of Private Property

As originally conceived by the Supreme Court, the fourth amendment had a two-level structure: the coverage of the fourth amendment right was limited by the concepts 'search' and 'seizure', whereas its scope of protection embraced those searches and seizures considered unreasonable[77]. Note that the term 'search' and 'seizure' clearly refer to positive actions, hence the right against searches and seizures clearly has a negative dimension. It is however not clear whether this right also has a positive dimension, that is, it is not clear whether the fourth amendment obliges the public power to set an adequate framework to enable the exercise of the right not to be subject to unreasonable searches and seizures. Under the property reading of the amendment, the Supreme Court did not have to decide on this issue and the fourth amendment right was regarded as a purely negative right. It therefore seems that the

[76]See *Schmerber v. California* (384 US 757 (1966)) and *Katz v. US* (389 US 347 (1967)), respectively.

[77]See *Boyd v. US*, 116 US 626 (1886); *Hale v. Henkel*, 201 US 43 (1906); *Wilson v. US*, 221 US 361 (1911); *Silverthorne v. US*, 251 US 385 (1920); *Go-Bart Importing Co. v. US*, 282 US 344 (1931); *US v. Lefkowitz*, 235 US 452 (1932); *Harris v. US*, 331 US 145 (1947); *Trupiano v. US*, 334 US 699 (1948); *US v. Rabinowitz*, 339 US 56 (1950); *Abel v. US*, 362 US 217 (1960); *Elkins v. US*, 364 US 206 (1960); *Rios v. US*, 364 US 253 at 261 (1960); *Chapman v. US*, 365 US 610 (1961); *H. Lanza v. NY*, 370 US 139 (1962); *Preston v. US*, 376 US 364 (1964); *Warden v. Hayden*, 387 US 294 (1967).

two-level structure of the fourth amendment was not put into question by the recognition of a positive right within its scope.

I will now analyse whether the interest in the protection of private property imposed any 'inherent limitations' on the coverage of the fourth amendment, that is whether it conditioned this coverage from outside. The following paragraphs (points [A] and [B]) will argue that, under the property reading of the amendment, the Supreme Court did not admit any such inherent limitations.

[A] The Mere-Evidence Rule.

One of the main manifestations of the influence of property upon the interpretation of the fourth amendment was the so-called mere-evidence rule, according to which searches and seizures are unreasonable if undertaken in relation to private property legitimately held for the mere purpose of using it as evidence at trial. This rule and its background were commented on in chapter 2, yet the question must now be posed whether the mere-evidence rule was applied in a way that conditioned the coverage of the amendment or rather whether it conditioned its scope of protection. The Supreme Court was always clear in this respect: searches and seizures carried out against legitimate property, most often with 'mere-evidence' purposes, were considered covered, but not protected, by the fourth amendment, that is they were considered *unreasonable* searches and seizures[78].

[B] The Physical-Infringement Rule.

The property reading of the fourth amendment also gave rise to the so-called physical-infringement rule. On the basis of this rule, the fourth amendment was applied only to *physical* infringements upon private property[79]. This means that the absence of physical intrusion did not condition the unreasonableness of searches and seizures but implied that no search and seizure existed.

At first sight, the physical-infringement rule would seem to amount to an 'inherent limitation' to the scope of the fourth amendment, that is to a limitation arising from outside the conceptual scope of the terms search and seizure. Yet a closer look shows that this is not so. The physical-infringement limitation to the coverage of the

[78] *Silverthorne v. US*, 251 US 385 (1920); *Gouled v. US*, 255 US 298 (1920); *US v. Lefkowitz*, 235 US 452 (1932); *Abel v. US*, 362 US 217 (1960).

[79] Once again, it must be pointed out that the fourth amendment was never urged in defence of non-material property. Thus, within the framework of the amendment, the only threats to private property arose from 'physical intrusion' (see chapter 2 above).

fourth amendment does not arise from outside those concepts but, precisely, from the conceptual boundaries of the terms 'search' and 'seizure', as drawn by the Supreme Court. Certainly, in drawing such boundaries the Court made use of the interest in the protection of property, yet property was not directly used as an external source of limitations of the range of the amendment. It was merely used to indirectly limit the scope of the fourth amendment, something which is perfectly justified. For in the end the interest lying behind a provision is meant to condition its interpretation and to help towards its understanding, something which does not amount to imposing 'inherent limitations' to its range.

On the basis of the above considerations one can conclude that on the basis of the interest in the protection of private property the fourth amendment was read as a provision with a two-step structure and allowed for no 'inherent limitations'. Let us now analyse the extent to which this approach was altered when privacy started to be conceived of as the underlying interest of the amendment.

1.2 The Interest in the Protection of Privacy

Under the privacy reading of the fourth amendment, the Court has not abandoned the main lines of its approach to the structure of this provision: the coverage of the amendment is still defined on the basis of the terms 'search' and seizure' and is subsequently distinguished from its scope of protection, which is defined on the basis of the term 'unreasonableness'[80]; nor has the Court yet had a chance, at least to my knowledge, to rule whether the right recognised in the amendment also has a positive dimension. It is important however to analyse whether the interest in privacy has imposed 'inherent limitations' to the coverage of the amendment. In the following paragraphs I will argue that the Supreme Court has admitted privacy-based 'inherent limitations'.

In this respect I would like first of all to call attention to the position that the interest in privacy occupies in the context of the fourth amendment. Note in particular that the Supreme Court often refers to privacy not only as the underlying interest of the amendment but also as its direct object, in other words the Court often approaches the fourth amendment as a provision which directly recognises privacy as a right. Being

[80] *Terry v. Ohio*, 392 US 1 (1968); *US v. Chadwick*, 433 US 1 (1977); *Scott v. US*, 436 US 128 (1978); *Rakas v. Illinois*, 439 US 128 (1978); *Colorado v. Bertine*, 479 US 367 (1987); *NY v. Burger*, 482 US 691 (1987); *California v. Greenwood*, 486 US 35 (1988); *Maryland v. Buie*, 494 US 325 (1990); *Soldal v. Cook County*, 121 L. Ed. 2d 450 (1992) (pending publication).

consistent with this approach, the Court has often argued[81] that in the absence of an interest in privacy the coverage of the fourth amendment is not at stake, so that independently of whether a search and seizure has occurred the amendment does not apply. The absence of privacy interests is thus regarded as an 'inherent limitation' to the right against searches and seizures.

The imposition of 'inherent limitations' to the coverage of the fourth amendment, therefore, results from the fact that the Court often refers to privacy as the direct object of the amendment. Although such direct references to privacy can be found in a considerable number of cases of most diverse sorts, at least two groups of cases can be singled out. These are [A] cases of searches and seizures of items lying in open view and [B] cases of lawful imprisonment.

A] The Open-View Rule

The Supreme Court has consistently affirmed that no interest in privacy is at stake in cases of searches and seizures of 'effects' or even of personal features (such as one's voice or handwriting) which are normally exposed to the public, that is which are open to anybody's view. It has therefore been consistently affirmed that the fourth amendment does not protect against such searches and seizures. The consequences that this open-view rule has had upon the amendment differ depending on whether one speaks of searches or of seizures: with respect to the former the rule acts as a limitation to the coverage of the amendment, whereas with respect to the latter it acts as a limitation to its protected scope. In other words, on the basis of the open-view rule the act of looking at objects as they lie in the open view has not been considered a search, whereas taking such objects has been considered a seizure, though a seizure which can reasonably be carried out without a warrant since no interest in privacy is involved[82]. As a result, the open-view rule poses no problems for the structure of the amendment in the context of seizures but only in the context of searches. The question then is whether the open-view rule limits the coverage of the amendment from within the conceptual boundaries of the term 'search' or whether it directly relies on the concept of privacy, that is whether it limits the coverage of the amendment as an 'inherent limitation'.

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[81] *U.S. v. Chadwick*, 433 U.S. 1, 7, 11 (1976); *Wahlen. v. Roe*, 429 US 589 (1977); *Rakas v. Illinois*, 439 U.S. 128 (1978); *Rawlings v. Kentucky*, 100 S.Ct. 2256 (1980); *Illinois v. Andreas*, 463 US 765 (1983); *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968); *Combs v. U.S.*, 408 U.S. 224, 227 (1972); *California v. Ciraolo*, 104 S.Ct. 1809 (1986); *Dow Chemical Co. v. U.S.*, 106 S.Ct 1819 (1986); *California v. Greenwood*, 486 US 35 (1988); *Minnesota v. Olson*, 495 US 91 at 97 (1990).

[82] The way the open-view plays out in the context of seizures will be explained in chapter 5. There has been however at least one case in which the Court stated that taking something lying in open view does not amount to a seizure within the meaning of the amendment (*Maryland v. Macon*, 472 US 463 (1985)).

The position of the Court has never been very clear in this respect. In some cases it has reasoned in terms of 'inherent limitations'. It has affirmed that there is no 'reasonable' or 'legitimate' expectation of privacy in an object lying in open view and that *therefore* the act of taking notice of these objects is not covered by the fourth amendment prohibition against searches[83]. However, in most cases the Court has preferred to argue from within the concept of 'search', that is it has affirmed that taking notice of something exposed to the public eye is an action alien to the act of searching[84], provided that the object in question is simply observed in the position it is in, that is that it is not moved in order to discover some of its hidden details[85]. It thus seems that for the most part the open-view rule has not been interpreted as an 'inherent limitation' to the coverage of the fourth amendment, although the position of the Court in this respect is not as clear as would be desirable.

B] The Condition of Lawful Imprisonment

The question whether the condition of lawful imprisonment stands as an 'inherent limitation' to the coverage of the fourth amendment started to be posed only when the interest in privacy began to motivate the reading of this provision. This could not be otherwise; for the condition of imprisonment imposes severe restrictions to the right to privacy, whereas it does not have a direct effect upon property rights.

A prison inmate does not have a "legitimate expectation of privacy ... in his prison cell and, accordingly, the fourth amendment proscription against unreasonable searches does not apply within the confines of the prison cell"[86]. This sentence summarises the most recent position of the Supreme Court regarding prisoners' fourth amendment rights. It clearly conceives imprisonment as an 'inherent limitation' on the constitutional right against searches and seizures. The position of the Court with respect to searches and seizures is thus similar to the position sustained by the German Constitutional Court and -originally- by the organs of the European Convention on Human Rights with respect to the secrecy of telecommunications.

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[83]*US v. Dionisio*, 410 US 1 (1973); *US v. Mara*, 410 US 19 (1973).

[84]See *Ker v. California*, 374 US 23 (1963); *Harris v. US*, 390 US 234 (1968); *Walter v. US*, 447 US 649 (1980); *Texas v. Brown*, 460 US 730 (1983); *Illinois v. Andreas*, 463 US 765 (1983); *Maryland v. Macon*, 472 US 463 (1985); *Florida v. Riley*, 488 US 445 (1989); *Horton v. California*, 496 US 128 (1990). Some of these cases are, however, ambiguous. At times, in fact, after having stated that an 'open-view' case involves no 'search', the Court has continued to reason on the mere basis of privacy (see, e.g., *Illinois v. Andreas*).

[85]*Arizona v. Hicks*, 480 US 321 (1987).

[86]*Hudson v. Palmer*, 468 US 517 at 526 (1984).

It is curious to observe the extent to which the doctrines of the Supreme Court and of the Convention's organs have evolved in opposite directions. As was explained in section 1 of this chapter, the Conventions' organs initially approached lawful imprisonment as an 'inherent limitation' to the right to correspondence and only started to consider imprisonment a limitation to the protected scope of this right in the 1970s. On the other hand, the Supreme Court originally interpreted the condition of imprisonment as a factor which did not affect the coverage of the fourth amendment but its protected scope[87]. The Court, in fact, used to hold the general view that prisoners retain their rights, although these are subject to the restrictions imposed by the condition of lawful imprisonment. "There must be mutual accommodation between institutional needs and objectives and the provisions of the United States Constitution that are of general application"[88]. In the case of the fourth amendment rights, the Court used to require that one balance the need for the particular search against the invasion of the personal rights that the search entails, a balance which concerned the scope of protection of the fourth amendment[89]. This position is no longer held. As was pointed out above, the present doctrine of the Supreme Court is to consider imprisonment an 'inherent limitation' to the fourth amendment rights.

It is noteworthy however that in the field of telecommunications this latter position has always been implicitly held. Prisoners have always been considered deprived of the fourth amendment right to privacy in their telecommunications. The Court has never even considered the possibility that they could be holders of this right. Cases concerning the stoppage, opening and eventual censorship of prisoners' correspondence have been dealt with exclusively within the context of the first amendment right to freedom of speech; in other words, the only right considered at stake in such cases has been prisoners' freedom to engage in telecommunications either as senders or addressees, it has never been their right to the secrecy of telecommunications. The Court, therefore, has systematically approved of the opening of letters sent to or by prisoners. Moreover, as was the case in Germany, a constitutional claim as to the violation of the secrecy of telecommunications has never been raised in the context of imprisonment[90]. All this applies even in the context of prisoners' privileged communication with attorneys. In this latter case, letters may be opened in the presence of their addressees to check their content, i.e. that they contain no contraband, but they may not be read; yet this latter prohibition is regarded as a

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[87]See, e.g., *Lanza v. NY* (370 US 139 (1962); *Bell v. Wolfish*, 441 US 520 (1979), with respect to the fourth amendment rights of both prisoners and pretrial detainees.
[88]*Wolf v. McDonnell*, 418 US 539 at 555-556 (1974).
[89]*Bell v. Wolfish*, 441 US 520 (1979).
[90]See, e.g., *Procunier v. Martinez*, 416 US 396 (1974); *Wolf v. McDonnell*, 418 US 539 at 575-577 (1974); *Procunier v. Navarette Jr.*, 434 US 555 (1978).

means to protect not the secrecy of such letters, but prisoners' freedom to communicate with their attorneys; that is, it is regarded as a means of reassuring that prisoners' telecommunications with their attorneys are not subject to censorship[91].

To summarise, the Supreme Court has always interpreted the fourth amendment as a provision with a basic two-level structure. Yet when relying on a privacy interpretation it has imposed 'inherent limitations' to the coverage of this amendment. Strictly speaking, however, such 'inherent limitations' do not result from the replacement of property by privacy as the underlying interest of the fourth amendment; rather they result from the fact that, unlike property, privacy is regarded as the direct object of recognition of this provision and thus defines its coverage directly. Examples of privacy-based 'inherent limitations' can be found in a great number of cases, of which the most significant in the context of the secrecy of telecommunications are the cases of lawful imprisonment. Let us now proceed to analysing the extent to which the interpretation of the fourth amendment relies on the second corner-stone of a liberal, two-level structure of rights; that is, let us see the extent to which the Court has considered that lawful interferences with the fourth amendment are exceptional.

2. The Exceptional Nature of Lawful Searches and Seizures

2.1 The Property Rationale

The initial, property-based approach of the Supreme Court to the fourth amendment influenced the assertion of the exceptional nature of lawful searches and seizures. A key element in this respect was the so-called 'mere-evidence rule'. Recall that under this rule searches and seizures were considered unreasonable if they infringed upon an individual's rights of possession; accordingly, they were held reasonable if the state was entitled to the property of the 'effects' at issue, that is if it had a *right* of possession over these 'effects' (provided of course that the warrant requirement had been duly fulfilled). On the basis of this distinction, the Court approached the fourth amendment as a provision which enshrined two parallel rights: first, a right against unreasonable searches and seizures and, second, a right, held by the public powers, to carry out reasonable searches and seizures[92]. Deciding on the

[91] *Wolf v. McDonnell*, 418 US 539 at 575-577 (1974).

[92] *Weeks v. US*, 232 US 383 at 392 (1914); *Gouled v. US*, 255 US 298 at p. 309 (1921); *Agnello v. US*, 269 US 20 at 30 (1925); *Carroll v. US*, 267 US 132 at 158 (1925); *Marron v. US*, 275 US 192 at 199 (1927); *Johnson v. US*, 333 US 10 at 14 (1948); *US v. Rabinowitz*, 339 US 56 at 61-62 (1950); *Wilson v. Schnettler*, 365 US 381 (1961); *Chapman v. US*, 365 US 610 at 615 (1961); *Preson v. US*, 376 US 364 at 367 (1964); *Cooper v. California*, 386 US 58 at 62 (1967).

reasonableness of searches and seizures was thus equal to deciding on whose rights were at stake -the affected individual's or the state's.

The above approach to the fourth amendment greatly influenced the issue under consideration. In particular, the two parallel rights just described had to enjoy, in principle, the presumption of their lawful exercise. This implies, first, that neither victims nor police officers could be consistently made to offer evidence of the (un)reasonableness of a search and/or seizure, that is, that neither of them could be consistently made to bear the burden of reasoning. It is thus no coincidence that, while the property reading of the amendment was dominant, the Court never held a clear position with respect to who had to reason that this provision had been or that it had not been violated.

Second, it would seem that, in principle, both of these rights should deserve favourable interpretation, so that lawful restrictions to the right against searches and seizures -lawful searches and seizures- could not be considered exceptional. The Supreme Court, however, did not follow such a line since it was favourable to according the right against searches and seizures the widest possible protection[93]. To this end, it treated lawful searches and seizures -that is the state's right to carry them out- as exceptional. This applied, in particular, to the warrant requirement, for which the Court imposed a condition of necessity: it developed the rule that the warrant requirement always had to be complied with unless it was not reasonably practicable, that is unless its being obtained would seriously endanger the aim to be achieved -i.e. the enforcement of law through the particular search and seizure at stake[94].

2.2 The Privacy Rationale

Since the interest in privacy started to eclipse the interest in property in the reading of the fourth amendment, the above interpretation underwent some changes. In fact, since the view that the State has a right to undertake reasonable searches and seizures stopped making sense, the doctrine that the amendment contains parallel rights has been gradually abandoned. Under its privacy reading individuals are therefore considered the only holders of fourth amendment rights. Hence, they enjoy the

[93] *Byars v. US*, 273 US 28 at 32 (1927). See also *Boyd v. US*, 116 US 616 at 635 (1886); *Gouled v. US*, 255 US 298 (1920); *Go-Bart Importing Co. v. US*, 282 US 344 at 357 (1931); *US v. Lefkowitz*, 235 US 452 at 464 (1932); *Grau v. US*, 287 US 344 at 357 (1931).

[94] *Agnello v. US*, 269 US 20 (1925); *Marron v. US*, 275 US 192 (1927); *Carroll v. US*, 267 US 132 at 156 (1925); *Go-Bart Importing Co. v. US*, 282 US 344 at 358 (1931); *Trupiano v. US*, 334 US 699 (1948); *McDonald v. US*, 335 US 451 (1948).

presumption that these rights are lawfully exercised and, conversely, that the search and seizure complained of is unreasonable.

An immediate consequence of this is that under the privacy reading of the amendment the Supreme Court has developed a consistent rule vis-à-vis the burden of reasoning. In particular, victims of a fourth amendment violation have only been made to argue that a search and seizure has occurred, whereas police officials must argue that this search and seizure was reasonable[95].

Paradoxically, the presumption of lawful exercise of the right against searches and seizures which derives from the privacy reading of the amendment, has not encouraged the view that lawful searches and seizures be considered exceptional. Privacy, in fact, tended to soften the sharp edges of the original position in this respect. To begin with, as opposed to the case of property, privacy imposes no material limits to the reasonableness requirement[96]. Under the privacy rationale, searches and seizures are lawful provided that they comply with the formal requirements of reasonableness imposed by the amendment, even if they frustrate a legitimate expectation of privacy.

Moreover, the Supreme Court has sometimes exhibited a looser attitude towards the warrant requirement under the privacy rationale as opposed to the property rationale. Under the privacy rationale, the lawfulness of warrantless searches and seizures is decided by way of striking a balance between the different interests at stake (i.e. privacy and law enforcement). In fact, the interest in privacy has been the controlling rationale whenever a balance has been struck to decide on the lawfulness of warrantless searches and seizures and this even at the time when property still dominated the reading of the fourth amendment. This point will be developed in full detail in chapter 5. However at this point one should note that a balance does not impose any kind of rule-exception relationship between the elements confronted, which rather relate as two independent conflicting interests. Whether or not such a rule is imposed is a question which lies in the hands of the authority (whether judicial or legal) striking the balance. In order that the exceptional nature of limiting measures can be assured also against this authority additional grounds are needed.

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[95]See *US v. Jeffers*, 342 US 48 at 51; *Rios v. US*, 364 US 253 at 261 (1960); *H. Lanza v. NY*, 370 US 139 at 145-146 (1962); *Warden v. Hayden*, 387 US 294 at 306-307 (1967); *Chimel v. California*, 395 US 752 at 762 (1969); *US v. Chadwick*, 433 US 1 at 14 (1977); *Payton v. NY*, 445 US 573 (1980); *Maryland v. Buie*, 494 US 325 (1990); *Minnesota v. Olson*, 495 US 91 (1990). There have been some exceptions to this consistent jurisprudential line (see *Wilson v. Schnettler*, 365 US 381 (1961); *Colorado v. Bertine*, 479 US 367 (1987)), which have remained isolated cases.

[96]Yet, in this context, see chapter 5 below.

The exceptional nature of restrictions of fourth amendment rights can for example be supported by a condition of necessity, such as the rule that restrictions may only be imposed if they are the least intrusive means to achieve an end. Yet such a rule has not been developed by the Supreme Court. In the context of telecommunications, the Court has occasionally hinted at it[97]; it has, however, never applied it consistently. Also the doctrine, developed under the property rationale, that a search warrant must be obtained whenever possible stands as a condition of necessity and thus supports the exceptional nature of restrictions. Unfortunately, this doctrine has not been followed as consistently under the privacy rationale as under the property rationale: followed and applied in many a case[98], it has also been explicitly rejected in many others[99]. It thus seems that under the privacy interpretation of the fourth amendment the Court has emphasised the balancing technique as the central criterion to ascertain the lawfulness of searches and seizures, hence to ascertain the lawfulness of interferences with the right to the secrecy of telecommunications. Nor is the balancing technique actually applied in a way which supports the exceptional nature of lawful interferences with the amendment. The result is that the privacy interpretation of the amendment has provided no solid grounds to sustain the exceptional nature of such interferences.

Let me summarise the position of the Supreme Court vis-à-vis the exceptional nature of lawful interferences with the fourth amendment right. The Court's position has been strongly conditioned by the fact that under the property rationale the fourth amendment was thought to enshrine a right of the State to carry out lawful searches and seizures. A consequence of this is that the Court could not set clear rules as to the burden of proof under the property interpretation of the amendment, it only could do so under its privacy interpretation. In fact, the Court has ruled that those who claim a fourth amendment violation bear the burden of arguing that their fourth amendment right has been infringed, whereas the authorities in question must argue that the infringement was lawful.

It would also have been natural for the Court to consider lawful searches and seizures exceptional to the extent that the fourth amendment does not accord the State a

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[97] *Turner v. Safley*, 482 US 78 at 90 (1987). The case dealt with prisoners' right to correspondence as part of the first amendment right to free speech. In this context, the Court stated that prison authorities could not be made to bear the burden of finding the least intrusive means to achieve their end of keeping security in prisons; yet, it continued, if prisoners could point to a measure less encroaching and equally or even similarly effective, this could operate as an argument that the measure actually used does not satisfy the requirement of reasonableness -i.e. of proportionality.

[98] *Chapman v. US*, 365 US 610 at 615 (1961); *Chimel v. California*, 395 US 752 (1969); *US v. Chadwick*, 433 US 1 (1977); *Lo-Ji Sales, Inc. v. NY*, 442 US 319 (1979).

[99] *US v. Rabinowitz*, 339 US 56 at 63 (1950); *Cooper v. California*, 386 US 58 (1967); *Maryland v. Buie*, 494 US 325 (1990).

right to carry them out. This however has not been the position taken by the Court. At the time when the interest in property guided the interpretation of the amendment (that is at the time when the Court affirmed that the State has a right to carry out lawful searches and seizures) the Court clearly approached lawful interferences as exceptional and even developed rules to sustain their exceptional nature (i.e. the rule that the warrant requirement must be obtained whenever possible). Then, as the Court started to interpret the amendment in privacy terms (that is as the State was no longer thought to have a right to carry out lawful searches and seizures) it stopped holding the exceptional nature of such lawful interferences. The reasons why the Court has not followed the implications of its own approach to the fourth amendment can be found in the ideological background of the property and the privacy interpretation of this provision, something which was explained in detail in chapter 2. The property interpretation of the fourth amendment belongs to an era characterised by the predominance of liberal thought and of strong individualistic feelings, that is to an era when the individual's rights were thought to deserve the widest protection possible. The passage to a privacy interpretation took place as individual-centred liberalism gave way to a realist, more sociological approach to law, so that privacy belongs to an era when the focus of attention shifted from the individual to social considerations, these including, e.g., the need for law enforcement.

Conclusions

The purpose of this chapter was to illustrate the idea that recognising the right to the secrecy of telecommunications with a two-step structure entails considerable advantages for the protection of this right. We should have been able to perceive these advantages by comparing the two-step structure of this right with cases in which this structure is not respected. Let us now look at the main points of this comparison.

The right to the secrecy of telecommunications is literally recognised in a two-step manner both in art. 8 of the ECHR and in art. 10 of the German Basic Law. Also the fourth amendment to the Constitution of the United States has been interpreted by the Supreme Court as having a two-step structure, even though this is not at all apparent in its wording. Nevertheless, this structure is not always consistently respected. To begin with, the European Court and Commission of Human Rights have stated that art. 8 also recognises positive subjective rights, rights which have a single-level structure. In this context, however, the consequences which derive from a single-level structure are justified by the logic of positive subjective rights and are in any case outweighed by the mere fact of the recognition of these; moreover, in the case of art. 8 of the ECHR such consequences have thus far been altogether avoided in practice.

More open to criticism is the fact that the two-step structure of the right to the secrecy of telecommunications is subjected to exceptions even when this appears as a negative right of defence against the State. This is presently the case in Germany and in the United States. The German Constitutional Court regards the condition of imprisonment on remand as an 'inherent limitation', that is, as a non-conceptual limitation which affects the coverage of the right to the secrecy of telecommunications, not its protected scope. In addition, it has admitted some 'conjunctural' 'inherent limitations' to this right with purely instrumental purposes, that is as a means to uphold restrictions which do not respect the requirement that they be based on a legal provision. The Supreme Court of the United States also has imposed 'inherent limitations' to the coverage of the fourth amendment. The imposition of such limitations is connected to the fact that privacy often defines the object of this provision, so that the coverage of the fourth amendment is often limited to cases where an interest in privacy is at stake. On the basis of this general 'inherent limitation' the Court has excluded the condition of imprisonment from the scope of application of the amendment, a circumstance which particularly affects the right to the secrecy of telecommunications. On the other hand, it is not clear whether the so-called open-view limitation to the

coverage of the fourth amendment is the fruit of an 'inherent limitation', or whether it simply is the result of an interpretation of the term 'search' on the basis of privacy.

The fact that imprisonment tends to be regarded as a limitation inherent in the right to the secrecy of telecommunications is regrettable, since it gives rise to the negative consequences for the protection of this right mentioned at the beginning of this chapter, yet it is not difficult to explain why this is generally the case. The crux of the explanation is that in general the systematic surveillance of prisoners' telecommunications appears as a reasonable practice. In particular, it seems to withstand any test of its proportionality as a measure aimed at keeping order and security in prisons. For this reason, the particular circumstances of a case tend to be overlooked and the surveillance of prisoners' telecommunications automatically upheld. It is precisely this automatism that ultimately leads to considering surveillance as a limitation inherent in the coverage of this right.

An example of how fine a line separates the automatic justification of a functional limit from the consideration of this limit as inherent can be found in the initial case-law of the European Commission of Human Rights on the condition of imprisonment. Initially, the position of the Commission fluctuated between a few cases where restrictions on prisoners' right to respect for correspondence were regarded as functional limitations, yet systematically justified, and other cases where imprisonment was thought to impose an inherent limitation on the coverage of the right. Admittedly, the actual result in both types of cases often coincides, yet their theoretical implications are significantly different and can also account for different practical consequences. To be more precise, only if the surveillance of telecommunications stands as a functional limitation does the possibility remain that, in a particular case, surveillance will prove unnecessary, unreasonable or out of proportion. Similarly, only if regarded as a functional limitation must surveillance comply with whichever other requirements are imposed upon such limitations, such as having to be in accordance with the law.

It ought to be recalled at this point that the German Constitutional Court has decided that the surveillance of telecommunications of convicted prisoners must be carried out in accordance with a law; thereby it has denied that the condition of convicted imprisonment is an inherent limitation. Further, the German Court has not always considered the condition of imprisonment on remand an inherent limitation; in particular, it has judged that the secrecy of telecommunications between these prisoners and their lawyers is covered by art. 10 of the Basic Law. It thus seems that in the case of Germany the surveillance of prisoners' telecommunications is approached as an inherent limitation only in cases where it has already passed a first, abstract test as to its

lawfulness. The problem is that, once this first test has been passed, the lawfulness of surveillance is automatically upheld, regardless of case-by-case considerations, and it is because of this automatism that surveillance finally has appeared as an inherent limitation.

From this one could conclude that the automatic application of limitations without due regard to the particular circumstances of every case might blur the borderline between the coverage and the protected scope of a right, in the sense that such limitations might tend to be regarded as inherent. In the context of the secrecy of telecommunications the risk of an automatic application of restrictions is particularly high in the context of lawful imprisonment. Of the three systems under consideration, this risk has only been avoided in the context of the ECHR, where imprisonment is not -no longer- approached as an inherent limitation to the secrecy of telecommunications. This circumstance is not purely coincidental. Rather, it is due to the fact that the ECHR recognises the freedom to engage in telecommunications and the secrecy of telecommunications as a single right: the right to respect for correspondence. For one thing, unlike in the case of the secrecy of telecommunications, restrictions to prisoners' freedom to engage in telecommunications are not always considered to be justified. Hence, such restrictions cannot be applied automatically, but only after due regard to the particular circumstances of every case. It should therefore not be surprising that the doctrine that imprisonment constitutes no inherent limitation to the right to respect for correspondence has been developed within the context of the freedom to engage in telecommunications, even though it is also applicable in the context of the secrecy of telecommunications[100].

It is noteworthy, in this respect, that also in Germany and the United States the two-level structure of the right to engage in telecommunications is respected even with respect to prisoners. Prisoners are holders of this right, even though its exercise can be -more or less exceptionally- restricted[101]. It is thus to be presumed that, were the freedom to engage in, and the secrecy of telecommunications recognised as a single right in these two systems, the result would be similar to the one reached in the ECHR,

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[100]The doctrine was explicitly laid down in the judgment to the case of *Golder v. U.K.* (Par. 45, p. 21) and has since then been consistently followed (see *Silver v. U.K.* judgment, Par. 84, p. 32; *Campbell and Fell v. U.K.* judgment, Par. 110, p. 49; *Malone v. U.K.* judgment, Par. 64, p. 30; *Schönenberger and Durmaz v. Switzerland* judgment, Par. 24, p. 13; *Kruslin v. France* judgment, Par. 26, p. 20; *Margareta and Roger Anderson v. Sweden* judgment, Par. 73, p. 25; *Pfeifer and Plankl v. Austria* judgment, Par. 43, p. 18; *Cambell v. U.K.* judgment, Par. 33, p. 16; *Lüdi v. Switzerland* judgment, Par. 39, p. 19).

[101]For Germany, see arts 24 et seq. of the StVollzG; BVerfGE 34, 384; 42, 234. For the United States, see *Procunier v. Navarette* (434 US 555 (1978)) and *Turner v. Safley* (482 US 78 (1987)).

that is the condition of imprisonment would not constitute an inherent limitation to the secrecy of telecommunications.

Let me conclude with some comments on the exceptional nature of lawful infringement upon the secrecy of telecommunications. In the three systems under consideration, the lawfulness of restrictions to this right is ultimately measured on the basis of a balance, that is of a proportionality test. In principle, as has been made clear earlier in this chapter, the test of proportionality neither grants nor precludes a position of advantage to the right which is going to be limited, so that this is left in the hands of the Court at issue. Nevertheless, both in the ECHR and in Germany, the proportionality test is complemented by an additional requirement which holds the exceptional nature of limitations, namely by the condition of necessity. On the basis of this requirement, limitations of rights are lawful only if they are the least intrusive means to achieve an aim, that is only if there is no alternative means to achieve the same end which imposes a lesser encroachment upon the right at issue (and which of course does not impose a bigger encroachment upon any other right). The requirement that a limiting measure be necessary does not control the choice of the aim which justifies a restriction of a right and thus cannot account for the exceptional nature of this aim; it does assure, however, that once the aim is chosen the restriction it imposes upon a right be exceptional. As has been mentioned, the necessity requirement has been adopted both by the Convention's organs and by the German Constitutional Court. It was also adopted by the Supreme Court of the United States in the context of the fourth amendment when this provision was interpreted under a property rationale, yet at present the Supreme Court is not consistently applying this requirement. From the time that privacy was taken to underlie the interpretation of the fourth amendment, the exceptional nature of limitations of the right to the secrecy of telecommunications has remained totally in the hands of the Supreme Court, which is free to interpret such limitations in more or less generous terms according to the policy at issue.

CHAPTER 4: THE OBJECT OF THE RIGHT TO THE SECRECY OF TELECOMMUNICATIONS: ITS COVERAGE

Introduction

The present chapter will deal with the coverage of the right to the secrecy of telecommunications, that is, it will deal with the way the conceptual boundaries of the right are drawn in each of the three systems under consideration. One of my main concerns in this chapter will be to consider the extent to which the conceptual boundaries of this right are in fact clearly defined. My contention is that a clear definition is crucial in the context of the right, so that whether or not it is at stake can be ascertained easily and is not a matter of much judicial speculation; to this end, I believe, it is also crucial that the definition of a right responds to a clear rationale which grants the right internal coherence, that is, I believe that the internal coherence of a right contributes significantly to the clarity of its external boundaries. I contend that a clear definition of rights remains important even where there is some risk of the application of the right becoming somewhat rigid, hence relatively inflexible and perhaps not well adapted to cover new situations. For one thing, rights which are defined in clear, i.e. rigid, terms still allow that the areas which fall outside their coverage be covered by a different right, if need be, by a right newly created for the particular purpose; on the other hand, rights whose coverage is flexible because not clear cannot act as a distinct point of reference in the coverage of any area at all.

Having these considerations as a guide-line, this chapter will be primarily concerned with the extent to which the ECHR, Germany and the United States detach the coverage of the right to the secrecy of telecommunications from the right to privacy and the conceptual confusion which surrounds the definition of the right; it will also be concerned with the extent to which the recognition of the right to the secrecy of telecommunications responds to a clear rationale, i.e. with the level of internal coherence that this right enjoys in each of these three systems.

Section 1: The European Convention on Human Rights

Introduction

Article 8:
"I. Everyone has the right to respect for his private and family life, his home and his correspondence.
II. There shall be no interference by a public authority with the exercise of his right except such as is in accordance with the law and is necessary in a democratic society in the interest 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 paragraph of art. 8 defines the scope of coverage of the right to the secrecy of telecommunications. This paragraph uses the expression "*the* right to respect for", which, together with its analogue in the second paragraph ("*this* right"), suggests that art. 8 caters for four different features (private life, family life, home and correspondence) of a single right, close in scope to the concept of privacy. Despite this, art. 8 has always been interpreted as a source of recognition of *four* different rights, whereas privacy has been conceived as the unifying rationale behind them. The present section will analyse "the right to *respect for ... correspondence*", since this is the right that covers the secrecy of telecommunication.

To be sure, the secrecy of telecommunication is also covered as part of the right to private life. Indeed, the expression 'private life' can be taken as a synonym for 'privacy', so that the right to private life covers all the areas which fall within the right to privacy. However, within the context of art. 8 the right to privacy or to private life occupies a 'subsidiary' ('fall-back') position, in the sense that it embraces all the areas of privacy which are thought to deserve recognition as rights but which are not specifically recognised. Since the secrecy of telecommunications is specifically recognised within the art. 8 'right to respect for correspondence' no recourse to the right to private life need be made in my discussion of the secrecy of telecommunication below.

It is the purpose of this section to study the scope of the coverage of "the right to respect for correspondence". The scope of the term "respect" will raise the issue of the negative and positive dimensions of the rights recognised in art. 8, that is the negative and positive obligations these rights impose upon the Contracting Parties. The

discussion of the scope of the term "correspondence" will then bring up the non-literal reading that the Convention's organs have made of this term and the problems this interpretation gives rise to. This section will then conclude with an analysis of the right to privacy as the underlying interest of art. 8, with particular reference to the confrontation of this provision with the freedom of expression as recognised within art. 10.

1. "The Right to Respect for..."

Let us now start with the term "respect" and the way it conditions the scope of the right to correspondence. Before entering this analysis, however, let me mention that the expression "the right to respect for" does not exclusively refer to the right to correspondence. Rather, it constitutes a general heading which defines the coverage of art. 8 as a whole and thus affects all the rights recognised in this article. As a result, the following arguments do not only apply to correspondence, but also to private life, family life and home. Equally, in the development of these arguments, account must be taken not only of the case-law on correspondence, but also of the case-law on each of these three other rights.

The scope of the term 'respect' has already been dealt with in the previous chapter. The word 'respect', it was then argued, denotes in large part an idea of 'refraining from acting'[1]. Its use in art. 8.1 thus suggests that correspondence is recognised as a negative right, that is as a right to enjoy a negative or passive permissiveness in the exercise of correspondence, in line with the most typically liberal tradition. As was also pointed out, this limitation in coverage seems confirmed in art. 8.2 with the use of the term "interference", a term which suggests an idea of active behaviour against the exercise of rights[2]. In sum, the expression "respect for" suggests that art. 8 recognises a right to suffer no active hindrance when corresponding with anybody.

It was also discussed in chapter 3 that the above interpretation has never been followed by the Convention's organs. I would now like to insist on this point and stress that, since their earliest cases on the subject, both the Commission and the Court

[1]Respect: "4.c. To treat with consideration; to refrain from injuring or interfering with; to spare" (*The Oxford English Dictionary*, 2nd Ed. Clarendon Press, Oxford, 1989, Vol. XIII, p. 733)
[2]Interfere: "4.a. (of things) To come into collision or opposition, so as to affect the course of; 4.b. (of persons) To meddle with; to interpose and take part in something, esp. without having the right to do so" (*The Oxford English Dictionary*, Vol. VII, p. 1102)

have interpreted the scope of the Convention's rights in general, and of the idea of 'respect' in particular, in more flexible terms. To be more precise, they have stated that "the rights recognised by the Convention are not all 'negative'"[3] but also have a positive dimension. Within the specific context of art. 8, in particular in cases dealing with the right to respect for private life or family life[4], the Convention's organs have stated: "[I]n addition to [art. 8] primarily negative undertaking there may be positive obligations inherent in an effective respect for private or family life"[5], so that "the State ... by failing to [act] ... might ... interfere with the respect due to private life without any positive new act of interference"[6]. Similar statements have been made within the context of the right to respect for correspondence: here the failure to provide prisoners with the means of writing letters has been seen to amount to a violation of art. 8[7].

The statement that the Convention's rights also are positive subjective rights is of major importance. With this the Convention's organs have gone beyond the premises of the liberal conception of fundamental rights, according to which these rights (and in this case the Convention's rights) are rights of defence against the State entailing negative claims against the State only. In the Court's view, this conception "may still have a certain philosophical value" but it "is in no way normative"[8]. Moreover, the Convention's organs have also gone beyond the conception of fundamental rights as objective values or principles of the constitutional order; for according to this conception fundamental rights impose positive obligations upon the State, yet they do not allow for subjective claims of the individual. The position of the Convention's organs relies on social theories of fundamental rights, according to which

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[3]*Case relating to certain aspects of the laws on the use of languages in education in Belgium* (languages case). Op. Com. of 24 June 1965, Series B, vol. 3-4; Judgment (merits) of 23 July 1968, Series A, vol. 6.

[4]Their ideas in this respect were mainly developed in three cases: *Marckx v. Belgium* (Op. Com. of 10 Dec. 1977, Series B, vol. 29; judgment of 13 July 1979, Series A, vol. 31); *Airey v. Ireland* (Op. Com. of 8 March 1978, Series B, vol. 30; judgment of 9 Oct. 1979, Series A, vol. 32); *Van Oosterwijck v. Belgium* (Op. Com. of 1 March 1979, Series B, vol. 36; judgment of 6 Nov. 1980, Series A, vol. 40). The subsequent case-law plainly takes these ideas for granted: see, e.g., *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A, vol. 91, Par. 23, p. 11; *Abdulaziz, Cabales and Balkadali v. U.K.*, judgment of 28 May 1985, Series A, vol. 94, Par. 67, p. 33; *Rees v. U.K.*, judgment of 17 Oct. 1986, Series A, vol. 106, Par. 35, p. 14; *Johnston and others v. Ireland*, judgment of 18 Dec. 1986, Series A, vol. 112, Par. 55, p. 25; *W. v. U.K.*, judgment of 8 July 1987, Series A, vol. 121, Par. 60, p. 27; *Gaskin v. U.K.*, judgment of 7 July 1989, Series A, vol. 160, Par. 42, p. 17; *Powell and Rayner v. U.K.*, judgment of 21 Feb. 1990, Series A, vol. 172, Par. 41, p. 18; *Cossey v. U.K.*, judgment of 27 Nov. 1990, Series A, vol. 184, Par. 37, p. 15.

[5]*Marckx v. Belgium* judgment, Series A, vol. 31, Par. 31, p. 15; *Airey v. Ireland* judgment, Series A, vol. 32, Par. 32, p. 17.

[6]*Van Oosterwijck v. Belgium*, Op. Com., Series B, vol. 36, Par. 45, p. 24.

[7]*Golder v. U.K.*, Op. Com. of 1 June 1973, Series B, vol. 16, Par. 119, pp. 60-61. See also Ap. No. 7291/75, Dec. Adm. Com. of 18 Oct. 1985, 50 *D&R*, p. 5. This statement concerns the freedom to communicate but, as has been argued, the doctrine behind it also applies to the right to communicate secretly.

[8]*Languages case* judgment, Series A, vol. 6 at p. 21.

fundamental rights entail positive subjective claims against the State, not only in the context of social rights but also in the context of traditional liberal rights of defence. Here the individual must be able to claim that the State actually develops the necessary pre-conditions so that rights can be exercised both against the State itself and against third parties, for otherwise the subjective dimension of fundamental rights risks remaining more formal than real. In brief, the Convention's organs have found that, in spite of being a traditional right of defence against the State, the right to respect for correspondence has both a negative and a positive dimension, hence that it imposes both negative and positive obligations upon the Contracting Parties[9]. Let us now explore the scope of each of these two dimensions.

1.1 The Coverage of the Negative Dimension of the Right to Correspondence

As already stated, then, the rights recognised in art. 8, conceived as negative rights, require that the Contracting Parties refrain from any active interference with their exercise. Their scope is limited by the use of the term 'interference'. Relevant questions thus are: what active infringements upon the right to correspondence amount to an 'interference' for the purposes of art. 8 and what level of infringement is needed in order for an 'interference' to have taken place?

The question of what active infringements amount to an 'interference' arises in at least two groups of cases. The first group involves cases where the responsibility of the disclosure of a piece of communication lies with one of the parties involved, either because the disclosure was actively made by one of the parties communicating or simply because it was made with her consent. The second group concerns the act of taking notice of the circumstances surrounding a piece of telecommunication. Of all these three issues the organs of the Convention have only addressed the second one: they have stated that the disclosure of a piece of communication by one of the parties communicating is *not* an 'interference' according to art. 8[10].

It is the second question (what level of infringement is needed in order for an 'interference' to exist?) that has mainly occupied the organs of the Convention. To be precise, this question has only been raised in the context of the freedom to correspond,

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[9]For the sake of clarity, the Contracting Parties are already put forward here as the passive subjects of the art. 8 right to correspondence, although a comprehensive analysis of both active and passive subjects will take place in a different section.

[10]See, e.g., Ap. No. 3788/68, Dec. Adm. Com. of 13 July 1970, 35 *Coll. Dec.*, p. 56.

yet the answer to it can very well be extended and applied to the right to the secrecy of telecommunications. The position of the Convention's organs on the issue has evolved overtime. Initially, they equated the term 'interference' with "a total prohibition from communicating"[11] and saw no interference in, e.g., discouraging someone from sending letters, restricting the number of letters per week someone may send, tearing a letter in two as long as it is still legible, or forbidding a particular means of communication as long as others are still available[12]. This initial interpretation is contained in the Commission's Decisions of Admissibility, which should not come as a surprise: as has previously been mentioned, the interpretation of art. 8 was initially controlled by the Commission, something which tended to down play the responsibilities of the Member States, so as to guarantee them as wide a scope of action as possible. Nor should it come as a surprise that this initial interpretation was reversed by the Court in the 1970s, when giving its opinions on art. 8. In one of its first decisions on this provision, the Court held that "the right under Article 8 (1) to respect for correspondence envisages a free flow of such communications"[13]. Since then any censorship or other active limitation to this free flow has been regarded as an interference; further, any active infringement upon the secrecy of correspondence, however partial, has been considered an interference, hence a violation of art. 8.1.

1.2 The Coverage of the Positive Dimension of the Rights of Art. 8: States' Positive Obligations

The problem of limiting the coverage of the positive dimension of the art. 8 rights is not so straightforward. This is because the recognition of this dimension is not explicit in art. 8 but is a result of the way the organs of the Convention have interpreted this provision. In order to know a State's positive obligations arising from art. 8 one therefore must look at the case-law of the Convention's organs. This is the purpose of the present heading.

The organs of the Convention have defined the positive dimension of the rights in art. 8 on the basis of one criterion. States, have they affirmed, must adopt the required positive measures in order that the rights recognised in art. 8 can be effectively

[11]Ap. No. 2749/66, Dec. Adm. Com. of 11 July 1967, 24 *Coll. Dec.* p. 95.
[12]Respectively, Ap. No. 2122/64, Dec. Adm. Com. of 28 Sep. 1964, 15 *Coll. Dec.*, p. 6; Ap. No. 7180/75, Dec. Adm. Com. of 7 Oct. 1976 (unpublished), *Digest of Strasbourg Case-Law*, Council of Europe, Vol. 3, p. 176; Ap. No. 2749/66, Final Dec. Adm. Com. 11 july 1967, 24 *Coll. Dec.* p. 98; Ap. No. 6870/75, Dec. Adm. Com. of 14 May 1977, 10 *D&R*, p. 37.
[13]*Silver and others v. U.K.* (Op. Com. of 11 Oct. 1980, Series B, vol. 40, Par. 269-270) and *Campbell and Fell v. U.K.* (Op. Com. of 12 may 1982, Series B, vol. 65, Par. 142, p. 75).

exercised, but only in as far as these measures fall within their juridical responsibility. On the basis of this criterion, the States' positive obligations can be defined as follows. First, States must provide an adequate legal framework for the exercise of the rights of art. 8, which must make the protection of their exercise adequately accessible to all[14]. Second, States must also (re-)establish the preconditions for the exercise of the right in question whenever this is or has been hindered by an action or non-action attributable to the States[15]. The Contracting Parties must thus remove all significant obstacles to the exercise of the right to correspondence for which they can be held responsible, so that, for example, they must pay the postage on prisoners' correspondence where the prisoners' lack of financial means is directly related to their situation of imprisonment[16]. On the other hand, no obligation exists for the Contracting Parties positively to render possible the exercise of rights whenever this has been hindered by reasons beyond their responsibility[17]. For example, States are under no obligation to provide with means to avoid "the risk of occasional miscarriage of mail" which "the very nature [of the postal service] involves"[18].

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[14]See, e.g., *Marcks v. Belgium* judgment (Series A, vol. 31, Par. 31, p. 15); *Airey v. Ireland* judgment (Series A, vol. 32, Par. 33, p. 17); *X and Y v. The Netherlands* judgment (Series A, vol. 91, Par. 23, p. 11); *Johnston and others v. Ireland* judgment (Series A, vol. 112, Par. 56, pp. 25-26).

[15]*Van Oosterwijck v. Belgium*, Op. Com. of 1 March 1979, Series B, vol. 36, Par. 45, p. 24. See also, e.g., Ap. No. 13134/87, Dec. Adm. Com. of 13 Dec. 1990, 67 *D&R* p. 216 (the Commission ruled that the U.K. has a positive duty under the Convention to secure that all pupils, including pupils at private schools are not exposed to corporal punishment as an inhuman or degrading treatment contrary to art. 3 of the Conventin, and that this duty is an effect of compulsory education -ibid. at 223).

[16]Ap. No. 9659/82, Dec. Adm. Com. of 6 March 1985, 41 *D&R*, p. 91. In the context of the right to respect for family life, States may not refuse permanence or admission to an alien if there is no other place where he can live together with his family (*Abdulaziz, Cabales and Balkandali v. U.K.*, judgment of 28 May 1983, Series A, vol. 94, pp. 33-34; see also Ap. No. 7816/77, Dec. Adm. Com. of 19 May 1977, 9 *D&R* p. 219, at 220; Ap. No. 9285/81, Dec. Adm. Com. of 6 June 1982, 29 *D&R* p. 205, at 209; Ap. No. 14112/88, Dec. Adm. Com. of 14 Dec. 1988, 59 *D&R* p. 267). Similarly, "it is part of a prisoner's right to respect for family life that prison authorities assist him in maintaining contact with his close family" (Ap. No. 13756/88, Dec. Adm. Com. of 12 March 1990, 65 *D&R* p. 265 at 277; Ap. No. 15817/89, Dec. Adm. Com. of 1 Oct. 1990, 66 *D&R* p. 251 at 255). However, in a recent decision the Commission has ruled that a State has no positive obligation to create a postal service of home delivery in areas where it does not exist, even if certain persons, for example the elderly, might have difficulties to go to the postal office to collect their mail (see Ap. No. 22964/93, Dec. Adm. Com. of 12 Oct. 1994 (pending publication)).

[17]In some cases, the responsibility for the passive hindrance the exercise of a right has been seen to lie with a different State (Ap. No. 7597/76, Dec. Adm. Com. of 2 May 1978, 14 *D&R*, p. 122), or even with the applicants themselves (see, among others, Ap. No. 5416/72, Dec. Adm. Com. of 30 May 1974, 46 *Coll. Dec.*, p. 92. Ap. No. 6577/74, Dec. Adm. Com. of 19 Dec. 1974, 1 *D&R*, Par. 92. Ap. No. 8317/78, Dec. Adm. Com. of 15 May 1980, 20 *D&R*, Par. 80, p. 90. *Guzzardi v. Italy*, Op. Com. of 7 Dec. 1978, Series B, vol. 35, Par. 87, p. 35; judgment of 6 Nov. 1980, Series A, vol. 39, Par. 109, p. 41). In some other cases, no responsibility has been found at all (see next footnote).

[18]Ap. No. 8383/78, Dec. Adm. Com. of 3 Oct. 1979, 17 *D&R*, p. 228. In the context of family life, see Ap. No. 11776/85, Dec. Adm. Com. of 4 March 1986, 46 *D&R*, p. 253: "[art. 8] respect for family life [does not] ... impose on States a general obligation to provide for financial assistance to individuals in order to enable one of two parents to stay at home to take care of children").

The coverage of the positive dimension of the rights in art. 8 is thus based on the criterion of responsibility, i.e. on the criterion of what is properly in the control of the State. However, in order to appreciate the scope of these rights attention must be paid to their limits. The reason, as was discussed in the previous chapter, is that the positive dimension of the rights in article 8 appears to have a single-level structure, so that it can be subjected to conceptual restrictions but not to restrictions of a functional character. In other words, the exercise of the positive rights in article 8 can only be restricted as a matter of definition of their coverage and the scope of a State's positive obligations deriving from them must be assessed exclusively within the context of art. 8.1[19]. As a result, the description of the coverage of the positive rights in article 8 must rely on considerations which in the context of rights with a two-level structure would describe the scope of protection.

At this point, one should bear in mind that the mere fact that individuals have a claim that the Contracting Parties positively guarantee the effectiveness of the Convention's rights implies a significant broadening of their rights -as well as a significant restriction of the Contracting Parties' scope of political action. It is therefore to be expected that the Convention's organs seek to compensate for this restriction by way of binding States' positive obligations within adequate limits. They have in fact accorded the Contracting Parties a wide 'margin of appreciation' to set the scope of their own obligations[20].

Of course, whether or not a State has acted within the scope of its 'margin of appreciation' is ultimately decided by the organs of the Convention. If the 'margin of appreciation' is not thought to be at stake, the Convention's organs also control whether or not the action of a State respects the positive obligations that this has under the Convention. This control is exercised on the basis of the criterion of responsibility, but not exclusively. In addition, the Convention's organs rely on criteria which coincide with those contained in art. 8.2, that is with the ones which control the imposition of functional limits upon art. 8 negative rights and which will be studied in detail in the next chapter[21]. The result is a strong parallelism between the functional

[19]In this respect, see *Marckx v. Belgium* judgment, Series A, vol. 31, Par. 31, p. 15; *Airey v. Ireland* judgment, Series A, vol. 32, Par. 32, p. 17; *Van Oosterwijck v. Belgium*, Op. Com. Series B, vol. 36, Par. 52, p. 26.

[20]*Abdulaziz, Cabales and Balkandali v. U.K.*, judgment of 28 May 1985, Series A, vol. 94, Par. 67, pp. 33-34; *Johnston and others v. Ireland*, judgment of 18th Dec. 1986, Series A, vol. 112, Par. 55, p. 25; *W. v. U.K.*, judgment of 8 July 1987, Series A, vol. 121, Par. 60, p. 27; *Gaskin v. U.K.*, judgment of 7 July 1989, Series A, vol. 160, Par. 42, p. 17. See also, e.g., Ap. No. 10871/84, Dec. Adm. Com. of 10 July 1986, 48 *D&R* p. 154 at 170; Ap. No. 13756/88, Dec. Adm. Com. of 12 March 1990, 65 *D&R* p. 265 at 278.

[21]*Rees v. U.K.* judgment, Series A, vol. 106, Par. 37, p. 15; *Gaskin v. U.K.* judgment, Series A, vol. 160, Par. 42, p. 17.

limits of art. 8 negative rights and the conceptual limits of art. 8 positive rights. This issue was discussed in the previous chapter, where it was noted that thanks to this parallelism the stronger implications of the single-level structure of art. 8 positive rights have thus far been avoided.

Let me now summarise how the Convention organs define the expression 'respect for' correspondence, both in its negative and in its positive dimension. In its negative dimension this expression means 'refrain from active infringement' or, to be precise, 'refrain from *any* active infringement', however marginal the infringement might appear. Also note that disclosures of a piece of telecommunication by one of the communicating parties has not been regarded as an infringement. In its positive dimension, the expression 'respect for' has been interpreted to mean that the Contracting Parties must take positive measures (legislative and others) to enable the exercise of the right. Yet the Contracting Parties are positively obliged to remove obstacles only when these can be regarded as their responsibility and in as far as these obstacles cannot be considered 'necessary in a democratic society' for attaining one of the aims mentioned in art. 8.2. This then concludes my discussion of the scope of the expression 'respect for' used in art 8 and leads me on to an analysis of the term 'correspondence', that is of the second term which limits the coverage of the right to the secrecy of telecommunications as recognised in art. 8.

2. "Correspondence"

The term 'correspondence' is the second element limiting the coverage of art. 8 right to telecommunications. As with the word "respect", a sharp distinction must be made between the literal scope of the term "correspondence" and the scope of that word as interpreted by the Convention's organs because, as in the case of the word "respect", the Convention's organs enlarged the scope of "correspondence" beyond its literal conceptual boundaries. Let us now enter the analysis of the term 'correspondence', first, in its literal scope and, second, as interpreted by the Convention's organs.

2.1 The Literal Scope of the Term 'Correspondence'

Taken literally, the term 'correspondence' does not cover all means of telecommunication, but is limited only to letters[22]. In this concern the ECHR belongs to a more general trend in international law. In particular, it follows the steps of art. 12 of the Universal Declaration of Human Rights, by which it was inspired[23], and of art. 17 of the International Covenant on Civil and Political Rights: these provisions only mention a right to correspondence[24]. A literal interpretation of the term 'correspondence' is supported (more or less explicitly) by most commentators[25], who at most grant that the term 'correspondence' also covers other means of written telecommunication. Moreover, the limited character of the scope of the term 'correspondence' is most often not even criticised by commentators, since, as some of them have pointed out[26], the secrecy of means of telecommunications other than correspondence are nonetheless covered under art. 8 as part of the right to respect for private life. As was noted at the beginning of this chapter, the right to private life plays a subsidiary role, in the sense that it covers areas of privacy considered worthy of recognition as a right but which do not fall within the scope of a more specific right. Art. 8, therefore, embraces all types of telecommunication, independently of whether or not they are covered by the right to respect for correspondence.

Contrary to the most general doctrinal trend and in spite of the above considerations, the Convention's organs have not respected the literal meaning of the term 'correspondence' when defining the scope of the right to correspondence. Let us therefore focus our attention on the view they hold in this regard.

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[22]Correspondence: "6.a: Intercourse or communication by letters; 6.b: The letters that pass between correspondents" (*The Oxford English Dictionary*, Vol. III, p. 966).

[23]J. Velu, "The European Convention on Human Rights and the Right to Respect for Private Life, the Home and the Communications" *Privacy and Human Rights* (Reports and Communications Presented at the 3rd. Colloque about the European Convention on Human Rights). Chapter one, pp. 12-95 (at 14).

[24]"No one shall be subjected to arbitrary interference with his privacy, home or correspondence..." (art. 12 of the U.D.H.R.); "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence..." (art. 17 I.C.C.P.R.). This trend seems so solidly rooted that the term 'correspondence' was never questioned during all the 'travaux préparatoires' on art. 8 of the ECHR (J. Velu, "The European Convention ..." at 15-18)

[25]For some explicit comments, see J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (Article 8). Clarendon Press, Oxford, 2nd edition. 1987, pp. 210-235 (at 228); J. Velu, "The European Convention ..." at 65; E. García de Enterría, E. Linde, L.I. Ortega, *El Sistema Europeo de Protección de los Derechos Humanos*. Ed. Civitas, 2nd. Ed. 1983, p. 105. See also the separate opinion of Sir G. Fitzmaurice to the *Golder* judgment (Series A, vol. 18, separate opinion of Sir G. Fitzmaurice, Par. 5, p. 33).

[26]*Golder* judgment, Series A, vol. 18, separate opinion of Sir G. Fitzmaurice, p. 33, footnote 2; J.E.S. Fawcett, *The Application of the European Convention* ...; J. Velu, "The European Convention ..." at 65.

2.2 The Doctrine of the Organs of the Convention

The Convention's organs have not limited the scope of the right to correspondence contained in article 8 to the literal meaning of the term 'correspondence'. Ever since facing the issue for the first time[27], both the Commission and the Court have made an effort to enlarge the scope of the right to correspondence beyond the descriptive meaning of the term, so that it embraces all telecommunications. They have thus disregarded the literal wording of the provision, together with the most general doctrinal position on the issue. On the other hand, "communications by person to person by word of mouth" have been interpreted as being only part of the scope of the right to private life[28]. In sum, the Convention's organs have tended to understand by 'correspondence' the flow of any piece of *tele*communication from the sender to the addressee[29]. Even within these limits, the broadening of the scope of the term 'correspondence' beyond its descriptive definition is far from uncontroversial. It poses, first, the question of whether such broadening was acceptable (may the organs of the Convention simply disregard the literal meaning of the terms used in the Convention?) and, second, the question of whether there was any need for such broadening, since the secrecy of telecommunications other than correspondence can always be considered covered by the right to private life, which is also recognised within art. 8. Both these questions will be addressed in the following paragraphs.

2.2.1 Was the Broadening of the Term 'Correspondence' Acceptable?

In chapter 1 I argued that the term 'privacy' can be used at three different levels, namely at a descriptive, a moral and a legal level. The same analysis can be applied to 'correspondence'. As was said with respect to privacy, it seems only logical that the descriptive definition of a term lies at the basis of its definition both as a moral and as a legal right. It was also shown, however, that this way of proceeding is not always followed in practice, for the definition of a legal right sometimes goes beyond the descriptive definition of the term which lies at its basis. Such a way of proceeding can

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[27] *Klass and others v. Germany*, Op. Com. of 9 March 1977, Series B, vol. 26; judgment of 6 Sep. 1978, Series A, vol. 24.

[28] *McVeigh and others v. U.K.*, Report of the Commission of 18 March 1981, 25 *D&R*, Par. 226-227, p. 50.

[29] As the Commission has ocassionally pointed out, "the right to respect for correspondence does not apply to documents which have already reached the addressee and are kept by him" (Ap. No. 9614/81, Dec. Adm. Com. of 12 Oct. 1983, 34 *D&R* p. 119; Ap. No. 21962/93, Dec. Adm. Com. of 11 Jan. 1994, 76-A *D&R* p. 157).

give rise to a considerable degree of confusion, as was argued in chapter 1. However, as was also noted in that chapter, the re-definition of ordinary language for using it in a technical legal sense is, in the end, a perfectly legitimate practice -one could simply affirm that thereby the same word is used to refer to a different concept. Moreover, the inconveniences that such re-definitions entail can be minimised. In particular, a great deal of confusion can be avoided if the right in question is defined with a certain degree of internal coherence and in rather clear terms. In the following paragraphs I will argue that the re-definition of the term 'correspondence' can be considered internally coherent and reasonably clear.

[A] Internal Coherence

The re-definition of 'correspondence' can be considered coherent. Coherence, justified on the basis of objective technical reasons, implies that the secrecy of *closed-channel* telecommunications be recognised as a single right and that the freedom to engage in *all* telecommunications be recognised as a single right. Why this is so will be explained in the following paragraphs.

Let me first of all refer to the case of the secrecy of telecommunications. Communications carried out through open channels (whether they are telecommunications or person-to-person communications) have very different features from telecommunications carried out through closed channels. The key-point is secrecy or, to be more precise, secrecy in as far as it is objectively guaranteed. Secrecy is an inherent feature of closed-channel telecommunications. Open-channel communications, on the contrary, do not rely on the objective guarantee of their secrecy; they entail the risk that uninvited members of the audience may see or hear a piece of communication and even record it. This difference implies that interfering with open-channel communications simply is in breach of a (more or less legitimate, more or less justified) subjective expectation of secrecy, whereas interfering with open-channel telecommunications additionally violates the secrecy which qualifies those particular means of communicating.

Although the above distinction applies for the most part to the right to the *secrecy of* correspondence, it would of course also be coherent to draw it in the context of the *freedom to* correspond; yet, in this context it makes more sense to draw the dividing line between all telecommunications, on the one hand, and face-to-face communications, on the other hand, so as to make the former the object of a single right. The reason is that, in order to engage in telecommunications, one must make use of some technical devices (these including pen and paper), whereas face-to-face communications require nothing of the sort. The freedom to engage in

telecommunications thus requires that legal attention be paid to the means by which they are carried out.

Having clarified what coherence implies in the context of the recognition of the right to telecommunications, let us now examine whether the Convention's organs were reasoning consistently with these implications in their re-definition of the term 'correspondence'. The Convention's organs have stated that "correspondence in a broader sense"[30] embraces not only letters, but also, e.g., telegrams[31] and telephone conversations[32] all of which are modes of closed-channel telecommunications. Moreover, they have stated that the right to correspondence does not cover the secrecy of telecommunications vis-à-vis telecommunication partners, for the simple reason that here no secrecy is involved: the confidentiality existing between the parties in a piece of telecommunication can only eventually be covered as part of the right to private life[33]. Nevertheless, on at least one occasion[34], the Commission has taken the view that correspondence embraces all types of telecommunications, even forms of telecommunications carried out through open channels, such as radio-communication. Yet I would like to stress that such a view has been taken in the context of the right to *engage in* 'correspondence'. In short, the term 'correspondence' has so far been interpreted to mean closed-channel telecommunications in the context of the right to the secrecy of telecommunications and open-channel telecommunications in the context of the freedom to engage in telecommunications. According to the above considerations, therefore, the re-definition of this term can be regarded as internally coherent.

[B] Clarity

Thus, when the Convention's organs have dealt with the scope of the term 'correspondence', they have drawn a distinction between the the right to the secrecy of correspondence and the freedom to correspond. This distinction seems to introduce an element of complexity in the re-definition of correspondence, thus preventing a straightforward understanding of this term as used within the context of art. 8. Complexity does not imply 'unclarity', however. The re-definition of correspondence is perfectly clear with respect to the secrecy of correspondence, on the one hand, and with respect to the freedom to correspond, on the other. Thus, the re-definition of

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[30] *Klass and others v. Germany*, Op. Com. Series B, vol. 26, Par. 62, p. 37.
[31] Ap. No. 6870/75, Dec. Adm. Com. of 14 May 1977, 10 *D&R*, p. 37.
[32] *Klass and others v. Germany*, Op. Com. Series B, vol. 26, Par. 62, p. 37; judgment Series A, vol. 24, Par. 41, p. 21. *Malone v. U.K.*, judgment of 2 Aug. 1984, Series A, vol. 82, Par. 64, p. 30. *Schenk v. Switzerland*, judgment of 12 July 1988, Series A, vol. 140, Par. 52, p. 31.
[33] Ap. No. 14838/89, Dec. Adm. Com. of 5 March. 1991, 69 *D&R*, p. 286.
[34] Ap. No. 8962/80, Dec. Adm. Com. of 13 May 1982, 28 *D&R*, p. 112 at 124.

correspondence should not be considered unclear because it is based on a plausible distinction between the secrecy and the freedom of correspondence.

2.2.2 Was the Broadening of the Term 'Correspondence' Needed?

The broadening of the scope of 'correspondence' can still be subject to further criticism. In particular, one could object that, however legitimate, such a broadening implies no change in the scope of art. 8, since secrecy of telecommunications is nevertheless covered under the heading of the right of private life, which is part of art. 8. No actual advantage seems to compensate for the terminological confusion that such a broadened definition creates[35]. I will argue, however, that some actual advantages do derive from the reading the Convention's organs have made of 'correspondence' within the context of art. 8. These advantages are, at least, the following:

First, including the secrecy of closed-channel telecommunication and the freedom to engage in all telecommunications under the heading of 'correspondence' has permitted the development of a coherent jurisprudence in each of these two fields. This, of course, is highly desirable, since the protection of the secrecy of closed-channel telecommunication, on the one hand, and of the freedom to engage in all telecommunications, on the other hand, gives rise to similar problems, as was argued above. A coherent jurisprudence would have been more difficult to achieve if different modes of telecommunication had been treated as part of different rights, even if recognised in the same article. Second, a coherent jurisprudence in turn helps to coordinate the ECHR and the national Constitutions of the Contracting Parties, since the latter have a tendency to include all forms of telecommunication within a single right[36]. In this way, the doctrine of the Convention's organs on the subject can be more easily followed by the Contracting Parties. Finally, it should be noted that extending the scope of 'correspondence' to embrace other forms of telecommunication helps to avoid the uncertainties that their coverage under the heading of a subsidiary right to privacy or to 'private life' would have implied.

For these reasons it seems wise to have included telecommunications within the right to correspondence, even if they could also have been covered by art. 8 under the

[35]This, as for the rest, has been the solution sometimes adopted by the Convention's organs. See, e.g., Ap. No. 10828/84, Dec. Adm. Com. of 6 Oct. 1988, 57 *D&R*, p. 5 at 28: "The Commission leaves open the question whether bank statements may be regarded as 'correspondence' ... , given that in any event they fall within the domain of private life".

[36]See the Constitutions of Denmark (art. 72), Germany (art. 10), Italy (art. 15), the Netherlands (art. 13), Portugal (art. 34), Spain (art.18.3), Sweden (art. 6) and Turkey (art. 22).

right to private life and even if this required a re-definition of the term 'correspondence'. Paradoxically, the fact that the right to telecommunications is in any case covered by art. 8 turns out to be of benefit when justifying the jurisprudential broadening of the scope of 'correspondence'. Due to this circumstance, the issue is avoided of whether the Court is allowed to enlarge the literal scope of a provision so as to create a new right, since the Convention's organs merely re-allocated under different conceptual headings rights which were already recognised.

3. Art. 8 and the Right to Privacy

3.1 Respect for Correspondence and Private Life

The main features of the coverage of the right to the secrecy of telecommunications can now be summarised as follows: first, the right to the secrecy of telecommunications has both a positive and a negative dimension, that is it imposes both positive and negative obligations upon the Contracting Parties; second, the coverage of this right embraces *all* closed-channel telecommunications and, so far, *only* closed-channel telecommunications[37]; third, the secrecy of telecommunications is entirely recognised within the right to respect for correspondence, not within the right to respect for private life. Taking account of these three features, the coverage of this right appears defined in generous terms (first feature) but in terms which, at the same time, are internally coherent (second feature) and clear (second/third feature).

The third one of these features deserves further attention, however. In particular, it ought to be noted that in a number of cases dealing with the secrecy of telecommunications the Convention's organs, mostly the Commission, have started to refer both to the right to correspondence and to the right to private life[38]. The fact that private life is referred to together with correspondence indicates that it does not occupy a 'subsidiary' or 'fall-back' position; rather it seems to be regarded as a right which embraces all the others listed in art. 8, that is to say it seems to be regarded as a

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[37]Questions such as whether this right covers only closed letters or also, e.g., postcards, whether it coves only letters or also other acts of postal sending or whether it covers correspondence sent through channels different to the post have not yet been settled by the Convention's organs.

[38]See Ap. No. 10439/83, 10440/83, 10441/83, 10512/83 and 10513/83, Dec. Adm. Com. of 10 May 1985, 43 *D&R*, p. 34; Ap. No. 10628/83, Dec. Adm. Com. of 14 Oct. 1985, 44 *D&R*, p. 175; Ap. No. 10862/84, Dec. Adm. Com. of 6 March 1986, 46 *D&R*, p.123; Ap. No. 11811/85, Dec. Adm. Com. of 8 March 1988, 55 *D&R*, p. 196; *Kruslin v. France*, judgment of 24 April 1990, Series A, vol. 176, Par. 26, p. 20; Ap. No. 13274/87, Dec. Adm. Com. of 6 Sep. 1990, 66 *D&R* p. 164; Ap. No. 12327/86, Report of the Com. of 9 May 1989, 67 *D&R* p. 123; Ap. No. 14838/89, Dec. Adm. Com. of 5 March 1991, 69 *D&R* p. 286.

synonym for the all-embracing right to privacy. It would thus seem that by way of referring to private life the Convention's organs have started to push privacy to the foreground of art. 8[39].

As has been argued, making privacy the direct source of recognition of art. 8 rights can only prove to be to the disadvantage of these rights, since it subjects the scope of art. 8 rights to the uncertainties inherent in the concept of privacy. So far, this danger has not materialised as far as the secrecy of telecommunications is concerned. The reason is that in this context the right to correspondence has remained the central point of reference, even if cited jointly with the right to private life. Private life -hence privacy- has merely been mentioned as a way of reinforcing the position of the claimants, maybe even to stress the importance of privacy as the interest underlying art. 8 rights, but not to undermine the fact that the secrecy of telecommunications is the object of recognition and protection as a independent right. The role of privacy as the 'underlying interest' in the context of art. 8 will be the main focus of attention for the rest of this section.

3.2 Respect for Correspondence and Freedom of Speech

The analysis of the coverage of the right to telecommunications in article 8 would not be complete without a comment on the scope of the expression "respect for correspondence", taken as a whole. In particular, it ought to be noted that this expression covers the *freedom to engage in* telecommunications as well as the *secrecy of* telecommunications, that is that the freedom and the secrecy of telecommunications are approached as two different aspects of a single right.

That the freedom and the secrecy of telecommunications are recognised jointly was pointed out in the introduction to this thesis, where I also noted that a feature distinguishes the ECHR from the Constitutions of Germany and the United States, where the freedom to engage in telecommunications is protected as part of a different constitutional right. This feature of the ECHR has up to now been taken for granted in my discussion of the case-law of the Convention's organs. It is however an aspect of

[39]On one occasion, the Committee of Ministers even made an explicit reference to privacy as the direct source of coverage of all telecommunications within art. 8 ("Recommendation No. R(85)10 of the Committee of Ministers to Member States concerning the practical application of the European Convention on Mutual Assistance in Criminal Matters in respect of letters rogatory for the interception of telecommunications" adopted by the Committee of Ministers on 28th June 1985, Council of Europe. Publication Section (Legal Affaires). Strasbourg, 1986, esp. Par. 17, p. 13; Par. 22, pp. 13-14). This, however, has remained an isolated case.

the right to correspondence which raises important issues in the context of the coverage of this right and, more generally, in the context of the coverage of art. 8 as a whole. It is now time to address these issues.

There is a danger that the inclusion of the freedom to engage in telecommunications within the right to respect for correspondence undermines privacy as the interest underlying art. 8 rights and that, as a consequence, this provision loses its internal coherence and the clarity of its external limits. In particular, there is the danger of blurring the borderline between art. 8 and art. 10. For art. 10 recognises the right to free speech, a right with which art. 8 freedom to engage in telecommunications has many common traits. The tension between these two articles is underlined by the fact that the borderline between them lies in the privacy-publicity distinction; in other words, whereas privacy underlies art. 8, the idea of publicity underlies art. 10 freedom of expression[40]: freedom of expression concerns the divulgence of facts or ideas purportedly addressed to an unidentified number of people or to a non-restricted or non-selected group of persons[41].

The internal coherence of the right to respect for correspondence, in particular, and of art. 8, in general, ought to be maintained. In order to make this possible and to avoid confusion with art. 10, the scope of art. 8 must be limited to the freedom to engage in telecommunications in so far as the recognition of this freedom is justified by the interest in privacy. One should thus take into account the point that privacy supports the recognition of the freedom to engage in acts of telecommunication only if they are intended to be private or if they can reasonably be expected to be private. As long as these qualifications are borne in mind, privacy can still be taken as the point of reference for the coverage of art. 8.

In the context of the freedom to engage in telecommunications, one can assume that the term 'privacy' is not used as a synonym for 'seclusion' (after all, a piece of telecommunication is an instance of the contact that a person has with the outside world) but as a synonym for 'secrecy'. Secrecy thus constitute the common rationale of

[40]The free-speech claimant "is still part of the open society and fights his battle in the market place of ideas; [whereas the privacy claimant] is part of the closed society and fights to withhold his allegiance and perhaps even his identity and association" (R.G. Dixon, "The Griswold Penumbra: Constitutional Charter for an Expanded Law on Privacy?" *The Right of Privacy. A Symposium*, New York 1971, p. 8).

[41]Such a distinction appears in the Italian Constitution, one of the few ones within the Council of Europe where freedom and secrecy of telecommunications are recognised as complementary aspects of a single right: "La libertà e la segretezza della corrispondenza e di ogni altra forma di comunicazione sono inviolabili" (art. 13). See also art. 41 of the Constitution of Malta and art. 22 of the Constitution of Turkey.

the secrecy of and the freedom to engage in telecommunications. In spite of this, however, these two different rights do not have the same scope: as was noted above, the former covers telecommunications the secrecy of which is objectively guaranteed on technical grounds, whereas the latter covers both closed-channel and open-channel telecommunications. What I would now like to note is that in order for art. 8 to keep its internal coherence the right to engage in telecommunications cannot embrace just *any* open-channel telecommunications. If internal coherence is to be achieved, then the definition of this right must be qualified on the basis of a criterion which bespeaks the interest in the protection of privacy. For example, it would be coherent to affirm that art. 8 only covers the right to engage in telecommunication which are carried out with the intention or the expectation of keeping its content private (i.e. secret); it could even be required that this expectation be somewhat justified. Unfortunately, the Convention's organs have not yet given an indication as to the criteria which define the right to engage in telecommunications. The risk therefore exists that this right appears to embrace all kinds of telecommunications, whether or not they are intended to be private.

Nevertheless, and although a definition of 'private open-channel telecommunications' has not yet been provided, the Convention's organs have so far respected the internal coherence of art. 8, that is they have managed to keep art. 8 under the controlling rationale of privacy. A good indication of this is that they have sometimes referred to open-channel telecommunications as part of the right to private life[42]. This however has not prevented 'hard cases' on the borderline between arts. 8 and 10 from arising. Such 'hard cases' arise in the context of the freedom to use means of telecommunication which are intended to publicise the content of the communication. A good example involves 'public' letters, i.e. letters which are ultimately intended for publication; another example is the case of radio-communications, provided that they are intended to be public. Does art. 8 cover the right to use such 'public' means of telecommunication?

The freedom to write 'public' letters has been dealt with by the Convention's organs. Their case-law on the issue shows an evolution towards a broader interpretation of the scope of art. 8. In their earliest jurisprudence on this issue, they judged that the freedom to write such letters was covered only by art. 10[43];

[42]Ap. No. 8962/80, Dec. Adm. Com. of 13 May 1982, 28 *D&R*, p. 112 at 124.
[43]Art. 8, for example, was not thought to protect the right to contact a publisher (e.g., Ap. No. 5442/72, Dec. Adm. Com. of 20 Dec. 1971, 1 *D&R* p. 41).

subsequently they judged that it was covered *both* by arts. 8 and 10[44], which is the current view. Although the coverage of public letters by both art. 8 and 10 can be considered settled doctrine, the Convention's organs have not been clear as to how in particular these two articles relate and apply: in some cases, art. 8 has been considered "lex specialis", the application of which excludes the need to examine a complaint with respect to art. 10[45], whereas in other cases complaints have been examined within the scope of art. 10[46].

On the other hand, the Convention's organs have not yet had to decide on any case dealing with radio-communications intended to be public. It is however worth noting that they have judged on the freedom to engage in *private* radio-communications (i.e. radio-communications intended to be kept secret) not only with reference to art. 8 but also with reference to art. 10[47]. In this way, they have enlarged the scope of art. 10 and made it cover private communications, which is just another way of blurring the borderline between this article and art. 8.

In sum, we can affirm that, generally speaking, and in spite of the fact that art. 8 covers the freedom to engage in open-channel telecommunications, the organs of the Convention have so far respected the fundamental division between the scope of art. 8 and the scope of art. 10. The interest in the protection of privacy thus outlines the boundaries of the scope of art. 8 and the privacy/publicity distinction makes the borderline between arts. 8 and 10. This distinction confirms and reinforces the clear definition of the right to the secrecy of telecommunications: the right is defined by the conceptual boundaries of the terms 'respect' and 'correspondence', to which the organs of the Convention give a clear definition and, at least in principle, it does not overlap with the coverage of the freedom of speech. Nevertheless, the recognition of the freedom to engage in open-channel telecommunications has given rise to border-line cases, which the organs of the Convention have not been able to solve on the basis of the above distinction. This could lead to a blurring of the borderline between art. 8 and art. 10. It would therefore be desirable that a clear distinction between the scope of these two rights operated with very great weight in the solution of border-line cases.

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[44]*Silver and others v. U.K.*, Op. Com. of 11 Oct. 1980, Series B, vol. 40, Par. 272, p. 72; Ap. No. 8317/78, 3 *EHRR* 161, Par. 107

[45]Ap. No. 8317/78, 3 *EHRR* 161, Par. 107.

[46]Ap. No. 8231/78, Dec. Adm. Com. of 12 Oct. 1983, 49 *D&R*, Par. 52, p.15.

[47]Ap. No. 8962/80, Dec. Adm. Com. of 13 May 1982, 28 *D&R*, p. 112.

Section 2: Germany

Introduction

Article 10:
"1. Privacy of correspondence, posts and telecommunications is inviolable.
2. Restrictions may only be ordered pursuant to a law. Where a restriction serves to protect the free democratic basic order or the existence or security of the Federation or a *Land* the law may stipulate that the person affected shall not be informed of such restriction and that recourse to the courts shall be replaced by a review of the case by bodies and subsidiary bodies appointed by parliament."

The secrecy of telecommunications is recognised as an independent right in art. 10 of the German Basic Law. This provision is exclusively dedicated to the recognition of this right, thus differing from the analogous provisions in the ECHR and in the Constitution of the United States. To be sure, the right to the secrecy of telecommunications is considered by the Constitutional Court to be an aspect of privacy, which is recognised as a right within art. 2.1 of the Basic Law, yet it is an aspect of privacy which art. 10 recognises as a specific right, and which therefore no longer falls within the scope of art. 2.1. This is not to say, however, that privacy has no role to play in the context of the secrecy of telecommunications, for privacy remains in any case for the Constitutional Court the interest behind the protection of this right. Further, as was explained in chapter 1, art. 2.1 covers areas not clearly covered under art. 10 (*supplementäres Freiheitsrecht*) and areas that art. 10 covers but for which if offers no protection (*subsidiäres Freiheitsrecht*). Nevertheless, in as far as covered by art. 10, the secrecy of telecommunications stands as an independent right.

Art. 10 of the German Constitution recognises three different rights, the right to the secrecy of correspondence (although translated as 'privacy' the German term used by the Basic Law is '*geheimnis*', which translates into 'secrecy'), the right to the secrecy of communications by post and the right to the secrecy of other forms of telecommunications. In particular, it states that the secrecy of all these types of communication is inviolable. These three rights give form to an all-embracing right to the secrecy of telecommunications. It will be the purpose of the following pages to explore the conceptual boundaries of this right. Attention will first focus on the scope of the terms 'correspondence', 'post', 'telecommunications' and 'secrecy' as used in art. 10. Subsequently, I will try to shed some light upon the scope of the term 'inviolability' as used with reference to the secrecy of telecommunications.

1. "Post"

The secrecy of communications by post as recognised in art. 10 could be considered as a kind of *lex specialis* with respect to the other two rights covered by this provision, so that the area covered by the secrecy of 'correspondence' and the secrecy of 'telecommunications' are those left uncovered by the secrecy of telecommunications by post. This area can be described as follows: the secrecy of communications by post starts to apply from the moment when the object to be sent is accepted for carriage by the postal service to the moment when it is delivered by the postal service to the addressee. In other words, the secrecy of communications by post applies during the time when the postal service is in control of the object of the sending[48].

During this period of time, the right covers the secrecy not only of letters but of anything else sent by post; even the secrecy of postal checks, although in any case covered by the secrecy of bank, has been considered to be included within this right to the extent that they are means of communication between people by post[49]. In addition, art. 10 secrecy of communications by post does not only guarantee the secrecy of the content of a postal sending but also of all other circumstances concerning every particular use of the postal service. Amongst these circumstances there is, for example, the very fact of that use, the time and place where the communication took place, the kind of the postal service chosen, as well as the persons identified as the sender and the addressee[50].

2. "Correspondence"

Art. 10 of the Basic Law recognises an independent right to the secrecy of correspondence, i.e. a right to the secrecy of letters. The scope of this right overlaps with the scope of the one studied above during the time in which a letter is in the hands of the postal service. Thus, the secrecy of telecommunications by letter stands as an independent right only before letters are accepted by the postal service and after they

[48]See on this point the BVerwGE 79, 110 at 115.
[49]"Postscheckgeheimnis", regulated in § 6 PostG. In this context, see Badura, *Kommentar zum Bonner Grundgesetz*, Art. 10, Par. 34, p. 19. As the author points out, the same cannot be said, e.g., of accounts opened in the bank attached to the postal service -"Postsparkassengeheimnis", § 6 PostG.
[50]See BVerfGE 6, 299 et seq.; 67, 157 at 172.

have been delivered by it, as well as when a letter is sent by some means other than the postal service[51].

In the context of this right, the term 'correspondence' can be interpreted as any communication from person to person carried out in writing as a substitute for oral communication[52]. This implies, first, that this right covers letters, telegrams or postcards, but not other act of sending such as parcels, newspapers, books, etc.; second, that it only covers the correspondence between some concrete sender and addressee, not correspondence in which either of the two is not personally identifiable.

For the secrecy of a letter to be covered by art. 10, it must be surrounded by a certain objective expectation of "secrecy", that is, letters must be closed so as to provide secrecy. In this sense, contrary to the right to the secrecy of communications by post, the right under examination covers the content of letters, but not other circumstances involved in their transportation, such as, the name and address of the sender and the addressee. Moreover, this right covers the content of letters only when these have been properly closed, hence not when their content lies open to public view, as in the case of postcards, or when they have been wrapped in such a way that their content can still be seen without effort. Borderline cases are of course bound to arise in which it is difficult to decide whether the content of a letter is *easily* visible. Such cases should be solved with regard not only to the objective adequacy of the wrapping to guarantee secrecy but also to the subjective expectation of the sender or, to be more precise, having regard to what the wrapping can objectively say about the subjective expectations of the sender[53].

3. "Telecommunications"

Finally, art. 10 recognises a right to the secrecy of telecommunications. The coverage of this right goes from the most traditional means of telecommunications, namely telecommunications by phone and telegraph to new means of long-distance communication the secrecy of which might appear as worthy of protection, such as telefax, telex, electronic mail, etc. This right covers the secrecy of all telecommunications independently of whether or not they are carried out by the post. In

[51]See Badura, *Kommentar zum Bonner GG*, Art. 10, Par. 28, p. 17.
[52]Badura, *Kommentar*... Par. 29, p. 17; Maunz-Dürig-Herzog, *Grundgesetzeskommentar*, Art. 10, p. 13.
[53]See, e.g., BGH (ZR), Urteil v. 20. 2. 1990, (1991) *JZ* 67 at 68. This position is sustained by Maunz-Dürig-Herzog, *Grundgesetzeskommentar* p. 14; Badura, *Kommentar* ... Par. 29, p. 17.

this respect, the question arises whether public telecommunication networks must be considered part of the postal service. It has been noted[54] that if they must, then the right under consideration remains rather narrow in scope, since most forms of telecommunications take place within the framework of such networks. The discussion whether or not this is the case is, however, rather futile, since both rights are guaranteed in art. 10; moreover, they are guaranteed in similar terms, for as was the case with the secrecy of the post, the secrecy of telecommunications also covers not only the content but all other circumstances of every particular communication[55].

4. "Secrecy"

Art. 10 of the Basic Law recognises a right to the 'secrecy' of the post, correspondence and telecommunications. This element of the definition of the art. 10 right raises two issues: first, it must be decided which party in an act of telecommunication is entitled to secrecy; second, the scope of the term 'secrecy' as used in art. 10 must be defined.

4.1 Which Party has a Right to the Secrecy of an Act of Telecommunication?

Which party in an act of telecommunication has a right to its secrecy? Is it only the sender, only the addressee, or is it both of them? If both of them, does each party have a right to secrecy in a different phase of the telecommunication process or do they both enjoy a simultaneous right to secrecy? Of course, these questions do not arise in the context of every means of telecommunication. It is, in fact, rather artificial to pose them in a context in which every piece of telecommunication contains a dialogue between the parties involved, as in the case of telephone conversations, so that each party can be regarded as both the sender and the addressee. The above questions are relevant only in the context of pieces of telecommunication in which the sender and the addressee can be individualised and separated. This is the case with telecommunications carried out by letter and through the post and of all other types of telecommunications in which the parties involved do not hold a simultaneous reciprocal intercourse, such as telefaxes or electronic mail.

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[54]See Maunz-Dürig-Herzog, *Grundgesetzeskommentar* p. 17.
[55]See BVerfGE 67, 157 at 172; 85, 386 at 396.

Nothing is specified in art. 10 of the Basic Law as to which party to an act of telecommunication has a right to its secrecy. Ordinary law, on the other hand, gives certain indications in this respect. To begin with, according to the general view[56], the criminal protection of the secrecy of telecommunications (§ 202 *Strafgesetzbuch*) is accorded to the sender until the moment when the act of telecommunication reaches the addressee, at which point protection is accorded to the addressee. This distribution of rights appears to have been confirmed by the *Postordnung* (PostO), which grants the sender of a postal sending full control over it until the moment when it is delivered -the sender is entitled to have the postal sending returned upon petition any time before delivery (§ 44.1.1; 44.3 PostO). According to ordinary law, therefore, the questions formulated above could be answered as follows: until the moment when a piece of telecommunication reaches the addressee, only the sender has a right to the secrecy of this piece of telecommunication; from this moment onwards, the addressee becomes the only holder of the right to secrecy.

Nevertheless, the conclusions reached at the statutory level cannot be automatically followed in the context of a constitutional right to the secrecy of telecommunications. For one thing, the scope of a fundamental right cannot be defined by the scope of one of the rights that individuals have vis-à-vis the postal system as users of the postal service; nor can it be defined by ordinary law but only by the Constitution. We thus have to turn to the Basic Law for hints on the issue of which party to an act of telecommunication has a right to its secrecy. Now, art. 10 may give no indication as to which party has a right to the secrecy of an act of telecommunication, yet this is one of the issues that can be solved by way of an appeal to the interest behind the recognition of a right to the secrecy of telecommunications, that is, by an appeal to the interest in the protection of privacy. The relevant question therefore is which party has a privacy interest in an act of telecommunication? It seems to me that the answer can only be that *both* parties to an act of telecommunication have a privacy interest in keeping it secret, hence that an interference with the secrecy of an act of telecommunication breaches the privacy interests of both the sender and the addressee, independently of the particular moment in which the interference in question takes place. On this basis we can conclude that both parties to an act of telecommunication have a right to its secrecy[57].

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[56]See e.g. Dreher/Tröndle *StGB* 44. Aufl. § 202 Par. 7 and § 205 Par. 3; Schönkel/Schröder/Lenckner *StGB* 23. Aufl. § 202 Par. 8 and § 205 Par. 4; LK/Träger *StGB* 10. Aufl. § 202 Par. 24 and § 205 Par. 4 (references in BGH (ZR), Urteil v. 20. 2. 1990, (1991) *JZ* 67 at 69).
[57]BGH (ZR), Urteil v. 20. 2. 1990, (1991) *JZ* 67 at 68.

4.2 The Definition of 'Secrecy' in the Context of Art. 10

As used in the context of art. 10, the term 'secrecy' can be defined as the secrecy of an act of telecommunication which is inherent in the act of communicating. This definition can be gleaned from some of the details of the definition of this coverage which have been explained above. Note for example that the particular circumstances surrounding an act of telecommunication are covered by the rights to the secrecy of the post and to the secrecy of other forms of telecommunication, but not in the context of the right to the secrecy of letters. Similarly, the content of an open postal sending is part of the right to the secrecy of the post, whereas the content of open letters is not covered within the right to the secrecy of letters. The reason is precisely that both the right to the secrecy of the post and the right to the secrecy of telecommunications cover means of telecommunication entrusted to services that can guarantee the secrecy of their surrounding circumstances as well as the secrecy of the content of an open sending, which is not the case in the context of the secrecy of letters.

The fact that the term 'secrecy' defines the scope of art. 10 in the terms specified above helps to solve some issues concerning the definition of the coverage of art. 10. First, due to the definition of 'secrecy' the art. 10 right does not cover the secrecy of the circumstances surrounding a piece of telecommunication vis-à-vis the particular employee to whom it is entrusted in as far as such circumstances lie open to his view, that is in as far as they are not secret to him. As far as this employee is concerned, art. 10 does not even cover the secrecy of the content of an act of postal sending using material which is not properly closed, that is, it does not cover the secrecy of an open postal sending[58]. On the other hand, if the surrounding circumstances of a piece of telecommunication remain secret, then they are covered by the art. 10 right even if knowing them is essential in order that the telecommunication in question can be carried out; even in this latter case, finding out the details of an act of telecommunication which do not lie in open view amounts to an infringement upon the right to the secrecy of telecommunication, hence it is only constitutional if it fulfils certain conditions which will be explained in the next chapter, among which art. 10.2.1 of the Basic Law stipulates that they must be authorised by law (see § 5.1-2 *Postgesetz*; § 14a (1) *Fernmeldeanlagegesetz*).

Secondly, the definition of 'secrecy' implies that art. 10 does not cover the content of telecommunications concerning communication partners or vis-à-vis a third person who has access to the conversation from a regular extension telephone set. Yet

[58]See BVerwGE 32, 129 at 130; 76, 152 at 154.

neither a party nor such a third listener may divulge the content of a piece of telecommunication in question, since this goes against the right to privacy recognised in art. 2.1 and, eventually, against the more specific right to one's own voice also recognised within this provision. On the other hand, the circumstances that surround a piece of telecommunications are covered by art. 10 also vis-à-vis communication partners. As a matter of fact, the secrecy of these circumstances vis-à-vis communications partners has recently been reinforced by the European Commission in its "Amended proposal for a European Parliament and Council Directive concerning the protection of personal data and privacy in the context of digital telecommunication networks, in particular the Integrated Services Digital Network (ISDN) and digital mobile networks"[59]. In this proposal (arts. 7 and 8), the Commission gives the subscriber of a telecommunication service the possibility both to have itemised bills and to effectuate a calling-line identification, yet it also makes it a duty for Member States to ensure that the privacy of the subscribers affected by such bills or calling-line identification devices will be preserved.

Finally, the way the term 'secrecy' is approached and the fact that this term defines the coverage of art. 10 sheds light upon the question of whether this provision embraces only closed-channel or also open-channel telecommunications, i.e. whether it only covers means of telecommunication the secrecy of which is guaranteed on a technical basis or whether it also covers other means the secrecy of which lies in no more solid a basis than the expectations or hopes of the parties involved. The German Constitutional Court has not yet had to judge on this issue, yet the way the term 'secrecy' is interpreted within art. 10 suggests that the scope of this provision is limited to closed-channel telecommunications. This is also the desirable solution. For, as I argued in section 1, the definition of the right to the secrecy of telecommunications can only be coherent if this right covers only telecommunications carried out through closed-channels, i.e. if the coverage of this right is limited to telecommunications the secrecy of which is guaranteed on a technical basis.

Admittedly, some common rationale could be found for the recognition of the secrecy of both closed-channel and open-channel telecommunications as a single right, the problem is that in order to embrace these two types of telecommunications such a rationale must be rather lax, which means that it cannot have much strength as a point of reference for the definition of the right to the secrecy of telecommunications (the only instance of such a rationale I can think of is a 'reasonable expectation of secrecy' where the term 'reasonable' is interpreted in subjective or social terms). Recognising the

[59]COM(94) 128 final - COD 288, Brussels, 13 June 1994.

secrecy of open-channel telecommunications as part of the same right as the secrecy of closed-channel telecommunications would thus be to the detriment of the coverage of the latter, since its otherwise rather clear boundaries would then be subject to ill-definition. This is not to say that the secrecy of open-channel telecommunications ought not to be recognised as a right; this is only to say that the secrecy of open-channel telecommunications ought to be recognised within a different right to the rationale of which it is closer, such as the right to privacy recognised in art. 2.1 of the Basic Law.

The way the term 'secrecy' defines the coverage of art. 10 proves important in the face of the development of the new means of telecommunications. Let me give two examples. The first example is the so-called electronic mail (E-mail), that is the "system of message transfers sent between computer terminals via telephone lines"[60]. The provider of this electronic telecommunication can have access to the content of messages sent and keep a copy of them in case of system failure. The question therefore arises whether the existence of this possibility puts E-mail communications outside the coverage of art. 10 of the Basic Law. This question has to be given a negative answer, because messages transmitted through E-mail do not lie in open view for the providers of the service. Having access to those messages thus amounts to an interference with art. 10 rights and may only be considered in accordance with the Basic Law to the extent that it is explicitly allowed in a legal text. Let me also note that E-mail services are provided by private parties, hence the secrecy of this means of telecommunication is not directly covered as a right under art. 10 of the Basic Law. This issue will be developed in chapter 7.

The second example concerns conversations by portable telephones. Conversations carried out from a portable telephone are partially transmitted via radio waves. One can therefore conclude that they partially fall outside the coverage of art. 10 of the Basic Law, hence that the secrecy of part of portable telephone conversations can only be protected within the right to privacy recognised in art. 2.1. This conclusion is particularly serious. For one thing, portable telephones have nowadays as much importance as traditional wire telephones have. In addition, parties to a portable telephone conversation are not usually aware of these implications, hence they have the same confidence in its secrecy as do the parties in a telephone conversation completely carried out via wire; nor does someone speaking through a wire phone always know that at the other side of the line there is a portable phone. Before reaching a definite conclusion on the coverage of the secrecy of portable telephone conversations, I would

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[60]R.W. Kastenmeier, D. Leavy, D. Beier, "Communications Privacy: A Legislative Perspective" (1989) *Wisc. L. Rev.* 715 at 726, note 75.

like to pay closer attention to the technical characteristics of these conversations; in particular, I would like to distinguish among three different portable telephone technologies, each of which implies a different level of 'openness'.

A first type of portable telephones are *cordless telephones*, which consist of "a handset and a base unit wired to a landline and a household/business electrical current"[61]. The level of 'openness' of this means of telecommunication is very high. The reason is that from the handset to the base unit, a cordless telephone conversation is transmitted by AM or FM radio signals, which means that during this lapse a conversation can be intercepted from any radio set. Second, there are also *cellular telephones*. "When a caller dials a number on a cellular telephone, a transceiver sends signals over the air on a radio frequency to a cell site. From there, the signal travels over phone lines or a microwave to a computerised mobile telephone switching office"[62]. The cellular technology has some advantages over traditional 'cordless telephones': first, it makes portable phones available in areas distant from a telephone wire, typically in cars; second, cellular telephone conversations are more difficult to intercept than cordless telephones conversations: they can only be intercepted with a scanner particularly designed or adapted to this purpose. Finally, portable telephones can also be *microwave telephones*, which work through "extremely high frequency radio waves transmitted point-to-point on line-of-sight paths between terrestrial antennas, usually via satellite"[63]. These portable telephone conversations are most difficult to intercept: interception can only be carried out with the help of specialised and expensive equipment, which normally only satellite dish owners or intelligence agencies possess. In spite of these advantages, cellular phones appear to be taking over the market because they have a much higher channel capacity and allow the use of much more subscribers in an area.

In sum, portable telephone conversations are always partially carried out via radio waves, yet the extent to which these radio waves are accessible to the public varies with each mode of portable telephone. Cordless telephone conversations are accessible from any ordinary radio set; cellular and microwave conversations, on the other hand, are designed with the purpose of excluding uninvited ears, to the extent that they can only be intercepted with devices specifically and fundamentally designed for this purpose. Thus cordless telephone conversations appear to be open-channel, hence uncovered by art. 10 of the Basic Law, whereas cellular and microwave conversations are closed-channel and covered by this provision.

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[61]Kastenmeier and others, "Communications privacy ..." at 724, note 56.
[62]Ibid. at 723, note 50.
[63]Ibid. at 722.

I would now like to draw attention to one fact: the German Ministry for Post and Telecommunications recently liberalised the sale and possession of receivers for special frequencies of radio frequencies, these including the scanners which allow the interception of portable telephone conversations[64]. In this legal context, it seems that the only sure mechanisms to avoid interception is the use of digitalised types of cellular telephones (the so-called D1-D2 network). In this type, the transmission from the telephone to the cell site is digitalised and the conversation codified; the difficulties involved in the de-codification of a message make this mode of telecommunication truly 'secret', i.e. closed-channel, hence covered by art. 10 of the Basic Law.

What about the other types of cellular and microwave portable telephone communications, then? Have they become open-channel by virtue of the decision of a German Minister to liberalise the sale of special frequency receivers? Can a closed-channel modality of telecommunication be transformed into the open-channel variety merely by making intercepting devices available to all? To answer this question with a simple 'yes' would be unsatisfactory, because this answer amounts to taking uncritically the *is* for the *ought*, in the realist fashion. A critical position instead ought to be adopted. I would for example consider it reasonable to classify telecommunications either as open or as closed channel depending on whether they can be intercepted with devices that can primarily be used for other legitimate purpose (as is the case with ordinary radio receivers), on the one hand, or whether they can only be intercepted with devices specifically or mainly designed for that purpose, on the other. In this latter case, one must conclude that the availability of intercepting devices does not make closed-channel telecommunications stop being such. The coverage of a constitutional provision cannot be defined by the legal regulation on the availability of technical devices aimed at the violation of this very constitutional provision. Rather, norms making intercepting devices available must be regarded as interferences with art. 10 of the Basic Law.

The ideas developed in the above paragraphs as to how the term 'secrecy' defines the coverage of the right to the secrecy of telecommunications have recently found some support in the amended proposal of the European Commission for the Directive for the protection of privacy in digital telecommunication networks referred to above. This proposal limits the scope of this directive to closed-channel telecommunications; with respect to the open-channel part of some otherwise closed-

[64]Decision of 30 June 1992, *15. Jahresbericht des Landesbeauftragten für den Datenschutz*, Freie Hansestadt Bremen, March 1993, pp. 13-14.

channel telecommunications, the proposal makes it a duty for telecommunication organisations to inform the subscribers of the risk of interceptions and to offer them encryption facilities (see arts. 2.2, 2.5 and 4).

4. "Inviolability"

Art. 10 recognises a right to the "inviolability" of the "secrecy" of the post, of letters and of telecommunications. Although the addressees of the art. 10 right will be studied in chapter 7, let me make the point now that this right is directly addressed only to public authorities. To be more precise, it is addressed to *all* public authorities, whether or not these are in some way connected to the postal service itself. On the other hand, it is not directly addressed to private individuals, even if they run a telecommunication service. The inviolability of art. 10 rights, therefore, only results in the imposition of duties upon public authorities. Let us now see what these duties are.

4.1 The State's Negative Obligations

As traditional rights of defence against the State, art. 10 rights impose negative obligations upon public authorities. In this context, authorities may not obtain, whether directly or indirectly, any information about aspects of telecommunications which, according to the above considerations, are covered by art. 10. As explained above, postal officers entrusted with some act of telecommunication do not infringe art. 10 when they take notice of information concerning this piece of telecommunication in as far as such information lies open to their view. On the other hand, in as far as such information does *not* lie in open view, taking notice of it encroaches upon the secrecy of telecommunications; yet this encroachment can be justified if the information taken notice of is necessary to carry out the piece of telecommunication in question -provided of course that this is duly authorised by law, as will be explained in the next chapter (see § 5.1-2 PostG; § 14a (1) FAG). In addition, postal employees may not disclose to a third party any information about a communication obtained as part of their duties on the job, whether the third party be private or a public authority to whom the information in question was not addressed (on this issue, see § 5.1 PostG).

Touching on a different point, the Constitutional Court has stated that infringements upon the secrecy of telecommunications amount to violations of the rights of art. 10 even if these infringements have been consented to by one or even all of the parties involved. With respect to such infringements, the Court has posed the

question of whether they are justified, that is whether the consented violations of the secrecy of telecommunications touch upon the protected scope of art. 10 rights, an issue which will be dealt with in detail in the next chapter. On the other hand, the Court has considered that disclosing the content of an act of telecommunication by one of the parties involved does not amount to a violation of the secrecy of telecommunications. Nevertheless, showing one's letters or taping and reproducing one's oral telecommunications might violate different rights of the other party involved in the communication, such as her rights to privacy, to intellectual property or to her own voice[65].

4.2 The State's Positive Obligations

Art. 10 also imposes positive obligations upon the State. It is, in fact, uncontroversial that the State must provide for an adequate legal framework and adopt whichever immediate measures might be needed to protect the secrecy of telecommunications against third parties; it must also develop the necessary procedural means to ensure the protection of this right against the State itself[66]. Moreover, this double duty of the German State has been confirmed at the European level by the draft of the European Commission on the secrecy of telecommunications (arts. 12 and 16). However, the existence of these positive obligations is uncontroversial only in as far as the objective dimension of the right to the secrecy of telecommunications is concerned, that is only in as far as this right is regarded as an 'institutional guarantee'[67]. The question that arises now is whether such positive obligations are also implicit in the subjective dimension of this right, that is whether the State's positive obligations in the context of the right to the secrecy of telecommunications can be the object of subjective claims.

The Constitutional Court has not yet faced this question. Moreover, it has not yet adopted a clear position with respect to the more general issue of whether the State's positive obligations arising from fundamental rights can be the object of subjective claims on the basis of these rights. In this respect, the Court has only stated in more or less clear terms that the right to human dignity (art. 1.1) and the right to one's life and physical integrity (art. 2.2.1) taken together grant the individual a positive subjective

[65]This latter right has been included within art. 2.1's right to personality in BVerfGE 34, 238.
[66]See Maunz-Dürig-Herzog, *Grundgesetzeskommentar*, pp. 14, 16 et seq.
[67]See BVerfGE 75, 40.

claim to having the minimum conditions for her existence guaranteed by the State[68]. Beyond this, all that can be said is that the Court has not precluded a potential future finding that fundamental rights can have a positive subjective dimension. This is so at the three levels where such a positive subjective dimension of rights can exist. In other words, the Court has not stopped off the possibility that the State can be obliged, first, to provide an adequate legal framework for the protection of an individual's fundamental rights against third parties, second, to develop an organisational and procedural apparatus which enables the actual protection of an individual's fundamental rights against the State itself[69] and, third, even to provide for the exercise of social rights in the narrow sense[70]. It is therefore likely that fundamental rights in Germany will in the future enshrine positive subjective claims against the State[71]. This however cannot yet be said to be the case.

With this I conclude my analysis of the coverage of the fundamental right to the secrecy of telecommunications as recognised in the German Basic Law. On the basis of this analysis we can affirm that in Germany the right is defined in rather clear terms. This is to be celebrated, even if it implies that the secrecy of certain modes of telecommunication (i.e. open-channel modes) are left out of the coverage of this right. Besides, the secrecy of open-channel telecommunications is recognised as an aspect of the right to privacy recognised in art. 2.1 of the Basic Law. It is to be regretted only that the Constitutional Court has not ruled that the right to the secrecy of telecommunications also has a subjective positive dimension, hence that it imposes subjective positive obligations upon the State. One can only hope that recognising this dimension of fundamental rights will be a future line in the evolution of the case-law of the Court.

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[68]See BVerfGE 1, 97 at 104 et seq; 40, 121 at 133 (R. Alexy, *Theorie der Grundrechte*, Nomos Verlagsgesellschaft, Baden-Baden 1985, at 398).

[69]See R. Alexy, *Theorie der Grundrechte* at 413-415 and 434, respectively.

[70]In this context, all the Court has stated is that holders of fundamental rights can claim access to means which are intended to enable the exercise of these rights *in as far as such means have already been created* by the State (*"derivative" Teilhaberechte*) (BVerfGE 33, 303 -Numerus-clausus case- and 35, 79 -High-school organisation case), which in the end is just a variation of a negative right of the individual that the State does not prevent his access to means which facilitate the exercise of fundamental rights (see e.g. Ossenbühl, "Die Interpretation der Grundrechte in der Rechtsprechung des Bundesverfassungsgerichts", (1976) *NJW*, 2100 at 2104). Yet the Court has not precluded the possible existence of an additional subjective right that the State *creates* the necessary conditions for the exercise of fundamental rights (*"orginäre" Teilhaberechte*) (BVerfGE 33, 330).

[71]The way to this evolution is also being paved by the 'Federal Adminstrative Court' ('Bundesverwaltungsgericht' -BVerwG). It for example granted the individual a positive subjective right to the existential minimum before the Constitutional Court did and in much clearer terms (see Alexy, *Theorie der Grundrechte* at 398); in addition, the BVerwG has consistently stated that the fundamental right to found schools (art. 7. 4 of the Basic Law) implies a claim to the public finance of such schools (BVerwGE 23, 347; 27, 360) (see M. Hund, "Schutzpflichten statt Teilhaberechte?" *Festschrift für Wolfgang Zeidler*, Band 2 p. 1445 at 1446 and 1450 et seq., Walter de Gruyter, Berlin - New York (1987)).

Section 3: The United States

Introduction

Fourth Amendment
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

As was explained in the previous chapter, the Supreme Court has interpreted the fourth amendment as recognising a right with a two-step structure: it recognises a right against searches and seizures, but only offers protection against those searches and seizures which are 'unreasonable'. In dealing with the coverage of the fourth amendment, therefore, attention must primarily be focused on the terms 'search' and 'seizure'.

The terms 'search' and 'seizure' define the coverage of the fourth amendment right. This circumstance deserves at least two comments. First of all, let me recall a remark I made when dealing with the structure of the fourth amendment in chapter 3. As was then pointed out, the terms 'search' and 'seizure' indicate that the fourth amendment recognises a negative right, yet the question whether this provision also imposes positive obligations upon public bodies has, to my knowledge, not yet been addressed by the Supreme Court. Second, note that the fact that the terms 'search' and 'seizure' define the scope of the fourth amendment right implies that this right is recognised in a manner contrary to most rights. By this I mean that, unlike most provisions recognising a right, the fourth amendment does not emphasise the behaviour that the holders of the right it recognises may adopt (*right to* be secure), but on the behaviour that the addressees of this right may not adopt (*right against* searches and seizures)[72]. In other words, rather than describing the right itself the fourth amendment describes what constitutes interference with that right. In this respect, this provision is a product of its history, since it was adopted not in order to guarantee security in general but in order to put an end to the practice of issuing general warrants for searches and seizure. This in fact explains why the "right against searches and seizures" appears at the foreground of the amendment, whereas the "right to be secure" (in one's person,

[72]This becomes clear when comparing the fourth amendment with arts. 1-17 of the GG and, within the American framework, with the first, fifth, sixth and eighth amendments.

house, papers and effects) hardly has any relevance; the latter seems included only as an introduction to the former, in an attempt to make the fourth amendment comply with the most general approach to constitutional rights taken in the U.S. Constitution.

The above characteristic of the wording of the amendment has had some practical consequences. Jurists' minds seem in general to be so shaped that they approach rights in an 'affirmative' manner, that is as *rights to* do something. The fact that in the case of the fourth amendment a right thus recognised might be missing or might not be significant enough to account for the intricacies of the coverage of the fourth amendment has often created uneasiness. This is why courts, in particular the Supreme Court, have willingly undertaken either to reaffirm the importance of the fourth amendment 'right to security' or simply to find a more significant 'right to' as its object. The former was the tendency under the property reading of the amendment. This was surely conditioned by the fact that security in one's papers, objects and home are rights where an interest in property can easily be identified. The latter, on the contrary, has been the tendency under the amendment's privacy reading, in which context the interest in privacy has often been brought to the foreground and been spoken of as if it were the right directly recognised by the fourth amendment[73]. This alternative is now preferred probably because the literal wording of the amendment, even if it includes a 'right to security in one's person', does not stand strongly enough for privacy interests; additionally, mentioning privacy as the right recognised in the amendment initially helped the Court to stress its reaction against the property reading of the amendment and the rigidly formalistic type of judicial adjudication attached to it[74].

All these considerations already give a first idea of how the interest in property and the interest in privacy have conditioned the coverage of the fourth amendment. In the following paragraphs I will attempt a more detailed analysis of this issue. This analysis will show that property acted as a rather narrow but very clear rationale for defining this coverage, whereas privacy has been acting in the opposite way, that is it has provided the fourth amendment with a scope of coverage which is as wide as it is

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[73]See, e.g., *Terry v. Ohio*, 392 US 347 (1967); *G. M. Leasing Corporation v. US*, 429 US 338 (1977); *Wahlen v. Roe*, 429 US 589 (1977); *US v. Chadwick*, 433 US 1 (1977); *Rakas v. Illinois*, 439 US 128 (1978); *Payton v. NY*, 445 US 573 (1980); *Griffin v. Wisconsin*, 483 US 868 (1987); *California v. Greenwood*, 486 US 35; *Florida v. Riley*, 488 US 445 (19989); *Minnesota v. Olson*, 495 US 91 (1990); *Michigan Dep. of State Police v. Sitz*, 496 US 444 (1990).

[74]Privacy is cited as the object of the fourth amendment since, and especially when, it starts to slowly outweigh the importance of property behind the amendment. See, e.g., *US v. Lefkowitz*, 235 US 452 (1932), *Zap v. US*, 328 US 624 (1946), *Harris v. US*, 331 US 145 (1947); *Trupiano v. US*, 334 US 699 (1948), *McDonald et al. v. US*, 335 US 451 (1948).

ill-defined. In the context of both rationales, particular attention will be paid to the coverage of the secrecy of telecommunications under the fourth amendment.

1. Searches and Seizures under a Private-Property Rationale

1.2 The Fourth Amendment

Interpreted in property terms, the fourth amendment was regarded as a provision guaranteeing a right to security in one's house, papers and effects, i.e. a right to security in one's -legitimate- property rights. Accordingly, the terms 'search' and 'seizure' as used in the amendment were interpreted as synonyms for interferences with material property. In this context both searches and seizures independently amounted to an interference, yet attention primarily focused on seizures since they were regarded as a more significant threat to private property rather than searches. Thus far we have been dealing with the general guide-lines concerning the coverage of the fourth amendment. More particular statements in this respect were only made in borderline or otherwise dubious cases. Under the private-property rationale, such cases were the following:

[A] A first such case was *Boyd v. U.S*[75]. This case and how it influenced the property reading of the fourth amendment were analysed at length in chapter 2. At this stage one should only note that the *Boyd* case enlarged the scope of coverage of the fourth amendment beyond the common understanding of the terms 'search' and 'seizure'. In particular, the Supreme Court declared that the 'compulsory production' of one's private papers or of any private property in general is tantamount to a 'seizure' within the meaning of the amendment, even if no real seizure as commonly understood had actually taken place.

[B] If the case of *Boyd* raised the issue of the forcible production of private property, the case of *Perlman v. U.S*[76] raised the issue of their voluntary production. In this respect, the Supreme Court took the view that the voluntary exposition and/or production of papers or personal effects did not amount to a search and/or a seizure. The Court thus confirmed what had been indicated in *Boyd v. US*, that is that only a forcible production of private property can be considered to be a search and seizure for the purpose of the amendment.

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[75] *Boyd v. U.S.*, 116 US 616 at 622 (1886).
[76] *Perlman v. U.S.*, 247 US 7 (1917).

This case also gave the Supreme Court an opportunity to judge on the issue of *consented* searches and seizures for the first time. Based on the view that the exposition and production of private property must be forcible, the Court reasoned that the concepts of search and seizure as used in the fourth amendment enshrine an idea of compulsion, be this physical or moral (i.e. threats). From this it concluded that searches and seizures carried out with the consent of the person affected thereby were not 'searches and seizures' for the purpose of the amendment, hence that the fourth amendment did not cover any right to security against them. The legal meaning of the words 'search' and 'seizure' was thus restricted with respect to their descriptive meaning. This restriction, however, would not be followed by the Court in later cases[77]. The Supreme Court soon took the view that rather than remaining outside the scope of the fourth amendment searches and seizures voluntarily permitted were not to be considered 'unreasonable'. Consent, therefore, started to be interpreted as an exception to the warrant requirement or, moreover, as a waiver to the protection of the fourth amendment.

[C] During the property reading of the fourth amendment, the scope of searches and seizures was still subject to a third restriction, a restriction which would remain as a leading feature of the property interpretation of the fourth amendment. I am referring to the so-called 'physical-infringement limitation' introduced in the case of *Olmstead v. US*[78] and according to which the terms 'search' and 'seizure' only embraced physical interference with private property. This limitation was explained in chapters 2 and 3.

To summarise, on the basis of the interest in the protection of property the coverage of the fourth amendment appeared well defined. The fourth amendment was thought to recognise a right to security in one's home, papers and effects against forcible searches and seizures carried out by means of physical infringement upon private property and this included the forcible production of private papers. A consequence of this interpretation of the fourth amendment was the exclusion of the secrecy of wire telecommunications from its coverage, as will now be explained.

1.2 The Case of Telecommunications

When looking at the coverage of the secrecy of telecommunications under the fourth amendment we have to depart from a distinction between written and wire

[77]The doctrine of *Perlman* was mainly followed in *U.S. v. Mitchell*, 322 US 65 (1944) and also finds support in recent decisions of the Court (see *Florida v. Terrance Bostick*, 115 L Ed 2d 389 (1991)).
[78]*Olmstead et al. v. US*, 277 US 438, part. at 464-465 (1928).

telecommunications. Written telecommunications (i.e. letters) fell under the heading 'papers' or more broadly under the heading 'effects', hence they were regarded as instances of private property; similarly the stoppage and/or opening of this type of telecommunications were regarded as a seizure and/or search within the meaning of the amendment, since they had to be carried out by means of physical infringement upon private property. Their secrecy was thus covered by the amendment[79]. This was not the case for wire telecommunications, for here no private property is at stake and in principle interference with the secrecy of wire telecommunications need not involve physical infringement upon rights of possession. The secrecy of wire telecommunication was therefore not covered by the fourth amendment, unless of course this secrecy had been breached by means of a 'physical infringement' upon private property, i.e. by trespass[80].

Although heavily criticised on policy grounds[81], the doctrine settled in the *Olmstead* decision survived for nearly forty years. During this time the secrecy of wire telecommunications did not remain completely unprotected, however, for soon Congress made it the object of statutory recognition and protection in Section 605 of the Communication Act of 1934[82]. Yet, for its recognition and protection as a constitutional right the property reading of the fourth amendment had to be definitely abandoned for the privacy one. It is to this that we shall now turn.

2. Searches and Seizures under a Privacy Rationale

2.1 The Fourth Amendment

During the second third of this century, the approach of the Supreme Court to the fourth amendment evolved in the sense that privacy was accorded increasing importance as the underlying interest of the amendment, until the point (in the 1970s) when it completely replaced private property. The substitution of privacy for property has had important consequences upon the coverage of the amendment. First, the amendment has no longer been conceived in absolute material terms. This implies that

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[79]See *Ex parte Jackson*, 96 US 727 (1877).

[80]On *Lee v. US*, 343 US 747 (1952), *Silverman v. US*, 365 US 505 (1961); *Lanza v. NY*, 370 US 139 (1962). In *Silverman v. US* the Court saw trespass in the insertion of an electronic listening device ('spike mike') through a wall from the moment that it made contact with private premises, in particular the heating duct.

[81]Perhaps the most significant criticisms were made by Justice Brandeis in his dissenting opinion (see *Olmstead*, 277 US 438 at 470 et seq. (1928)).

[82]48 Stat. 1064, U.S.C.

now a material interference is neither necessary nor sufficient for the amendment to be infringed, since interferences with a person's privacy can also adopt non-material forms. As a result, the Court has turned away from much of its preceding case-law on the coverage of the amendment, in particular it has abandoned the 'compulsory-production' enlargement and the 'physical-infringement' reduction of its scope. Second, a privacy interpretation implies that searches are regarded more dangerous than seizures for the purposes of the amendment and started to be perceived as its main focus of attention[83]. Third, persons have slowly replaced material objects as the main point of reference for the amendment[84], from which a number of consequences followed, for example, taking physical evidence from persons[85] or stopping them for the purposes of investigation have been regarded as seizures[86].

The substitution of privacy for property has had a yet more important consequence, however. It appears that privacy has enlarged the coverage of the fourth amendment beyond the strict limits that a property-based, material interpretation had imposed upon it. It ought immediately to be added however that, as a counterpart, privacy has also exposed the amendment to a great deal of ill-definition. The reason is that privacy, which is a broad but rather ill-defined concept, has been regarded as the direct object of recognition of the fourth amendment, so that the coverage of this provision is now defined on the basis of the scope of the 'right to privacy'. Indeed, as the Supreme Court started to interpret the fourth amendment in privacy terms, privacy started to be referred to as the direct object of this provision, the result being that the 'right to privacy' took the place of the 'right to security' as the direct object of the amendment. Above I suggested some reasons why the Supreme Court might have brought privacy to the foreground; I would now like to look at the consequences that bringing privacy to the foreground has implied. To begin with, direct references to privacy have altered the two-level *structure* of the amendment by way of imposing 'inherent limitations' upon its coverage, something that was analysed in the previous chapter. In addition, direct references to privacy have also affected the *coverage* of the

[83]This is best appreciated in connection with the protected scope of the amendment, since the lawfulness of seizures has been made dependent on the lawfulness of searches. Particularly significant in this respect is the plain-view doctrine with respect to seizures (see chapter 3 above and chapter 5 below).

[84]See explicit statements in this respect in e.g., *Schmerber v. California*, 384 US 757 (1966); *Terry v. Ohio*, 392 US 1 (1968); *Sibron v. NY*, 329 US 40 (1968); *Delaware v. Prouse*, 440 US 648 (1979); *Alabama v. White*, 496 US 325 (1990); *Michigan Dep. of State Police v. Sitz*, 496 US 444 (1990).

[85]See *US v. Dionisio*, 410 US 1 (1973); *US v. Mara*, 410 US 19 (1973).

[86]On this subject, see generally the Annotation by John F. Wagner Jr, J.D., "Law Enforcement Officer's Authority, under Federal Constitution's Fourth Amendment, to Stop and Briefly Detain, and to Conduct Limited Protective Search of or 'Frisk', for Investigative Purposes, Person Suspected of Criminal Activity -Supreme Court Cases", *United States Supreme Court Reports*, 104 L Ed 2d 1046 et seq. (1991).

amendment. The conceptual boundaries of the right to privacy now define the scope of the fourth amendment, which entails the obvious risk that this provision will suffer from the same ill definition as the right to privacy. Let me now dwell on these latter consequences.

From the case-law of the Supreme Court one can glean that in the context of the fourth amendment, privacy is understood in terms of seclusion and secrecy, which would appear as a step towards giving this provision a rather clear definition. On the other hand, however, the Court has qualified the concept of privacy as used in the context of the fourth amendment in a way that creates strong uncertainty: the Court conceives of privacy as an individual's *expectation of* privacy. Expectations of privacy are subjective. Indeed, the Court initially relied on the expression 'expectation of privacy' to define the coverage of the right to privacy recognised in the fourth amendment in purely subjective terms: the Court affirmed that the fourth amendment recognises a right to privacy in what a person "seeks to preserve as private, even in an area accessible to the public"[87]. Soon, however, the Court introduced objective standards into the definition of the fourth amendment right to privacy, so that a subjective expectation of privacy was necessary, but no longer sufficient for this right to be at stake. The Court thus ruled that the fourth amendment right to privacy embraces only expectations of privacy which can be considered 'justifiable'[88], 'legitimate'[89] or 'reasonable'[90]. For example, the Court has dismissed as 'illegitimate' or 'unreasonable' the expectation of privacy that a car passenger might have in the car where she is sitting[91] or an expectation of privacy in areas or items lying in open view, an issue which was studied in detail in the previous chapter.

The coverage of the amendment is thus subject to the indeterminacy of the terms 'justifiable', 'legitimate' or 'reasonable', particularly to the indeterminacy of the term 'reasonable', which the Court prefers over the other two. To make things worse, the Supreme Court interprets the words 'justifiable', 'legitimate' and 'reasonable' in a way which only intensifies their indeterminacy, since it relies on social standards: an expectation of privacy has been deemed 'justifiable' or 'reasonable' only if society is ready to accept it as such. Let me give some examples: the Court has stated that the

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[87] *Katz v. U.S.*, 389 U.S. 347, 351-352 (1967)
[88] *Katz v. U.S.*, 389 U.S. 347 at 353; *U.S. v. White*, 401 U.S. 745, 748-749 (1971).
[89] *U.S. v. Chadwick*, 433 U.S. 1, 7, 11 (1976); *Rakas v. Illinois*, 439 U.S. 128 (1978); *Rawlings v. Kentucky*, 100 S.Ct. 2256 (1980); *Illinois v. Andreas*, 463 US 765 (1983).
[90] *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968); *Combs v. U.S.*, 408 U.S. 224, 227 (1972); *California v. Ciraolo*, 104 S.Ct. 1809 (1986); *Dow Chemical Co. v. U.S.*, 106 S.Ct 1819 (1986); *California v. Greenwood*, 486 US 35 (1988); *Florida v. Riley*, 488 US 445 (1989); *Minnesota v. Olson*, 495 US 91 at 97 (1990).
[91] *Rakas v. Illinois*, 439 U.S. 128 (1978).

fourth amendment does not cover the expectation of privacy that an individual may have in the garbage he has left for recollection outside the curtilage of his home, since this expectation is not accepted as reasonable by society[92]; on the contrary, it has considered that society does accept as reasonable the expectation of privacy of a houseguest in his host's home, hence that the fourth amendment applies in this case[93].

The introduction of social standards into the definition of privacy is regrettable. On its basis privacy becomes even more imprecise, since it is left at the mercy of oscillations in social standards, or at the mercy of oscillations in the judicial interpretation of social standards. An example of this is the question of whether somebody who is legitimately on the premises has a reasonable expectation of privacy in them, hence whether she has standing against searches and seizures carried out in them; this question has sometimes been given an affirmative, sometimes a negative answer[94]. Moreover, the introduction of social standards into the definition of the right to privacy makes the scope of this right not only imprecise, but also necessarily narrower, for thereby its definition is laid in the hands of the major enemy of privacy, i.e. society. As a result, the weight that the right to privacy is accorded when balanced against any other interest is seriously undermined, since it is measured by those who are most interested in keeping its weight low.

The Supreme Court thus undermines the relative importance of the right to privacy rather systematically. This confirms the idea advanced in chapter 1 that the right to privacy seems to be regarded by the Court as suspicious, since its protection is thought to respond to purely individualistic interests: the protection of privacy is sought by individuals in order that they can develop their own personality away from the gaze of society and public power. Thus conceived, the protection of privacy clashes with the protection of other interests which are thought to be more orientated toward the common good, be this social or political. This clash becomes more evident if one thinks that on the basis of the right to privacy individuals aim at concealing information from the public realm, independently of whether this information might turn out to be useful for the well-being of society and/or of the State. This individualistic approach to

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[92]*California v. Greenwood*, 486 US 35 (1988). Whether or not society accepts such an expectation of privacy as reasonable is however debatable (see Justice Brennan's dissenting opinion to the Greenwood case, ibid. at 51-52). On the issue of garbage searches, see, e.g., Gordon J. McDonald, "Stray *Katz*, is Shredded Trash Private?" 79 *Cornell L. Rev.* 452 (1994). Here the author distinguishes the Supreme Court's approach to garbage searches under the property and under the privacy reading of the fourth amendment.

[93]*Minnesota v. Olson*, 495 US 91 at 97 (1990).

[94]See, for example, *Jones v. US*, 362 US 257 (1960) or *Minnesota v. Olson*, 495 US 91 (1990) for an affirmative answer and *Rakas v. Illinois*, 439 US 128 (1978), *US v. Salvucci*, 448 US 83 (1980) or *Rawlings v. Kentucky*, 448 US 98 (1980) for a negative one.

privacy seems to prevail in the United States. Indeed, it seems to be in order to correct this 'antisocial' or even 'undemocratic' inclinations of the right to privacy that the definition of the right to privacy is left here in the hands of society, which both undermines the importance of this right and contributes to making its boundaries ill defined.

Furthermore, the Supreme Court has taken yet another step towards minimising the importance of the right to privacy. The Supreme Court does not take society to be the source of a *prescription* of what expectations of privacy ought to be taken as reasonable, but merely to *describe* what expectations of privacy actually *are* reasonable given the present circumstances. Only in situations in which privacy actually exists is an expectation of privacy reasonable; in situations where privacy has not been fully preserved, on the other hand, it is unreasonable to have expectations of privacy. By adopting this understanding, the Court undermines the role of the right even further: not only is its scope defined by its major enemy; in addition, it is not invoked as a value, but called upon in a descriptive fashion to cover situations the privacy of which is actually respected by society and the State. In short, in accordance with the American realist tradition, the Supreme Court takes the *is* for the *ought* and grants the right to privacy a descriptive rather than a prescriptive role.

Moreover, the Court takes the is for the ought in a manner that suggests that it conceives of the right to privacy in all-or-nothing terms. If an individual renounces a sphere of his privacy in the context of his social relations (if he openly declares his sexual tendencies by participating in gay demonstrations, for example), even if he renounces a sphere of his privacy only in his relations with a selected part of society (for example by way of going to gay clubs), then the Court assumes that he has altogether renounced his right to privacy in this sphere, hence that he cannot reasonably expect any privacy even from the State in the context in question. In brief, the Court assumes that a person renounces his right to privacy where he does not take adequate measures to protect his privacy from *every* prying eye. This all-or-nothing approach to the right to privacy stands in contradiction to a conception of privacy as a prerequisite for participation and for the exercise of constitutional rights[95]. For many constitutional rights (free speech, freedom of association, freedom of meeting) have by their nature to

[95]Indeed, it has been criticised by commentators who defend a more participatory vision of this right. See for example J.J. Tomkovicz, "Beyond Secrecy for Secrecy's sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province", 36 *The Hastings L. J.* 645 at 681 (1985); S.E. Sundby, ""Everyman" 's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?" 94 *Col. L. Rev.* 1751 at 1798 (1994). Compare the Supreme Court's all-or-nothing definition of the right to privacy with the 'graded' definition of this right made by the German Constitutional Court, which as has been mentioned regards privacy as a condition for participation. In particular, see BVerfGE 90, 255 esp. at 261 et seq.

be exercised in the public light, that is, their exercise requires that an individual renounces a sphere of his privacy vis-à-vis society; yet in order that they can be exercised freely, an individual must be able to preserve this sphere of his privacy vis-à-vis the State. The State, that is, may not take note of whether and how an individual exercises his constitutional rights. The problem with the Supreme Court's doctrine of the right to privacy, however, is precisely that privacy is not approached as a condition for participation. The result is a very narrow definition of the right to privacy. When looking at the right to the secrecy of telecommunications we will come across some of the negative consequences of the Supreme Court's descriptive and absolute conception of the right to privacy.

2.2 The Case of Telecommunications

The position of the Supreme Court with respect to telecommunications underwent a radical change as its understanding moved from one characterised by property to one characterised by privacy. This could not be otherwise, since the issue of telecommunications stands as the landmark of a broader issue which conditioned the general passage in Supreme Court reasoning from property to privacy, i.e. whether there can be searches and seizures without physical infringement upon private property (the 'physical-infringement' limitation). As a matter of fact, the 'physical-infringement' limitation had been introduced by the Court in a case (*Olmstead v. US*) dealing with wire telecommunications as an easy formula to justify that the secrecy of these could not be embraced by the amendment under its property reading. The property period in the history of the fourth amendment only came to a definite end when the Supreme Court abandoned the physical-infringement rule[96] and a formal reading of the object of the amendment replaced its previous material reading, so that the concepts 'search' and 'seizure' were no longer defined as physical intrusion into private property. Wire-tapping and eavesdropping appeared as the most notable examples of non-physical searches and seizures.

In *Katz v. US*[97] the Court for the first time explicitly stated that there was a reasonable expectation of privacy in a telephone conversation, hence that for the purposes of the fourth amendment wire-tapping was a 'search' and the acquisition of

[96]The mere-evidence rule had been recently abandoned. See *Schmerber v. California*, 38 US 757 (1966) and *Warden v. Hayden*, 387 US 294 (1967).
[97]*Katz v. US*, 389 US 347 at 355 (1967).

information therewith a 'seizure'[98]. Telecommunications thus came to join written letters within the coverage of the fourth amendment. It ought not to be forgotten however that thereby the boundaries of the secrecy of telecommunications as a constitutional right have been exposed to the problems arising from the ill-definition of the coverage of the fourth amendment; to be more precise, the constitutional right to the secrecy of telecommunications is only recognised in so far as an expectation of privacy is involved which society is ready to regard as reasonable.

The Supreme Court has not had many opportunities to make decisions on the coverage of the constitutional right to the secrecy of telecommunications. It is however worthy of note that on these few occasions the Supreme Court has not subjected the secrecy of telecommunications to the same degree of ill-definition as privacy. It is clear that in the context of telecommunications privacy is understood only as 'secrecy', so that the fourth amendment only covers the *secrecy* of telecommunications (that is it only covers the privacy of telecommunications which is inherent in their secrecy), or more precisely it only covers expectations of secrecy which society considers reasonable. What matters most is the way the Supreme Court has interpreted the condition of reasonableness in this context. Thus far the Supreme Court seems to adhere to the idea that there is a reasonable expectation of secrecy only where secrecy is intrinsic to the act of communicating, thus translating the social standards that qualify the reasonableness of an expectation of privacy into an objective standard. According to the Court, for example, the fourth amendment does not apply vis-à-vis communication partners[99]. Similarly, it only covers the secrecy of first-class mail, i.e. the secrecy of letters and sealed packages subject to letter postage and thus closed to postal inspection[100].

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[98]Shortly before, in *Berger v. NY* (388 US 41 at 59 (1967)), the Court had implicitly considered eavesdropping within the scope of coverage of the amendment, independently of whether it had been carried out by way of physical intrusion. In fact, the Court examined whether the New York's statutory authorisation of eavesdropping (NY Code Crim Proc § 813-a) contravened the fourth amendment, thus accepting without arguing that eavesdropping is a kind of search and seizure.

[99]This doctrine had been developed with reference to Section 605 of the Communication Act of 1934 (see *Rathburn v. US*, 355 US 107 at 110-111 (1957)). This idea can also be applied to written telecommunications: divulgence of their content by one party might violate some rights of the other party -such as his rights to privacy, intellectual property, honour- but not his right to the *secrecy* of telecommunication.

[100]*US v. van Leeuwen*, 397 US 249 (1970); *US v. Ramsey*, 431 US 606 (1977). This definition of the coverage of the right to the secrecy of letters is confirmed at the statutory level: Title 39 USC § 3623(d) only recognises a right to secrecy to first-class mail of domestic origins. It is worthy of note that the coverage of the secrecy of written telecommunications under the fourth amendment was already so drawn by the Supreme Court in *Ex parte Jackson* (96 US 727 (1877)), that is, in the earliest case of the Supreme Court on this issue. Here the Court drew a line "between what is intended to be kept free from inspection, such as letters and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets and other printed matter, purposely left in a condition to be examined" (ibid. at 733). It thus seems that in this early case the Court interpreted the fourth amenement as a provision aimed at the protection of privacy and defined privacy in terms of what is intended to be kept free from inspection by means which objectively guarantee freedom from inspection.

Moreover, on the basis of this objective standard the Supreme Court has introduced a very important limitation to the constitutional right to the secrecy of telecommunications: it has ruled that the secrecy of the circumstances surrounding an act of telecommunication is not intrinsic in the act of communicating[101], given that "pen registers and similar devices are routinely used by telephone companies for the purpose of checking billing operations, detecting fraud, and preventing violations of law"[102]. Here we have an example of a descriptive definition of the right to the secrecy of telecommunications on the basis of an all-or-nothing view of what expectations of secrecy society can consider reasonable. Since the circumstances surrounding an act of telecommunication are never totally secret, it is unreasonable to expect any secrecy in them with respect to anyone, independently of whether or not these circumstances *ought to* and actually *could* remain secret, at least to a certain extent and with respect to certain people[103].

It thus appears that the right to the secrecy of telecommunications recognised in the fourth amendment has thus far escaped ill-definition. If the objective criterion hinted at by the Court continued to apply consistently (i.e. that this right exists in as far as there is an expectation of secrecy which is reasonable on objective or even technical grounds), then the Court would also have a more narrow margin of action to portray its mistrust of privacy in the context of telecommunications. This doctrine ought therefore to be celebrated as a positive step in the attitude of the Court towards telecommunications, perhaps even as a positive step in its more general attitude towards privacy. Yet it ought not to be celebrated without reservations: given that constitutional cases on the secrecy of telecommunications have thus far not been many, this doctrine cannot be considered in any sense consolidated yet. Now, this remark calls attention to a circumstance that contributes to the rather clear definition of the constitutional right to the secrecy of telecommunications. I am thinking of the existence of a well-defined statutory right to the secrecy of telecommunications. This statutory right influences its corresponding constitutional right in at least three different ways. First, the existence of

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[101]This is confirmed in Title 18 of the U.S.C., which only condemns the surveillance of the *content* of telecommunications, while it allows the surveillance of the circumstances surrounding an act of telecommunication, by means for example of a 'pen register'. On the other hand, Title 50, Chapter 36 of the U.S.C. contains a statutory exception to this rule for the case of foreign intelligence surveillance telecommunications. According to § 1801, this Chapter protects the 'content' of telecommunications, this including "any information concerning the identity of the parties to such communication or the existence, substance, purport or meaning of that communication".

[102]*Smith v. Maryland*, 442 US 735 at 742 (1979)

[103]Ibid. at 743 et seq.; see also *US v. Choate*, 576 F.2d 165 (9th Cir.), cert. denied, 439 US 953 (1979) (mail covers, i.e. the recording by postal employees of the outsides of first-class envelops and sometimes the insides of lower-class mail addressed to a given person, falls outside the coverage of the fourth amendment). For this limitation of the coverage of the fourth amendment, see J. Applegate & A. Grossman, "Pen Registers after *Smith v. Maryland*", 15 *Harv. C.R.-C.L. L. Rev.*, 753 et seq.

a well-defined statutory right to the secrecy of telecommunications reduces litigation concerning this right altogether and, in particular, it reduces the number of cases on the coverage of this right that arrive before the Supreme Court. Second, cases on the secrecy of telecommunications are hardly ever solved on a constitutional basis, since the Supreme Court avoids constitutional issues whenever possible and prefers to solve cases on statutory grounds ("if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter"[104]). Finally, even when dealing with the secrecy of telecommunications from a constitutional point of view, the Court tends to reason on the basis of patterns provided by statutes, given that statutes regulate this right in much clearer terms.

In sum, it is certainly positive for the constitutional right to the secrecy of telecommunications that it be clearly defined on objective grounds. With this it does not only escape ill-definition but also gives the Supreme Court fewer opportunities to portray its mistrust of privacy in the context of telecommunications. One ought however to be cautious when celebrating this doctrine because it is not consolidated at the constitutional level; moreover, it finds strong support in the existence of a well-defined statutory right to the secrecy of telecommunications. It would even seem that to some extent the constitutional right to the secrecy of telecommunications depends upon its corresponding statutory right and that a change in the latter could provoke a change in the doctrine concerning the former. All in all, therefore, it is difficult to predict what can be the future line of evolution of the Court's doctrine. One can only hope that the Court will maintain its present definition of the right to the secrecy of telecommunications on purely constitutional grounds and that it will not occasionally fall back on vaguer sociological criteria to define the coverage of this right where they seem convenient. Given the general case-law of the Supreme Court on the fourth amendment, this latter danger unfortunately cannot be excluded.

One last question still remains unsolved unfortunately, namely, whether open-channel telecommunications are covered under the fourth amendment right to the secrecy of telecommunications. As in the cases of the ECHR and Germany, the answer to this question depends on whether or not the term 'secrecy' is interpreted in purely objectives terms, that is, it depends on whether or not secrecy (or, to be more precise, an expectation of secrecy that society considers reasonable) is thought to exist only where it is guaranteed on some objective technical grounds. Although this question has

[104] *Ashwander v. Tennessee Valley Authority* (Justice Brandeis concurring), 297 US 288, 346 (1936) (quotation from Martin Shapiro & Rocco J. Tresolini, *American Constitutional Law*, at 69).

not yet been directly addressed by the Supreme Court, we have seen that so far the Court has only been applying the fourth amendment to situations where secrecy is inherent in the communication itself. This suggests that if the Court had a chance to decide on open-channel telecommunications, then it probably would not admit them within the coverage of the amendment -assuming of course that it does not alter its present doctrine. As was argued in the context of the ECHR and Germany, this is the desirable solution.

As in the context of Germany, the fact that the right to the secrecy of telecommunications only covers closed-channel telecommunications is of particular importance at a time when new modes of telecommunications are being developed. The reason is that not all of these new modes clearly fall within the category of closed-channel telecommunications. This is notably the case of portable telephone conversations, which are partially carried out via radio waves. The question therefore arises whether the constitutional right to the secrecy of telecommunications covers portable telephone conversations. As was noted in the context of Germany, the answer to this question varies according to the kind of portable telephone technology at issue, for not all portable telephone conversations are equally easy to intercept. The easiest ones in the range are conversations carried out from a cordless telephone, for they are partially transmitted through AM or FM radio waves, hence they can easily be intercepted from any radio set. Then come cellular telephone conversations, which are partially transmitted via a radio frequency which can be intercepted by scanners designed or significantly modified for this purpose. Finally, microwave telephone conversations are transmitted through radio waves via satellite; the interception of these conversations requires complex technology which is only available for satellite dish owners and foreign intelligence agencies.

Which ones of the above modes of portable telephone telecommunications can be considered closed-channel, hence covered by the fourth amendment's right to the secrecy of telecommunications? When dealing with Germany I defended the idea that telecommunications can only be considered closed-channel to the extent that their interception is possible only by means specifically and fundamentally devised for this purpose[105]. On the basis of this criterion, I concluded that cordless telephone conversations are open-channel, whereas both cellular and microwave telephone conversations are closed-channel. The same considerations and conclusions apply in the context of the United States. As in the context of Germany, the secrecy of the two

[105]In the context of the United States, this idea has been developed by Samuel Rosenstein, "The Electronic Communications Privacy Act of 1986 and Satellite Descramblers: Towards Preventing Statutory Obsolescence" 76 *Minn. L. Rev.* 1451 (1992).

latter modes of telecommunications must therefore be regarded as covered by the fourth amendment's right to the secrecy of telecommunications, whereas the secrecy of the former falls outside the coverage of this provision. This solution has also been adopted by the Electronic Communication Privacy Act, which in 1986 amended Title 18 of the United States Code. This Act will be explained in detail in chapter 5; let me however advance the proposition that it limits the coverage of the statutory right to the secrecy of telecommunications it recognises to closed-channel telecommunications only and explicitly leaves out open-channel telecommunications.

Conclusions

The three systems under consideration recognise a fundamental right to the secrecy of telecommunications, yet the terms in which the right is recognised differ in each of them. I would now like to draw attention to some points that constitute, I believe, the most significant differences in the coverage of the secrecy of telecommunication in these three systems. These differences will show that this right finds more favourable recognition in the ECHR and the German Basic law than in the Constitution of the United States. It will also become clear that the position of disfavour that the constitutional right to the secrecy of telecommunications enjoys in the United States is mostly the result of a combination of two circumstances: first, here this right is recognised as part of the right to privacy and this is rather ill-defined; second, the right to privacy (hence also the right to the secrecy of telecommunications) is regarded as an individualistic interest worthy of limited recognition and protection.

First of all, the recognition of the right to the secrecy of telecommunications in the ECHR has one clear advantage over the recognition of this right in Germany and in the United States. In the former system the secrecy of telecommunications as a subjective right has not only a negative but also a positive dimension. Art. 8 of the ECHR entails both negative and positive obligations for the Contracting Parties, so that on its basis, individuals can claim not only that the Contracting Parties refrain from interfering with its exercise but also that they provide adequate means to render its exercise possible. The advantages that this positive subjective dimension entails for the protection of the secrecy of telecommunications are obvious, yet this dimension has not been adopted either in Germany or in the United States, where the secrecy of telecommunications is recognised only as a negative right. In principle, neither the German Constitutional Court nor the Supreme Court of the United States seems to preclude the idea of recognising a positive subjective aspect to fundamental rights. Nevertheless, in order that they consider applying this idea to the right to the secrecy of telecommunications, and given the important commitments, even financial commitments, that positive subjective obligations imply for the public power, the right must be considered of particular importance. This is the case in Germany, where the right to privacy is regarded as a fundamental key to a constitutional democracy; moreover, here the recognition of a positive subjective dimension of the right to the secrecy of telecommunications could eventually be urged by the organs of the Convention, if some case on the subject should be brought before them. This is not, on the other hand, true of the United States, where the Supreme Court regards the right to

privacy as antisocial and undemocratic and tries to minimise the importance that it is granted.

Second, the recognition of the right to the secrecy of telecommunication in Germany also has an advantage over its recognition in the other two systems. In Germany it covers the secrecy of the circumstances surrounding an act of telecommunication in as far as this is under the control of a telecommunication system (that is, in the context of the right to the secrecy of the postal system and the right to the secrecy of telecommunications). The European Court and Commission of Human Rights have not yet had to express their opinion on this matter, whereas the Supreme Court of the United States has decided to disregard the importance of protecting these surrounding circumstances by way of adopting a 'realist' attitude toward their secrecy: on the grounds that telecommunication companies can easily have access to them, the Court argues that they cannot in truth be regarded as 'secret', hence that they are not covered by the fourth amendment. The circumstances surrounding an act of telecommunication have thus been excluded from the right to the secrecy of telecommunications

Finally, in one important respect the recognition of the right to the secrecy of telecommunications in the ECHR and Germany is more favourable to the right than is the way it has been recognised in the United States. This concerns the relation existing between the secrecy of telecommunications as a fundamental right and privacy as the interest lying behind it. Both in the ECHR and in Germany, the secrecy of telecommunications is given independent recognition as an independent right. As a result, the right can be and is defined in clear terms, because its boundaries have been cut out of the shaky scope of the all-embracing right to privacy. Of course, saying that the right to the secrecy of telecommunications is independent from the right to privacy is not to say that privacy has no role to play in this context. Privacy, remains the interest behind the recognition of the right, thus it stands as a central interpretative criterion of particular importance in border-line cases; additionally, the right to privacy offers coverage to areas which do not -or do not clearly- fall within the scope of the right to the secrecy of telecommunications, thus compensating for the eventual rigidity that might arise from the clear definition of the right. For example, as an interpretative criterion, privacy helps to maintain a coherent rationale for art. 8 of the ECHR and imposes a certain interpretation of the right to respect for correspondence (i.e. that this right covers the freedom to engage only in open-channel telecommunications intended to be held in secret), whereas in Germany it leads to the conclusion that both parties to an act of telecommunication have a right to its secrecy. As a subsidiary right, privacy plays a role in the crucial question of whether the right to the secrecy of

telecommunications also covers open-channel modes of telecommunication. Open-channel telecommunications should not be covered by the right to the secrecy of telecommunications if this is to keep its internal coherence, yet that does not mean that they will remain unprotected. As long as they are intended to remain private, open-channel telecommunications are covered by the subsidiary right to privacy.

In the United States, the relationship between the right to the secrecy of telecommunications and the right to privacy is not the one depicted above. Here the recognition of the right to the secrecy of telecommunications in the Federal Constitution is a by-product of the rise of privacy as the interest underlying the fourth amendment right against searches and seizures. The coverage of this right therefore depends on the concept of privacy, that is, the definition of the right to privacy decides the extent to which the terms 'search' and 'seizure' must be read to embrace interferences with the secrecy of telecommunications. Therefore, the coverage of the secrecy of telecommunications is subject to the ill-definition which characterises the scope of the right to privacy. The ill-definition of the right to privacy has been reinforced by the Supreme Court, which has furthermore interpreted the scope of this right in restrictive terms. At the source of their position there is the idea that privacy is a suspect interest because it protects individual preferences for secrecy and seclusion at the expense of the common good, which tends to require publicity. In order to compensate for the antisocial character of privacy, the Court has defined the right to privacy on the basis of sociological and 'realist' patterns. It has defined the right to privacy as an expectation of privacy that society (i.e. the greatest enemy of privacy) is willing to accept as 'reasonable' or 'legitimate', and has stated that this can only be the case if total privacy is already implied in the situation in question.

Nevertheless, the coverage of the constitutional right to the secrecy of telecommunications has thus far escaped ill definition. In fact, in the context of telecommunications, the expression 'reasonable' or 'legitimate' expectation of privacy (here 'reasonable' or 'legitimate' expectation of secrecy) has so far been interpreted in purely objective terms, so that an expectation of secrecy is considered 'reasonable' or 'legitimate' by society where secrecy is inherent in the act of communicating. As long as this rationale is respected, the right to the secrecy of telecommunications can keep its internal coherence, which makes it easy to identify, hence to protect. Positive though this doctrine is, however, cases on the subject have so far been few, if compared to the number of cases there have been on searches and seizures. It therefore remains to be seen whether the purely objective definition of the fourth amendment right to the secrecy of telecommunications will be followed consistently, or whether the Court will fall back upon its more general and better established practice of defining the fourth

amendment right on sociological grounds, if it finds a reason for doing so. The existence of a well-defined statutory right to the secrecy of telecommunications might help the Court to maintain a clear definition of this right at a constitutional level, yet the Court should also avoid the risk of making a constitutional right depend upon statutes. In short, in the United States the constitutional right to the secrecy of telecommunications so far appears to be well defined. However, this position is not a consolidated 'doctrine' and, given the Court's more general and better established doctrine on the fourth amendment, it is difficult to predict whether it will be held consistently, at least, whether it will be held without the Court's relying upon the statutory right to the secrecy of telecommunications.

As a final remark, I would like to note that unfortunately the question of the coverage of open-channel telecommunications has not yet been faced straightforwardly in any of these three systems, at least not at the constitutional level. A clear answer to this issue, however, is rather urgent, given the growth of modalities of telecommunication which are transmitted through open channels, such as cordless telephones. My opinion is that the right to the secrecy of telecommunications ought to be well-defined on the bases of a clear rationale and that this implies that, to the extent that they are open-channel, the secrecy of all these new systems should remain outside the coverage of the right to the secrecy of telecommunications.

Indeed, the definition of an independent right to the secrecy of closed-channel telecommunications relies on a clear rationale or point of reference, i.e. the right covers telecommunications the secrecy of which is guaranteed on technical grounds. On the other hand, the definition of a right to the secrecy of open-channel telecommunications must rely on a much vaguer rationale, such as the existence of a more or less reasonable expectation of secrecy in an act of telecommunication. A common recognition of these two rights would have to rely on this latter rationale as a common point of reference, something which would clearly be in detriment to the coverage of the secrecy of telecommunications carried out through closed channels. The situation would be worse in cases where the reasonableness of an expectation of secrecy is measured in 'realist' terms, that is, on the basis of things as they are, as is the case in the United States. This situation can be avoided if the secrecy of open-channel telecommunications is recognised as an independent right or, in the absence of such a right, if it is recognised as part of the right to privacy. Only in this way can the right to the secrecy of telecommunications conserve its clear, effective definition, while the secrecy of open-channel telecommunications can be covered in the same terms as it would be under an all-embracing right to the secrecy of telecommunications. It is reassuring that both the U.S. Electronic Communication Privacy Act of 1986 and the draft of the European

Commission for the Directive for the protection of privacy in digital telecommunications have adopted this point of view.

CHAPTER 5: THE OBJECT OF THE RIGHT TO THE SECRECY OF TELECOMMUNICATIONS: THE PROTECTED SCOPE

Introduction

In chapter 4, I analysed the coverage of the right to the secrecy of telecommunications as defined in the ECHR and the Constitutions of Germany and the United States. In the present chapter, I will look at the sphere within the coverage of this right that each of these three systems is willing to protect; in other words, I will look at the way the ECHR and the Constitutions of Germany and the United States define the protected scope of the right to the secrecy of telecommunications. As was explained in chapter 3, the protected scope of a right is generally defined from outside, that is, it is defined by reference to the sphere within the coverage of a right that may go unprotected; it was also explained in chapter 3 that this definition is the result of having struck a balance between the right in question and other conflicting constitutional principles. These ideas will be illustrated in the present chapter. We will see that art. 8 of the ECHR, art. 10 of the German Basic Law and the fourth amendment to the Constitution of the United States do not define the area within the right to the secrecy of telecommunications that may not be infringed upon; rather, they define the area of this right that may be lawfully interfered with (to be more precise, they define the conditions under which interferences are lawful). We will also see that the definition of this area of non-protection is done on the basis of the balancing technique as the basic criterion.

In this chapter, I will also try to add to my contention that the right to the secrecy of telecommunications is better off where it is defined in clear terms and where privacy is regarded as a condition for participation, hence where the protection of privacy is regarded as a pillar of the constitutional democratic system. Indeed, it will appear in this chapter that conceiving of privacy as a purely individualistic interest lowers the relative weight that the right to the secrecy of telecommunications is given when balanced against other interests. In addition, I will try to show that the relative position of the right to the secrecy of telecommunications is made even weaker where the right to the secrecy of telecommunications is recognised as an aspect of the right to privacy, where this right is recognised, that is, as an aspect of a right whose conceptual boundaries are highly ill-defined.

Section 1: The European Convention on Human Rights

Introduction

Article 8:
"I. Everyone has the right to respect for his private and family life, his home and his correspondence.
II. There shall be no interference by a public authority with the exercise of his right except such as is in accordance with the law and is necessary in a democratic society in the interest 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 protected scope of the right to the secrecy of telecommunications within the ECHR is defined in paragraph 2 of art. 8. According to this provision, art. 8 only protects against interferences with the right to correspondence which are not "in accordance with the law" or which are not "necessary in a democratic society" for the pursuance of some of the interests mentioned in this article. The following pages will analyse the scope of these two expressions.

As a preliminary to this analysis some comments are in order. First of all, note that paragraph 2 refers to *all* the rights recognised in paragraph 1 without distinction. Thus, the following arguments apply not only to the right to correspondence, but also to the rights to private life, family life and home; similarly, these arguments will be developed on the basis not only of the case-law on correspondence, but also of the case-law on each of these three other rights.

Second, the use of the conjunction "and" indicates that the expressions "in accordance with the law" and "necessary in a democratic society" do not impose alternative requirements, but requirements which must be fulfilled independently. As a consequence, an interference is unlawful from the moment that it does not comply with either of the two, so that once one of the requirements has not been fulfilled then an examination of the other one is often considered redundant and avoided. The Convention's organs have always preferred to analyse the requirement of legality first, thus following the order art. 8 proposes. This preference can be justified on the grounds that the fulfilment of the requirement of legality is easier to check than the fulfilment of the necessity requirement. This explains why the Convention's organs generally face this latter requirement only when the issue cannot be avoided, that is they

study the "necessity" of an interference only when this has already proven to be "lawful"[1].

Finally, note that the requirements of art. 8.2 only apply in as far as the holders of the rights recognised in art. 8.1 have not waived the exercise of these rights in the particular case at issue; in other words, the requirement of legality and the requirement of necessity must only be fulfilled by interferences with art. 8.1 rights which have not been explicitly or implicitly consented to by the victim of such interferences[2]. Consent thus appears as a limit to the protected scope of the right to the secrecy of telecommunications.

1. "In Accordance with the Law"

As well as other provisions of the Convention[3], art. 8 requires that interferences with the rights it recognises be in accordance with the law. Yet no indication is given as to how the word "law" ("loi" in the French version of the Convention) must be interpreted. Neither did the Convention's organs initially feel compelled to give a systematic interpretation of this word. In the earliest cases on art. 8 hardly any attention is paid to the requirement of legality at all[4]; subsequently, both the Commission[5] and the Court[6] started to check whether that requirement had been fulfilled, yet without entering into the question of the scope of the requirement itself.

A comprehensive and systematic interpretation of the requirement of legality was only accomplished in the Court's judgment in the *Sunday Times* case[7]. This case

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[1]In its opinion to *Silver and others v. U.K.* (Series B, vol. 51) the Commission, eager to clarify its position, studied the "necessity" of the interferences in question, even though these had previously been found unlawful (see Par. 299-300, 310-311, 320-321, 345-346, 361-362; pp. 78, 79-80, 81, 85, 88 resp.). After this case, and despite the criticism of some dissenting opinion (see the dissenting opinion of Mr. Pettiti to the Malone case judgment) the avoidance of that stage can be considered a settled trend.

[2]See, e.g., Ap. No. 13134/87, Dec. Adm. Com. of 13 Dec. 1990, 67 *D&R* p. 216 at 223-224.

3 See articles 2 (1), 5 (10), 9 (2), 10 (2) and 11 (2).

[4]See, e.g., Ap. No. 793/60, Dec. Adm. Com. of 21 Dec. 1960, 5 *Coll. Dec.* p. 3; Ap. No. 1628/62, Dec. Adm. Com. of 12 Dec. 1963, 12 *Coll. Dec.* p. 68; Ap. No. 2516/65, Dec. Adm. Com. of 23 May 1966, 20 *Coll. Dec.* p. 39; Ap. No. 2413/65, Dec. Adm. Com. of 16 Dec. 1966, 23 *Coll. Dec.* p. 9; Ap. No. 3717/68, Dec. Adm. Com. of 6 Feb. 1970, 31 *Coll. Dec.* p. 105.

[5]Ap. No. 5459/72, Dec. Adm. Com. of 23 March 1972, 40 *Coll. Dec.* p. 78; Ap. No. 4960/71, Dec. Adm. Com. of 19 July 1972, 42 *Coll. Dec.* p. 57; Ap. No. 5852/72, Final Dec. Adm. Com. of 8 July 1974, 46 *Coll. Dec.* p. 145; Ap. No. 7736/76, Dec. Adm. Com. of 9 May 1977, 9 *D&R* p. 207; Ap. No. 8065/77, Dec. Adm. Com. of 3 May 1978, 14 *D&R* p. 247-248; Ap. No. 7308/75, Dec. Adm. Com. of 12 Oct. 1978, 16 *D&R* p. 33-34.

[6]*Golder v. U.K.*, judgment of 21 Feb. 1975, Series A, vol. 18; *Klass and others v. Germany*, judgment of 6 Sep. 1978, Series A, vol. 28.

[7]*The Sunday Times v. U.K.* Op. Com. of 18 May 1977, Series B, vol. 28, par. 177, p. 60; Judgment of 27 Oct. 1978, Series A, vol. 30.

deals with art. 10 of the Convention, yet articles 8 and 10 have similar structures and their respective paragraphs 2 are drafted in similar terms[8]; in particular, they both contain a requirement of legality. On account of these similarities, the Convention's organs have applied the doctrine developed in the *Sunday Times* case to the art. 8 requirement of legality[9]. I will now proceed to analyse this requirement. My discussion will first focus on the diverse features of the requirement of legality, namely on its substantial and on its formal features; second, on the basis of those features, I will consider which norms fall within the scope of the term "law" as used in art. 8.

1.1 Features of the Requirement of Legality

A first question concerning the requirement of legality is whether this requirement is merely formal or whether it also has substantial content. "In a formal sense the term covers any act performed in accordance with the procedure for legislative action laid down by the constitution of the State in question. In the substantial sense it covers any act by the public authorities laying down general, permanent and binding rules of law"[10]. The preparatory work on the Convention does not throw any light upon this issue. Yet the provisions of the Convention followed the draft of the United Nations International Covenants very closely and, according to the United Nations Secretariat's commentary on the draft, these Covenants use the term "law" in a substantial sense[11]. This seems to indicate that art. 8 imposes a requirement of legality understood in a substantial sense.

The Convention's organs did not initially share this point of view. As was observed above, they did not initially pay much attention to the requirement of legality and when they did this requirement was considered fulfilled with the mere existence of

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[8]Art. 10.2: "The exercise of these freedoms ... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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...".

[9]In the context of the right to correspondence, the leading cases on this issue are *Silver and others v. U.K.* (Op. Com of 11 Oct. 1980, Series B, vol. 51; judgment of 25 March 1983, Series A, vol. 61) and *Malone v. U.K.* (Op. Com. of 17 Dec. 1982, Series B, vol. 67; judgment of 28 June 1984, Series A, vol. 80). The Convention's organs were aware that, in the English version of the Convention, each provision expresses the requirement of legality differently -art. 8.2 demands that interferences be "in accordance with the law", whereas art. 10.2 demands that they be "prescribed by law". Yet, the symmetry between both of the paragraphs 2 led them to rely on the French version, where the same literal expression -"prevue par la loi"- is used (see Sunday Times case judgment, Par. 48, p. 30; Silver and others case judgment, Par. 85, pp. 32-33).

[10]Jacques Velu, "The European Convention on Human Rights and the Right to Respect for Private Life, the Home and Communications" *Privacy and Human Rights -Reports and communications presented on the 3rd colloquy about the E.C.H.R.* Ed. by A.H. Robertson, 1970, p. 12 at 70.

[11]Ibidem.

a legal basis for an interference[12]. This position is no longer held, however. At a certain stage, the Court explicitly stated that the art. 8 requirement of legality is not merely formal but also requires that the laws which justify an interference have certain standard of quality[13]. Let us now see what the features of this standard of quality are.

1.1.1 "In Accordance with the Law" as a Substantial Requirement.

[A] Foreseeability

"A norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able ... to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail"[14].

Foreseeability is at the centre of the substantial aspect of the requirement of legality. As the above quotation indicates, it is not required that 'laws' be foreseeable with *absolute certainty*, but only with "*sufficient precision*", "to a degree *reasonable in the circumstances*", a question which, of course, is to be decided on a case-by-case basis. In other words, 'laws' need not enable individuals to foresee with absolute accuracy when their right to respect for correspondence is likely to be lawfully interfered with, so that they can adapt their conduct accordingly. Rather, 'laws' must only give adequate indications as to when public authorities may undertake such interferences[15]. Moreover, 'laws' can be considered foreseeable even if they confer a certain margin of discretion upon the authorities which must apply them; all they must do is be precise as to the margin of discretion accorded and provide sufficient guidance as to how the discretion they confer must be exercised[16].

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[12]"It is beyond doubt that the interference was 'in accordance with the law', that is Rules 33 (2) and 34 (8) of the Prison Rules 1964" (*Golder v. U.K.* judgment, Series A, vol. 18, Par. 45, p. 21); "This requirement is fulfilled in the present case since the 'interference' results from Acts passed by Parliament" (*Klass and others v. Germany* judgment, Series A, vol. 28, Par. 43, p. 22).

[13]*Silver and others v. U.K.*, Op. Com. Series B, vol. 61, Par. 282, p. 74; *Malone v. U.K.*, Op. Com. Series B, vol. 67, Par. 121, p. 48, judgment, Series A, vol. 82, Par. 67, p. 32; *Kruslin v. France*, judgment of 24 April 1990, Series A, vol. 176, Par. 27, p. 20; *Margareta and Roger Andersson v. Sweden*, judgment of 25 Feb. 1992, Series A, vol. 226, Par. 75, p. 25; *Herczegfalvy v. Austria*, judgment of 24 Sep. 1992, Series A, vol. 244 Par. 88, p. 27.

[14]*Silver and others v. U.K.*, Op. Com. Series B, vol. 51, Par. 282, p. 74. See also *Malone v. U.K.*, Op. Com. Series B, vol. 67, Par. 121, p. 48.

[15]*Malone v. U.K.* judgement, Series A, vol. 82, Par. 67, p. 32, *Kruslin v. France* judgment, Series A, vol. 176, Par. 35, p. 24.

[16]*Silver and others v. U.K* judgment, Series A, vol. 61, Par. 88, p. 33; *Margareta and Roger Andersson v. Sweden* judgement, Series A, vol. 226, Par. 75, p. 25; *Herczegfalvy v. Austria* judgment, Series A, vol. 244, Par. 89-91, p. 27; Ap. No. 13800/88, Dec. Adm. Com. of 1 july 1991, 71 *D&R* 94 at 107-108.

[B] The Existence of Adequate Safeguards Against Abuse

"The phrase 'in accordance with the law' .... implies .... that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1"[17].

This statement of the Court is extremely misleading, in that it could lead to the conclusion that lawful interferences with correspondence must be based on laws which also provide for adequate safeguards against abuses, whereas this is not at all the case. Indeed, providing for adequate safeguards has never been regarded as a material feature of "law" under art. 8. The Court has even affirmed that such "safeguards [need not] be enshrined in the very text which authorises the imposition of restrictions"[18]. The existence of such safeguards is the object of the right to an effective remedy against Convention wrongs, a right recognised in art. 13 and which will be addressed in chapter 6. In addition, providing for adequate safeguards can be regarded as part of the positive obligations that art. 8.1 imposes on the Member States, an issue studied in the previous chapter: in order to comply with art. 8.1, Member States must ensure that their legal systems, taken as a whole, provide for adequate guarantees against interferences with correspondence. In sum, a broader look at the case-law of the Convention organs shows that the States are under the obligation to provide for adequate safeguards against violations of the Convention rights, yet that providing for adequate safeguards is not considered a feature of the requirement of legality under art. 8.2, so that laws which do not contain such safeguards may still be 'laws' in the sense of art. 8.2, hence the interference based on such laws may still be 'lawful'.

Equally misleading is the insistence of the organs of the Convention that limiting laws must provide for "a measure of protection ... against arbitrary interferences" by public authorities with the right they limit[19]. For, in spite of what this might seem to indicate, the organs of the Convention have always regarded such a measure as a requirement of the rule of law. To be more precise, they have always referred to such a measure when dealing with limiting laws which confer a discretion upon a public authority, as a way to say that, in order to comply with art. 8.2, such laws must indicate the scope of the discretion they confer. In other words, in using the expression 'measure of legal protection' the organs of the Convention only want to

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[17] *Malone v. U.K.* judgment, Series A, vol. 82, Par. 67, p.32.

[18] *Silver and others v. U.K.* judgment, Series A, vol. 61, Par. 90, p. 34.

[19] See, e.g., *Herczegfalvy v. Austria*, judgment of 24 Sep. 1992, Series A, vol. 244, Par. 89, p. 27; *Funke v. France, Crémieux v. France and Miailhe v. France*, judgments of 25 Feb. 1993, Series A, vol. 256, Par. 56-57, p. 25, Par. 39-40, pp. 62-63, Par. 38-39, p. 90, respectively; Ap. No. 13800/88, Dec. Adm. Com. of 1 July 1991, 71 *D&R* p. 94 at 107.

remind us (unfortunately not in a very clear way) that the definition of the protected scope of art. 8 rights must primarily be 'legal', that is, that it must primarily be carried out by laws.

1.1.2 "In Accordance with the Law" as a Formal Requirement: the Accessibility of the Law

"The law must be adequately accessible, the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case"[20].

As a formal requirement, 'legality' imposes the requirement that laws be adequately accessible. A law is accessible if it is published, yet publication is not the only way of conforming with this requirement. In the case of *Silver and others*, the Court affirmed that certain unpublished restrictions imposed on prisoners' rights to correspondence were "in accordance with the law", insofar as prisoners had been informed in good time of their existence and content through an explanatory notice[21]. Law is therefore accessible (hence that it is 'law' under art. 8) if it has been made known, by whatever means.

To summarise, a law is 'law' under art. 8, hence it can allow interferences with art. 8 rights, if it is foreseeable with sufficient precision and adequately accessible. These are necessary requirements. The question that arises now is whether these requirements are also sufficient, that is whether every norm can authorise an interference with art. 8 rights provided that it is foreseeable and accessible, or whether the requirement of legality additionally imposes the requirement that such interferences be only authorised by certain particular types of norms. It is the view of the organs of the Convention that foreseeability and accessibility are *not* sufficient requirements and that only certain norms fall within the scope of the term 'law' as used in art. 8.2. Let us now look at what these norms are.

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[20] *Sunday Times v. U.K.* judgment, Series A, vol. 130, Par. 49, p. 31.
[21] *Silver and others v. U.K.* judgment, Series A, vol. 61, Par. 94, p. 36.

1.2 Scope of the Term 'Law' under Article 8 (2)

[A] International Law

"[T]he interference in question must have some basis in domestic law"[22].

As this statement shows, the word "law" only embraces "domestic law". International laws are thus excluded, unless, of course, they have been incorporated into the domestic law of a Member State and then comply with the substantial and formal features of the requirement of legality. Compliance with the requirement of legality can be difficult for international norms, even if incorporated into domestic law, because they tend to be too general and abstract to be considered 'foreseeable' under art. 8.2. Nonetheless, whether or not they can be considered 'laws', provisions of international law are not irrelevant under art. 8 in that they may contribute to setting an adequate framework for the decision whether an interference is "necessary in a democratic society"; for "a restriction which violates a State's international obligation is not ... necessary in a democratic society"[23].

The provisions of EEC law deserve separate attention, since EEC law is not international, but supranational law, hence it is "law" under art. 8.2. Again, the requirement of legality must be fulfilled in its diverse features and, again, the main difficulty arises from the foreseeability of the law. From this point of view, self-executing provisions can be considered 'law' taken by themselves, whereas other provisions are only 'law' in combination with the provisions by which they are complemented and executed[24].

[B] Unwritten Law

"The Court observes that the word 'law' in the expression 'prescribed by law' covers not only statute but also unwritten law"[25].

Unwritten law is 'law' under art. 8. This statement applies primarily to common law. In this respect, there has always been absolute agreement among the organs of the Convention and the applicants and governments involved. As the Court affirmed, the

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[22]*Silver and others v. U.K.* judgment, Series A, vol. 61, Par. 86, p. 33.

[23]P. J. Duffy, "The Protection of Privacy, Family Life and Other Rights under Art. 8 of the E.C.H.R." (1982) (2) *Yearbook of European Law*, p. 191 at 206.

[24]See Ap. No. 6871/75, Dec. Adm. Com. of 3 March 78, 12 *D&R* (1978), p. 14 at 18-19.

[25]*Sunday Times v. U.K.* judgment, Series A, vol. 61, Par. 47, p. 30. See also *Malone v. U.K.*, Op. Com. Series B, vol. 67, Par. 124, p. 49, judgment Par. 66, p. 31; *Chappel v. U.K.*, judgment of 30 March 1989, Series A, vol. 152, Par. 52, p. 22.

opposite interpretation "would clearly be contrary to the intention of the drafters of the Convention", for it would strike at the very roots of the legal system of States which are Party to the Convention[26]. In the context of continental legal systems case-law is also considered 'law', yet it is not 'law' independently taken but only in so far as it helps the interpretation of rules having the force of law. In other words, in order to judge on the foreseeability of the legal rule at the basis of limitations on art. 8 rights, account must be taken not only of this legal rule itself but also of the case-law developed in its regard[27].

Needless to say, in order to be considered 'law', both common law and continental case-law must be duly accessible and foreseeable. The difficulty, as usual, lies in the requirement of foreseeability. Only settled jurisprudential trends can be considered predictable and can thus be at the basis of an interference with the right to respect for correspondence. Hence the possibility is precluded of restricting this right on the basis of rules newly created by the judiciary.

[C] Written Rules Lacking the Force of Law

"It was common ground between Government, Commission and applicants that a basis for the interferences was to be found ... not in the Orders and Instructions which lacked the force of law"[28].

Rules lacking the force of law are not "law" under art. 8. This means that, taken independently, they do not offer sufficient basis to justify an interference with the right to respect for correspondence. The only question is whether, and if so to what extent, non-legal rules that have as their source legal rules may regulate interferences with this right. The Convention's organs have accepted that laws leave some discretion to administrative authorities, since laws cannot cover every eventuality, hence they cannot make every interference sufficiently foreseeable[29]. Moreover, the Convention's organs have considered that conferring such discretion is even desirable, lest laws become too rigid to keep pace with changing circumstances[30]. They have only required that laws

[26] *Sunday Times v. U.K.* judgment, Series A, vol. 130, Par. 47, p. 30.
[27] See *Kruslin v. France* judgment, Series A, vol. 176, Par. 29, pp. 21-22 and the case-law cited therein.
[28] *Silver and others v. U.K.* judgment, Series A, vol. 61, Par. 86, p. 33.
[29] *Silver and others v. U.K.* judgment, Series A, vol. 61, Par. 88, p. 33.
[30] See *Sunday Times v. U.K.* judgment, Series A, vol. 130, Par. 49, p. 31; *Olsson v. Sweden*, judgment of 24 March 1988, Series A, vol. 130, Par. 62, p. 31; *Eriksson v. Sweden*, judgment of 22 June 1989, Series A, vol. 156, Par. 60, p. 25.

which confer a discretion indicate with sufficient clarity the scope of the discretion and the way it must be exercised[31].

[D] Administrative Practice

The conclusions reached above with respect to rules lacking the force of law can also be applied to administrative practice. This is obvious when administrative practice has been couched in systematic rules. Yet, even when this is not the case, there seems to be no reason why administrative practice should not be a legitimate basis for interferences with art. 8 rights, provided that it acts as a complement to a legal rule and that it fulfils the requirement of legality in its formal and substantial features, i.e. that it is foreseeable and accessible.

At first sight, it would seem that the organs of the Convention do not share this viewpoint: the Commission has affirmed that "'law' (...) plainly does not include mere statements of administrative practice"[32]. Yet, statements such as this prove misleading if read out of context. For, whenever an administrative practice has been in question, the organs of the Convention have analysed whether this practice fulfils the requirements of foreseeability and accessibility necessary to be considered "law" under art. 8. The Convention's organs were thus open to the idea of counting administrative practice as law, providing that it complied with these requirements. This has never been the case, however. In the cases dealt with by the Convention's organs, an administrative practice was either not accessible (it consisted of secret measures[33]) or not adequately foreseeable (it did not have "binding effects" upon administrative authorities, hence it was impossible to predict whether it would be applied to particular cases[34]).

This then concludes the analysis of the first requirement that art. 8 imposes upon restrictions to the right to respect for correspondence and leads to the analysis of the second one, i.e., the requirement that restrictions be "necessary in a democratic society" for the protection of certain interests mentioned in art. 8.2. Before proceeding, however, let me briefly summarise the content of the above analysis. We have seen that, as interpreted by the organs of the Convention, the requirement "in accordance with the law" imposes clear and well-defined limitations to restrictions of the right to

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[31] *Silver and others v. U.K.* judgment, Series A, vol. 61, Par. 88, p. 33; *Margareta and Roger Andersson v. Sweden* judgement, Series A, vol. 226, Par. 75, p. 25.
[32] *Malone v. U.K.*, Op. Com., Series B, vol. 67, Par. 124, p. 49. See also *Leander v. Sweden*, judgment of 26 March 1987, Series A, vol. 116, Par. 51, p. 23.
[33] *Leander v. Sweden*, judgment, Series A, vol. 116, Par. 51, p. 23.
[34] *Malone v. U.K.*, Op. Com. Series B, vol. 67, Par. 124, p. 49.

respect for correspondence. It requires that these restrictions be adequately foreseeable and accessible. In addition, this requirement demands that such restrictions be contained in domestic written norms which have the force of law or in norms of common law (in common-law countries); yet in order to judge whether the requirements of foreseeability and accessibility have been fulfilled these norms must be read together with norms which lack the force of law, administrative practice and case-law which might eventually complement and interpret them.

2. "Necessary in a Democratic Society (in the Interest of ...)"

According to art. 8.2, restrictions to the right to respect for correspondence must be "necessary in a democratic society" for the pursuance of some particular interests. This requirement implies that a balance must be struck between a particular restriction and the interests this restriction pursues. This balance is structured in two phases. In the first phase, every measure limiting the right to correspondence must be one that is pursuing an aim important enough to justify a limitation on this right. In the second phase, once a limiting measure has been thus justified, the concrete terms in which this limiting measure is imposed must be balanced against the aim in question in the particular case at issue, that is, using the terminology of art. 8.2, limiting measures must prove that, in a democratic society, they are necessary for the pursuance of that aim.

These two phases will now be analysed in turn. Before let me recall only that the requirement that limitations be "necessary in a democratic society" must be respected not only by concrete measures which interfere with the right to correspondence, but also by the 'law' which is (must be) at the basis of such concrete measures. In other words, the second requirement of art. 8.2 applies "both to the domestic legislator and to the bodies, judicial amongst other, that are called upon to interpret and apply the laws in force"[35].

2.1 The First Phase: the Pursuance of Some Particular Interests

Every measure limiting the right to respect for correspondence must pursue some interest which is considered important enough to justify a limitation on this right. In principle, it would seem that art. 8.2 does not leave much flexibility in this first

[35] *Handyside v. U.K.*, judgment of 7 Dec. 1975, Series A, vol. 24, Par. 48, p. 22.

phase of the balancing process, since it explicitly settles the interests which can legitimately justify an interference. Nevertheless, the aims listed in this provision are conceived in such general terms and have such strong ideological, sociological and political connotations that they still allow for a wide scope of flexibility in their application. Moreover, the generality of these aims is such that it seems fairly easy to justify any measure as having been adopted in the pursuance of one of them. As a matter of fact, the Convention's organs have never decided that an interference with the right to respect for correspondence was unlawful just because it did not pursue any of the listed aims; rather, they have always decided on the basis of whether or not the interference in question could be considered "necessary in a democratic society" in order to attain one of these aims. The aims listed in art. 8.2 thus appear hardly to play a relevant role when deciding on the legitimacy of interferences with the right to respect for correspondence.

2.2 The Second Phase: "Necessary in a Democratic Society"

Once a limitation of the right to correspondence is justified as being in pursuance of one of the interests listed in art. 8.2, it must additionally be proved that it is "necessary in a democratic society" for the pursuance of the aim in question. In order for it to be proved, a fair balance must be struck between the limiting measure and the aim this measure pursues in the particular case at issue. In striking this balance, the Convention's organs rely on the following criteria: [1] limiting measures must be proportionate; [2] limiting measures must also be necessary; in addition [3], a dissenting opinion to a Court judgement has suggested that limiting measures should also prove to be adequate to reach the aim they pursue. I will now look at these three issues[36].

[1] Proportionality

According to the Court, the expression "democratic society" enshrines a principle of proportionality: the expression "democratic society" does not merely have a formal content, that is it does not merely stand for the majority rule, but it also implies substantial notions such as "pluralism, tolerance and broad-mindedness"[37]. In this

[36]In my discussion I will sometimes refer to the *Handyside* case, a case which concerns the freedom of expression recognised in art. 10 (*Handyside v. U.K.*, judgment of 7 Dec. 1975, Series A, vol. 24). The reason is that it is in this case where the Court first made a systematic analysis of the expression "necessary in a democratic society" and that the result of this analysis is applicable in the context of art. 8 because, as in the case of the expression "in accordance with the law", the expression "necessary in a democratic society" is identical in articles 8 and 10.

[37]P.J. Duffy, "The Protection of Privacy ...", at 208-209.

substantial sense, the Court sustains, a "democratic society" imposes a requirement of proportionality upon interferences with art. 8 rights: restrictions of a person's interest in the protection of her right to correspondence are in accordance with the Convention only if they are proportionate to the aim they pursue, i.e. with the aim that justifies the limitation in question[38].

[2] Necessity

In addition to being proportionate, a 'fair balance' requires that limitations of the right to respect for correspondence must also be "necessary". As interpreted by the Convention's organs, this requirement of necessity stems from a combination of the term "necessity" explicitly used in art. 8.2 and the expression "democratic society". In the Court's view, it is implicit in a "democratic society" that a restricting measure cannot be upheld if the aim it pursues can be equally reached by other means which are less intrusive upon the rights involved[39]. In other words, the Court has considered that it is part of a fair balance that the level of infringement upon the right to respect for correspondence be the lowest possible, that is, that this right only be subject to the level of infringement which is absolutely necessary, i.e. indispensable to achieve a particular aim[40].

[3] Adequacy

In his dissenting opinion to the *Handyside* case, Justice Mosler suggested that, "in a democratic society", a restricting measure ought to be considered "necessary" only if, independently taken, it proves adequate to achieve the aim it pursues. The adequacy of a measure, Justice Mosler continued, should not be decided on the basis of its actual success in achieving its aim; rather, account ought to be taken of whether or not "from an objective point of view, the measures ... could never have achieved their aim without being accompanied by other measures"[41].

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[38]With respect to the right to family life, see *Moustaquim v. Belgium* (judgment of 18 Feb. 1991, Series A, vol. 193, Par. 41-46, pp. 18-20) and *Beldjoudi v. France*, judgment of 26 March 1992, Series A, vol. 234, Par. 74-79, pp. 27-28. For cases dealing with the right to correspondence, see *Silver and others v. U.K.*; *Margareta and Roger Andersson v. Sweden*, Series A, ol. 226, Par. 95-97, p. 31; *Pfeifer and Plankl v. Austria*, judgment of 25 Feb. 1992, Series A, vol. 227, Par. 47, p. 19; *Campbell v. U.K.*, judgment of 25 March 1992, Series A, vol. 233, Par. 52, p. 21.

[39]As an example, the "prior ventilation restriction", contained in some of the Standing Orders regulating the management of prisons in the United States, was considered disproportionate since its aims could also be attained with a "simultaneous ventilation rule" (*Silver and others v. U.K.*, Op. Com. Series B, vol. 51, Par. 302, p. 78; see also Par. 314 and 340-341, pp. 80 and 84).

[40]Note however that in the judgment to *Handyside v. U.K.* (Series A, vol. 24, Par. 48, p. 22) the Court had referred to "necessity" in much looser terms. The term "necessity" was then considered stricter than expressions such as "admissible", "ordinary" (art. 4.3), "useful" (art. 1.1 of Protocol No. 1), "reasonable" (art. 5.3 and 6.1) or "desirable"; yet it was also considered more flexible than expressions such as "indispensable", "absolutely necessary" (art. 2.2) or "strictly necessary" (art. 6.1).

[41]*Handyside v. U.K.*, judgment, Series A, vol. 24, separate opinion of the Judge Mosler, Par. 2, p. 33.

The majority of the Court has never expressed its opinion on whether a restricting measure must be 'adequate' if it is to be regarded as the result of a 'fair balance'; yet the application of a requirement of 'adequacy' is hardly avoidable, not because it is part of a 'fair balance' (in the next section I will argue that in truth it is not) but because it is inherent in the idea that limiting measures may not be imposed arbitrarily. In addition, the suggestions of Justice Mosler would bring a harmonisation of the definition of the protected scope of the right to the secrecy of telecommunications in the ECHR and Germany: in Germany, 'adequacy' is, together with necessity and proportionality, one of the requirements enshrined in the so-called principle of reasonableness, a principle which can be considered the equivalent of the principle of the 'fair balance' applied by the Convention's organs.

Thus far we have considered the terms in which the Convention's organs strike a balance between limitations to the right to respect for correspondence and their aims. It has been pointed out[42] that the Court more and more often refers to the requirement that lawful interferences with a right must not infringe upon the 'very essence' of the right in question. The question has been raised of whether the non encroachment upon the 'very essence' of a right constitutes an additional requirement for lawful interferences with rights or whether it merely amounts to the requirement of proportionality which interferences must fulfil in the context of a fair balance. In my opinion, this latter is the correct answer, that is, I believe that a limiting measure respects the 'essence' of rights in so far as it is proportionate to the aim it pursues and it violates the 'very essence' of a right in so far as it is out of proportion with this aim. The reasons why I sustain this position will be developed in depth in Section 2 of this chapter.

When an applicant complains that one of his rights has been violated, the organs of the Convention must judge whether or not the limitation of this right is the result of a 'fair balance' having been struck, i.e. whether or not the limitation was proportionate and necessary. Nevertheless, State authorities are thought to be in a better position to judge on the proportionality and the necessity of certain restrictions and have therefore been granted a certain 'margin of appreciation'[43]. The expression 'margin of appreciation' is widely used by the organs of the Convention to refer to an area of

[42]Marc-André Eissen, "The Principle of Proportionality", *The European System for the Protection of Human Rights*, Martinus Nijhoff Publishers, Dordrecht-Boston-London, 1993, p. 125 at 144.
[43]See the judgments to *Handyside v. U.K.* , Series A, vol. 24, Par. 48-49, p. 22-23; *Klass and others v. Germany*, Series A, vol. 28, Par. 65, p. 26; *Silver and others v. U.K.*, Series A, vol. 61, Par. 97 (b), pp. 37-38. See also the cases of *Funke, Crémieux and Miailhe v. France*, judgment of 25 Feb. 1993, Series A, vol. 256, Par. 55, 38 and 36, respectively.

discretion granted to the Contracting Parties within which they can make a final decision on the proportionality and the necessity of a restriction[44]; conversely, this expression also defines the scope of supervisory power that the organs of the Convention retain. The doctrine of the 'margin of appreciation' has been developed by the organs of the Convention with a view to keeping a balance between the sovereignty of the Contracting Parties and their obligations under the Convention; in other words, the 'margin of appreciation' aims at balancing the need for a Contracting Party to act in accordance with what is demanded by its specific political, economic and social context, on the one hand, with the need for the Convention's organs to develop a set of principles which can be applied across the entire Convention, on the other[45]. It follows from the very nature of the margin of appreciation that it cannot be defined in the abstract. Whether or not a Contracting Party acted within the limits of this margin, hence whether or not its action is subject to revision by the Convention's organs, is something to be decided in every individual case. One can however note some general tendencies in the case-law of the organs of the Convention, among which the tendency to make the margin of appreciation widest in the context of economic rights and most narrow in the context of aspects of privacy, such as the secrecy of telecommunications[46].

Thus, when the Convention's organs receive a person's complaint that his right to respect for correspondence has been violated, they follow this logical sequence: first, they analyse whether or not the restriction of this right remains within the 'margin of appreciation' of the Contracting Parties; second, to the extent that this is not the case they continue to analyse whether or not this right has been limited on the basis of a fair balance, i.e. whether or not the limitation is proportionate and necessary. These questions can only be decided on the basis of the particular circumstances of every individual case. Nevertheless, certain restrictions have always been discarded by the Convention's organs as being intrinsically out of balance -a case in point is prohibitions that are blanket and general, that is, prohibitions which leave no room for possible

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[44]Attention has been drawn to the (regrettable) fact that the Convention's organs often use the expression 'margin of appreciation' in an ambivalent way: they use it both to refer to the extent to which a restriction is *non-reviewable* and also to refer to the extent to which the way in which a restriction has been imposed is *justifiable* (see R.St.J. Macdonald, "The Margin of Appreciation", *The European System for the Protection of Human Rights*, Martinus Nijhoff Publishers, Dordrecht-Boston-London, 1993, p. 83 at 84-85). Yet, the expression 'margin of appreciation' only has an independent meaning of its own in the former case; in the latter, it is simply a way to refer to the scope of non-protection of a right and to the fact that whether or not this scope is at stake must ultimately be decided by the Convention's organs.

[45]R.St.J. Macdonald, "The Margin of Appreciation", at 83.

[46]Macdonald, "The Margin of Appreciation" at 108, 123.

adjustments to the particularities of a case[47]. Some other general rules can also be induced from the case-law of the Convention's organs. For example, they have ruled that victims of telecommunication surveillance need not be informed thereof in as far as this would endanger the efficacy of the measure of surveillance and that this does not fail to be proportionate and necessary[48]. Another example is the professional correspondence between a prisoner and her lawyer: prisoners' correspondence with lawyers are considered to be of a privileged nature and, in principle, should be unhindered or, at least, it should only be hindered upon more weighty reasons than any other correspondence[49]. Also in the context of imprisonment, stopping or censoring private letters on the basis that they "hold the [prison] authorities up to contempt" has been considered as lacking proportionality[50].

With this I finish my analysis of the protected scope of the right to the secrecy of telecommunications in the ECHR. These last considerations have come to confirm the first impressions noted when studying the expression "in accordance with the law", that is that art. 8 of the ECHR as interpreted by the organs of the Convention subjects restrictions to the right to the secrecy of telecommunications to strict and rather well-defined limits. Restrictions of this right are lawful only if they have been consented to by their victims or, alternatively, provided that they fulfil the following requirements: [1] they must be based on a domestic rule which must have the force of law or be common-law (even if it can be complemented by case-law and/or non-legal rules) and which must be duly foreseeable and accessible; [2] they must pursue one of the interests mentioned in art. 8.2 and [3] they must be the result of the striking of a fair balance between the limitation of this right and the interest that its limitation pursues. The 'fair balance' requirement implies that restrictions must be both proportionate to their aim and absolutely necessary to achieve their aim. National authorities enjoy a certain margin of appreciation to impose the limitations they consider proportionate and

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[47]*Silver and others v. U.K.*, Op. Com. Series B, vol. 51, Par. 323-333, 348, 357, 363, 374, 387, pp. 82-83, 85, 87, 88, 90, 92.

[48]*Klass and others v. Germany*, judgment, Series A, vol. 28, Par. 58. Ap. No. 10439/83, 10440/83, 10441/83, 10512/83 and 10513/83, Dec. Adm. Com. of 10 May 1985, 43 *D&R*, 34 at 116; Ap. No. 10628/83, Dec. Adm. Com. of 14 Oct. 1985, 44 *D&R* 175 at 194; Ap. No. 13564/88, Dec. Adm. Com. of 8 June 1990, 65 *D&R* 210 at 219.

[49]This doctrine was set in the context of the so-called 'simultaneous ventilation rule' existing in the U.K. (rule that a prisoner's outgoing letters have to be shown at the same time to the prison Governor or the Secretary of State, in accordance with Standing Order 5B 34(j) which regulates prison management). According to the Convention's organs, this rule may be necessary in a democratic society for the prevention of disorder in prisons, yet it may not apply to prisoners' correspondence with lawyers. See *Campbell v. U.K.* judgment, Series A, vol. 233, Par. 52, p. 21; Chester v. U.K., Report Com. of 17 May 1990, 68 *D&R* p. 65 at 78-79; see also Ap. No. 12976/87, Dec. Adm. Com. of 9 Oct. 1991, 71 *D&R* p. 45.

[50]An example could be the rule that it is disproportionate to stop or censor private letters (*Silver and others v. U.K.* judgement, Series A, vol. 61, Par. 64 and 99, pp. 26 and 38; *Pfeifer and Plankl v. Austria*, judgment, Series A, vol. 227, Par. 47, p. 19).

necessary free from the supervisory power of the Convention's organs, yet the Convention's organs are interpreting the margin of appreciation granted to national authorities in more and more narrow terms, particularly in the context of rights relating to privacy, such as the right to the secrecy of telecommunications. This clear and broad definition of the protected scope of the right to the secrecy of telecommunications is coherent with the clarity and broadness of the definition of the coverage of this right, as we studied in the previous chapter.

Section 2: Germany

Introduction

Article 10:
"1. Privacy of correspondence, posts and telecommunications is inviolable.
2. Restrictions may only be ordered pursuant to a law. Where a restriction serves to protect the free democratic basic order or the existence or security of the Federation or a *Land* the law may stipulate that the person affected shall not be informed of such restriction and that recourse to the courts shall be replaced by a review of the case by bodies and subsidiary bodies appointed by parliament."

Art. 10.2.1 requires that restrictions to the protection of the right to communicate secretly be ordered pursuant to a law, that is, it imposes a 'legislative reservation of power' (*Gesetzvorbehalt*)[51] upon restrictions to the right to the secrecy of telecommunications. Standing by itself, this provision appears rather poor in content: all it requires is that limitations to the secrecy of telecommunications respect the principle of democracy and the rule of law attached to it. In order to grasp how significantly the protected scope of this right is limited by the Basic Law, art. 10 must be read together with paragraphs 1 and 2 of art. 19[52] and with the principle of reasonableness (*Grundsatz der Verhältnismäßigkeit*) which the Constitutional Court considers implicit in the Basic Law.

Art. 19.1 qualifies the legislative reservation of power as imposed in art. 10.2.1; it requires, in particular, that restrictions be made pursuant to laws which must be general and which must explicitly name the basic right they limit (in our case the right to the secrecy of telecommunications) indicating the provision where this right is recognised (in our case art. 10). For their part, art. 19.2 and the principle of reasonableness set substantive limits to the restrictions of the right to the secrecy of telecommunications; they require, respectively, that restrictions of this right do not encroach upon its essential content and that they be reasonable in the pursuance of a legitimate end.

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[51] I have taken the translation of *Gesetzvorbehalt* into the English 'legislative reservation of power' from Christian Starck, "Constitutional definitions and protection of rights and freedoms" in ***Rights, Institutions and Impact of International Law according to the German Basic Law*** (Ch. Starck ed.), p. 25, Nomos Verlagsgesellschaft, Baden-Baden 1987.

[52] "(1) In so far as a basic right may, under this Basic Law, be restricted by or pursuant to a law, such a law must apply generally and not solely to an individual case. Furthermore, such a law must name the basic right, indicating the Article concerned.
(2) In no case may the essential content of a basic right be encroached upon"

This section will be dedicated to the analysis of the conditions that the Basic Law imposes upon lawful restrictions to the right to the secrecy of telecommunications. This will include an analysis of the legislative reservation of power, both as a formal and as substantive requirement, and of the limits such restrictions are subject to, i.e. the essential content and the principle of reasonableness.

1. The Legislative Reservation of Power

1.1 The Legislative Reservation of Power as a Formal Requirement

The right to communicate secretly "may be restricted only pursuant to a law" (art. 10.2.1 GG). The imposition of a legislative reservation of power in the limitation of fundamental rights responds to the idea that such limitations should be controlled by the principle of democracy. In fact, the law-maker is here called upon to play a quasi-constitutional role: he is called upon to complete the regulation of the object of a constitutional right, for the restriction and regulation of rights are but different aspects of a single activity[53]. Given the importance of this role, in this context the term "law" (*Gesetz*) is used in a technical sense. This means that "law" only refers to acts which have been enacted according to the procedures that are specifically provided for the enactment of formal laws. Such procedures require that laws be enacted by the representative organs directly elected by the people. This is so both at the federal level and at the level of the *Länder*. At the former, formal laws are enacted by the federal Parliament[54]; at the latter, they are enacted by the legislative Chambers of the *Länder*[55]. The only exception to this technical conception of law is pre-constitutional law: according to the Constitutional Court, pre-constitutional restrictions to fundamental rights need not be couched in formal laws in order to be lawful[56].

In order to comply with art. 10.2.1, formal laws must regulate restrictions to art. 10 rights to such an extent that it can be foreseen which concrete limiting measures may be taken by the administrative power. Limiting laws must thus be precise[57], to the

[53]See BGHSt 29, 244 at 249.
[54]Arts. 76, 77, 78 and 82 of the GG.
[55]See Sigurd Hendrichs, "Art. 19", *Grundgesetzkommentar*, Hrg. von Ingo von Münch, 2. Auflage München 1981, Band I, p. 690.
[56]See BVerfGE 9, 63 at 70; 9, 73 at 76; 9, 213 at 221-222; 15, 226 at 231; 22, 114 at 122; 28, 21; 34, 293 at 303.
[57]Limiting laws, however, may use general or indeterminate terms in so far as their meaning has somehow become clear, be this in the practice, in the case-law or by way of their interpretation in

extent that they may not accord the administration any discretion to regulate the circumstances in which rights ought to be limited. Needless to say, art. 10.2.1 only requires that it be foreseeable whether a limitation may be imposed by the administration, not whether and when a limitation is actually going to be imposed[58].

The requirement that restrictions of the right to the secrecy of telecommunications be made pursuant to a law has not always been respected by the Constitutional Court. As was explained in chapter 3, the Court has twice dispensed with the application of this requirement. On two occasions, in fact, the Court has upheld the constitutionality of a restriction on the secrecy of telecommunications not made by means of a law on the grounds that the law-maker enjoys a certain margin of time to enact the required limiting law and that, under certain circumstances, this margin of time need not be considered to have expired. In chapter 3 these two decisions were commented on and criticised on the basis that, in order to justify the constitutionality of lawless limitations on the right to the secrecy of telecommunications, the Court had considered that such limitations were 'inherent' to this right. At this point let me simply add that the very idea that art. 10.2.1 may transitorily not be applied is open to criticism, for it is a matter of course that constitutional provisions must always be respected. This point becomes still more emphatic since art. 10.2.1 is phrased in unconditional terms and nothing indicates that it should not have started to apply together with the rest of the Basic Law. In any event, at the time the two cases at stake were raised enough time had elapsed since the enactment of the Basic Law. Both the restrictions in question were therefore unconstitutional and should have been declared thus by the Constitutional Court, eventually with a warning to the law-maker to quickly enact legislation in the fields at issue.

1.2 The Legislative Reservation of Power as a Substantive Requirement

[A] "In so far as a basic right may, under this Basic Law, be restricted by or pusuant to a law, the law shall apply generally and not merely to one case" (art. 19.1.1).

The requirement that laws restricting fundamental rights be general stems from the principle of equality (art. 3 of the Basic Law), yet it carries the rationale of this

conformity with the Constitution (see A. Bleckmann, *Staatsrecht II. Allgemeine Grundrechtslehren*, 1985, p. 276).

[58]A. Bleckmann, *Staatsrecht II*, ibid.

principle even further. On the basis of art. 19.1.1, the addressees of restricting laws must be indeterminate, that is, impossible to individuate, even if otherwise the law in question would not be considered to be against the principle of equality. This applies as much to the rules as to the exceptions contained in such laws: these must not only be general in their scope; they may contain neither particular exceptions nor particular privileges. This requirement is not necessarily incompatible with a law having a narrow scope of application[59]. Laws enacted to be applied in a certain context or under certain circumstances can be considered general if, despite their particular scope, the addressees of their rules and exceptions cannot be individuated[60]. On the other hand, laws phrased in general terms do not comply with the requirement of generality if, in practice, they only apply to certain, identifiable addressees[61].

[B] "Furthermore, the law shall specify the basic right and relevant Article" (art. 19.1.2).

According to this provision, the protected scope of fundamental rights may only be limited by law in explicit and clear terms. This provision aims at introducing some clarity as well as a warning element into the process of restricting fundamental rights. Thereby the law-maker is allowed to restrict a fundamental right in as far as he explicitly says he will do so in the law in question and clearly mentions the particular fundamental right and the article where it is recognised; in this way individuals are enabled to foresee whether and in which circumstances their rights may be lawfully interfered with[62].

Art. 19.1.2 has been the object of rather narrow interpretation by the Constitutional Court. To begin with, this provision only applies in cases where the law-maker is explicitly authorised to 'restrict' a right (the distinction between authorisations to 'restrict', to 'regulate' and to 'determine the content of' a right will be addressed below). In addition, art. 19.1.2 does not apply to pre-constitutional law, nor does it apply to post-constitutional laws insofar as these merely reproduce pre-constitutional

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[59]On this issue, the Constitutional Court has upheld the constitutionality of the so-called 'measure-laws' (*Maßnahmegesetze*), that is, laws enacted as a way to pursue a very particular, well-defined aim (see, e.g., BVerfGE 15, 126 at 146; 25, 371 at 396; 36, 383 at 400; 42, 263 at 292-293; 70, 35 at 66-67; see also Bleckmann, *Staatsrecht II* at 277 et seq.).

[60]BVerfGE 10, 234 at 241; 24, 33 at 52.

[61]BVerfGE 13, 225 at 229; 24, 33 at 52. In practice, it proves difficult to ascertain when a law is to be considered general and when it is not. Due to these difficulties, art. 3 is sometimes preferred to art. 19.1.1 as a much better defined, more reliable guarantee against abuses in the limitation of rights (see K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 16., ergänzte Auflage, C.F. Müller Juristischer Verlag, Heidelberg 1982, p. 133). For further comments on art. 19.1.2, see S. Hendrichs, "Art. 19" at 691-693; A. Bleckmann, *Staatsrecht II*. at 277 et seq.

[62]See K. Hesse, *Grundzüge des Verfassungsrechts* at 133. See also BVerfGE 85, 386 at 403 et seq.

law still effective[63]. The scope of this requirement is thus reduced to post-constitutional laws which restrict the exercise of fundamental rights beyond the limitations that valid pre-constitutional laws impose upon them. Art. 19.1.2 has thus been interpreted as a formal burden on restrictions of rights which have been imposed anew after the enactment of the Basic Law[64].

2. Substantive Limits to Restrictions on Fundamental Rights

The requirements with which restrictions on fundamental rights must comply cannot merely be formal in nature. Substantive 'limits to the limits' (*Schranken-Schranken*) also prove necessary, lest rights be deprived of protection to such an extent that their recognition becomes a mere form of words. The existence of substantive limits is thus the logical counterpart to the possibility of lawful limitations to the exercise of fundamental rights. The Basic Law contains two: first, art. 19.2 explicitly rules that the 'essential content' (*Wesensgehalt*) of rights may never be encroached upon; second, there is general agreement that the Basic Law implicitly imposes compliance with the 'principle of reasonableness' (*Grundsatz der Verhältnismäßigkeit*). In the following pages I will analyse how these two limits define the protected scope of the right to the secrecy of telecommunications.

2.1 The Guarantee of the Essential Content[65]

"In no case may the essential content of a basic right be encroached upon" (art. 19.2).

With this provision, the Basic Law imposes an explicit limit to the possibility of limiting fundamental rights, that is it draws a line which such limitations, in order to be

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[63]See BVerfGE 2, 121 at 122; 5, 13 at 16; 8, 214 at 329; 15, 288 at 293; 16, 194 at 199; 28, 36 at 46 et seq; 35, 185 at 189.

[64]See S. Hendrichs, "Art. 19" at 694- 695; A. Bleckmann, *Staatsrecht II* at 280; Pieroth/Schlink, *Grundrechte - Staatsrecht II*, Heidelberg 1988, p. 79.

[65]On the issue of the essential content of rights, see Herbert Krüger, "Der Wesensgehalt der Grundrechte i.S. des Art. 19 GG" (1955) *DÖV*, p. 597; Gunter Dürig, "Der Grundrechtssatz von der Menschenwürde" 81 *AÖR* 1956, p. 117, 136 et seq.; G. Herbert, "Der Wesensgehalt der Grundrechte", (1985) *EuGRZ*, p. 321; Pieroth/Schlink, *Grundrechte* at 76 et seq.; Ludwig Schneider, *Der Schutz des Wesensgehalt von Grundrechte nach Art. 19 Abs. 2 GG*, Duncker & Humbolt, Berlin 1983; Peter Häberle, *Die Wesensgehaltgarantie des Artikel 19 Abs. 2 Grundgesetz*, Müller Juristische Verlag, Heidelberg 1983; Robert Alexy, *Theorie der Grundrechte*, Nomos Verlagsgesellschaft, Baden-Baden 1985, pp. 267 et seq.; Manzer Stelzer, *Das Wesensgehaltsargument und der Grundsatz der Verhältnismäßigkeit*, Springer-Verlag, Wien - New York, 1991.

considered lawful, may not overstep. It is however not clear what the expression 'essential content of rights' exactly stands for. This question has been, and still is, the object of much doctrinal debate and the Constitutional Court has not provided a clear answer to it. This is the reason why, before looking at the essential content of the right to the secrecy of telecommunications, I will first deal with the issues that the definition of the expression 'essential content' generally brings up and with the position that the Constitutional Court has adopted in their respect.

[1] In order to define the expression 'essential content of a right', two conceptual choices must be made. The first one concerns the words 'essential content'; the second one concerns the way in which the term 'right' is used in this context. The implications of these two options will be analysed, respectively, in (A) and (B); in (C) I will comment on the position of the Supreme Court with respect to these options.

(A) The expression 'essential content' can be interpreted either in absolute or in relative terms[66]. Interpreted in absolute terms, this expression refers to the area within the coverage of a given fundamental right which enshrines the basic substance, the most fundamental features of a right; it is therefore an area which may in no case be encroached upon lest the right in question becomes conceptually unrecognisable[67]. Interpreted in relative terms, on the other hand, the expression 'essential content' refers to that part of the coverage of a fundamental right encroachment upon which is not justified on balance; the protection of a relative essential content therefore ensures that restrictions of fundamental rights never be unreasonable, hence it does not preclude the possibility that, eventually, a restrictive measure can be considered 'reasonable' even if it encroaches upon *the whole* coverage of a right.

The absolute interpretation of the essential content is usually preferred to the relative one, a preference which is generally justified on the basis of two arguments[68]. The first argument relies on the literal wording of art. 19.2; in particular the provision

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[66]See, e.g., Herbert, "Der Wesensgehalt der Grundrechte" at 323; Stelzer,*Das Wesensgehaltsargument* ... at 49 et seq. Further comments on the grounds and implications of each of these alternatives can be found in L. Schneider, *Der Schutz des Wesensgehalt* ... at 159 et seq.

[67]H. Krüger, e.g., speaks of the "*Stoff*" of a fundamental right as that aspect of its object without which this right can no longer accomplish its aim ("Der Wesensgehalt der Grundrechte ..." at 601). In a more sophisticated absolute conception, G. Dürig defines the essential content as the sphere of a fundamental right encroachment upon which amounts to an encroachment upon art. 1.1 right to human dignity ("*Würde des Menschen*"), which Dürig considers the basis of the whole system of protection of fundamental rights ("Der Grundrechtssatz von der Menschenwürde" at 136 et seq.). Also the Constitutional Court has sometimes related the protection of the essential content to the protection of art. 1.1 right to human dignity (see, e.g., BVerfGE 27, 344 at 351; 34, 238 at 245; 35, 35 at 39; 80, 367 at 245).

[68]See in this respect Stelzer, *Das Wesensgehaltsargument* ... at 100-101.

that the essential content of fundamental rights may "*in no case*" be encroached upon is often interpreted in the sense that the essential content cannot be made a relative concept. The second argument claims that, in the ensemble of the Basic Law, the explicit protection of the essential content of rights can only make sense if this essential content is conceived in absolute terms; a relative interpretation of this expression would make the art. 19.2 provision completely redundant, given that the guarantee that restrictions of fundamental rights be not unreasonable is already provided, precisely, by the principle of reasonableness.

However, neither of the above two arguments offers definite grounds as to why the absolute interpretation of the essential content ought to be preferred to the relative one. To begin with, the first argument is completely ill-founded. It relies on a mistaken assumption, namely, that the expression 'in no case' helps to define the expression 'essential content', whereas according to art. 19.2 the former expression only applies once the latter has already been defined. Indeed, the expression 'in no case' merely emphasises that, however defined, the essential content of rights must be respected without exception, that is, that it must be respected in every particular case and in the context of every right. Emphasising that the essential content of rights must *always* be respected might appear superfluous, yet it makes sense if art. 19.2 is read in connection with art. 19.1; in particular, the words 'in no case' make it clear that the coverage of art. 19.2 is not subject to the same restrictions as the coverage of art. 19.1[69]. Let me develop this point.

As was mentioned above, art. 19.1 imposes certain substantive requirements upon laws restricting fundamental rights, i.e. that they must be general and must name both the fundamental right in question and the constitutional provision where it is recognised. I would now like to comment on the scope of the application of this provision. In particular, I would like to point out that art. 19.1 only applies in so far as a fundamental right may be *restricted* by or pursuant to a law (*Gesetzvorbehalt*)[70]. This definition of the boundaries of art. 19.1 leaves three groups of rights outside its range. These groups are, first, rights the exercise of which may be 'regulated' -not 'restricted'- by the law-maker; second, rights of which the law-maker may 'determine' the 'content and limits'; third, rights which the law-maker is not explicitly authorised to

[69]Also on this issue, see L. Schneider, *Der Schutz des Wesensgehalt* ... at 60-61.

[70]This legislative reservation of power can be general (*einfacher Gesetzvorbehalt*), as in the case of arts. 2.2.3; 5.2; 8.2; 10.1; 16.1.2 or 17(a) of the GG, but it can also be limited to the protection of some particular interests (*qualifizierter Gesetzvorbehalt*), as in the case of arts. 5.2; 9.2; 10.2.2; 11.2 or 13.3 of the GG.

restrict at all[71]. On the grounds that, in the end, regulation simply is a modality of restriction, the Constitutional Court has broadened the range of art. 19.1 so that this also covers the rights included within the first of these three groups[72]; yet even this broadening has only been partial: according to the Court, laws which regulate the exercise of a right must be general (art. 19.1.1)[73] but they need not name the right it regulates (art. 19.1.2)[74]. In sum, art. 19.1.1 applies to fundamental rights which may be either restricted or regulated by or pursuant to a law, whereas art. 19.1.2 only applies to fundamental rights the exercise of which may be restricted by or pursuant to a law.

All the above considerations do not apply in the context of art. 19.2. As opposed to art. 19.1, the scope art. 19.2 is defined in very general terms, so that one can presume that this provision covers not only the rights subject to a legislative reservation of power but also to the three groups of rights described above[75]. That this is so is emphasised precisely by the words 'in no case' which introduce this provision: these words underline the generality of art. 19.2 and at the same time stress the difference between the scope of this provision and that of the preceding paragraph.

Let me now discuss the second argument raised by defenders of an absolute essential content, i.e the argument that a relative essential content adds nothing new to the principle of reasonableness. The explicit protection of a relative essential content

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[71]Arts. 4.3 and 12.1.2 belong to the first group, art. 14.1 to the second group and arts. 3; 4; 5.3; 6; 8; 16.1.2 and 17 to the third group.

[72]This broadening cannot embrace either the second or the third group. To begin with, the act of "determining" the "content and limits" of a right differs greatly from a mere 'restriction' of their exercise, for it amounts to a delimitation of its coverage, that is to a definition of the conceptual scope of the right in question, a 'creative' activity which is not embraced by art. 19.1 (BVerfGE 20, 351 at 356; 21, 92 at 93; 24, 367 at 396). As for rights recognised without a legislative reservation of power, the exercise of these rights are also subject to restrictions (*vorbehaltlose aber nicht schrankenlose Grundrechte* -see BVerfGE 20, 150 at 157; 69, 1 at 58-59; 80, 137 at 161; 83, 130 at 142), yet only to those restrictions that the Basic Law itself imposes and which mainly derive from the need to solve conflicts between different constitutional rights and values (*verfassungsimmanente Schranken* -see, e.g., BVerfGE 28, 243 at 260 et seq.; 69, 1 at 58 et seq.). The law-maker is merely called to identify and apply such restrictions, a task which remains outside the logic of art. 19.1 (BVerfGE 6, 32 at 41; 35, 35 at 39; 83, 130 at 142). As for the rest, note that the present implicit limitations differ from those discussed in chapter 3 in that they apply to the scope of protection, not to the coverage of rights.

[73]See, e.g., BVerfGE, 12, 45 at 53; 28, 243 at 259; 32, 40 at 45; 48, 127 at 163; 61, 82 at 113.

[74]BVerfGE 64, 72; 80, at 154; 83, 386 at 404.

[75]On this issue, see, e.g., BVerfGE 28, 243 at 261; 31, 58 at 68; 34, 238 at 245; 48, 127 at 163; 69, 1 at 58. The only controversial issue is whether art. 19.2 applies in the context of art. 14.1, which leaves the determination of the content and limits of the right to property and inheritance in the hands of the law-maker. The Constitutional Court has decided for the protection of the essential content of these rights. To this end it has identified the object of these rights in the ensemble of civil laws and principles which regulated them before the enactment of the Basic Law, that is, it has identified the object of art. 14.1 in the status quo of civil institutions of property and inheritance (i.e. in the right to property as an *Institutsgarantie*, in the Weimar sense of the term) before the enactment of the Basic Law (BVerfGE 26, 215 at 222; 31, 229 at 239; 58, 300 at 348. See L. Schneider, *Der Schutz des Wesensgehalt* ... at 65 et seq.).

may be regarded redundant -even authors who conceive the essential content as relative have no difficulties in admitting as much as this[76]; yet this argument constitutes no definite grounds to reject the relative interpretation. Note that the criticism that art. 19.2 is redundant can equally be raised if the essential content of rights is regarded as an absolute concept. The idea that fundamental rights must always be protected in their most essential features can be regarded as an implicit constitutional principle: it is implicit in the very fact that the Basic Law recognises certain rights which are considered binding upon all public powers, including the legislative (art. 1.3)[77]. This is not to say that art. 19.2 ought not to have been included within the Basic Law. Provisions with a mere declaratory meaning can still be relevant, particularly in as far as they can draw attention to a rule or principle which might otherwise have been overlooked. This precisely is the task of art. 19.2, a task that it can perform even if it is interpreted in relative terms. Indeed, the explicit protection of a relative essential content confirms and consolidates the principle of reasonableness, a principle, it ought to be recalled, that is not explicitly recognised in the Basic Law[78].

The relative interpretation of the essential content is defended by some commentators[79] on the simple grounds that the constitutionality of restrictions of fundamental rights can only be measured in terms of their reasonableness. For what else could an absolute definition of the essential content imply?. It could certainly not imply that restrictions of fundamental rights are constitutional if they are unreasonable; nor could it imply that they are *un*constitutional if they they are *not* unreasonable, unless one wants to rely on a deeper, metaphysical understanding of the concept 'essential content'. If one does not want to rely on such an understanding, then the so-called absolute essential content of rights can only amount to that part of the coverage of rights of which the restrictions are unreasonable. It is however not precluded that there can be a part within the coverage of rights of which the restrictions *always* are or tend to be unreasonable. As a matter of fact, this is very likely to be the case. For one thing, the more a principle has been restricted when balanced against others, the more resistant this principle becomes in future balances[80]. It is therefore likely that there is a last sub-

[76]See K. Hesse, *Grundzüge des Verfassungsrechts* at 134; P. Häberle, "Grundrechte und parlamentarische Gesetzgebung im Verfassungsstaat - das Beispiel des deutschen Grundgesetzes" 114 *AÖR* 361 at 389 (1989).

[77]Let me however qualify this by saying that, as will be explained below, the redundant character of art. 19.2 is exclusively connected to the *objective* interpretation of the essential content of fundamental rights. In other words, art. 19.2 appears to be redundant only in as far as it is thought to protect the essential content of fundamental rights conceived as institutional guarantees and not as subjective rights of the individual.

[78]See K. Hesse, *Grundzüge des Verfassungsrechts* at 134.

[79]See K. Hesse, *Grundzüge des Verfassungsrechts* at 133 et seq.; R. Alexy, *Theorie der Grundrechte*, at 269 et seq.

[80]See R. Alexy, *Theorie der Grundrechte*, at 271.

sphere within the coverage of rights which will be regarded as so important that it is not reasonable to leave it unprotected for the sake of any opposing principle.

On theoretical grounds, this interpretation of the essential content seems convincing to me. In addition, it has the practical advantage that, while being essentially relative, it succeeds also in embracing and reconciling the absolute interpretation. Moreover, it avoids the shortcomings of each of these two interpretations: on the one hand, the essential content does not appear as a metaphysical, ungraspable concept the definition of which (and with it the definition of the protected scope of rights) lies in the hands of the law-maker; on the other hand, the definition of the essential content is not merely subordinated to the achievement of some policy goal (something which is sometimes regarded as the greatest danger of the relative interpretation of the essential content), but is the result of striking a balance where the importance of the different principles at stake must be confronted and where some stable, absolute-like conclusions can be attained.

(B) A second controversy surrounds the definition of the essential content of rights: it is not clear in which way the term 'rights' is used in this context. Both a subjective and an objective interpretation have been put forward[81]. The first one sustains that art. 19.2 protects the essential content of fundamental rights in as far as they are subjective claims; this implies that the essential content must be protected in each and every individual case where the right in question is at stake, so that either a fair balance (relative essential content) or the conceptual identification of every right (absolute essential content) must be ensured in every such case. The second alternative sustains that art. 19.2 protects the essential content only within the context of rights as institutional guarantees; this implies that either a fair balance (relative essential content) or the conceptual identification of a right (absolute essential content) must not be ensured in every individual case but only in as far as they are recognised as objective guarantees of the constitutional order[82].

Note that in order that a right can be protected at a subjective level it is a precondition that it is protected as an institutional guarantee. The protection of the essential content of fundamental rights as institutional guarantees goes hand in hand

[81]The different positions concerning the term 'right' as used in this context are clearly illustrated in L. Schneider, *Der Schutz des Wesensgehalt* ... at 77 et seq.

[82]Probably the most significant construction of an objective approach to the essential content of rights can be found in P. Häberle, *Der Wesensgehalt* ... Note however that, as was discussed in chapter 3, Häberle denies that rights have a two-step structure, hence that there can be a distinction between coverage and protected scope. This means that Häberle's position as to the essential content of rights really applies to what he regards as the coverage of fundamental rights taken as a whole.

with their constitutional recognition as rights with binding effects upon all the public powers[83], to the extent that the provision of art. 19.2 can be considered redundant in as far as the objective dimension of fundamental rights is concerned[84]. For this reason, the subjective approach to the essential content of rights cannot imply that this is not protected at the objective level; rather, it relies on the presumption that this is already the case. The question, therefore, cannot be whether the essential content of rights is an objective *or* a subjective concept, but rather whether, *in addition to* being an objective concept, it must *also* be regarded as a subjective one[85].

Subjective theories of the essential content are supported by most commentators. They first of all argue on the basis of the words 'in no case' used in art. 19.2; yet, as pointed out when discussing the absolute interpretation of this provision, this argument seems misguided. A second and more substantial argument made by these commentators is that fundamental rights are primarily subjective rights of the individual[86]. Taken by themselves, it is argued, objective theories do not show much concern for rights as individual claims; this is particularly true since objective theories tend to measure the violation of the essential content of a right in purely quantitative terms, that is on the basis of the number of holders of a right who can still exercise it[87]. Only a subjective interpretation of the essential content can make sure that fundamental rights actually accomplish their prime aim of protecting the individual.

The argument that the individual is the centre of attention of fundamental rights is fully convincing and seems to point to the subjective interpretation of the essential content. Note however that the essential content can only be interpreted in subjective terms if it is thought to be a relative concept. For one thing, in the context of an absolute interpretation of this expression a subjective theory simply cannot account for the way things are. In particular, it does not account for the fact that under certain circumstances single individuals may be completely deprived of the possibility of exercising a right (deprivation of personal freedom in life imprisonment is the most typical example) and yet there is general agreement that this does not amount to a

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[83]Recall that the idea that fundamental rights have a hard core of absolute protection against the law-maker first arose in the Weimar era in the context of the so-called "*Institutsgarantien*" and "*Institutionsgarantien*", which, although not equal to the actual concept of rights as institutional guarantees ("*Institutionelle Gewährleistungen*") can be regarded as the closest precedent of this concept (see the introduction to chapter 3).

[84]In this sense, see Stelzer, *Das Wesensgehaltsargument* ... at 80.

[85]L. Schneider, *Der Schutz des Wesensgehalt*... at 87 et seq.; see also R. Alexy, *Theorie der Grundrechte*, at 447.

[86]See Herbert, "Der Wesensgehalt der Grundrechte" at 324; R. Alexy, *Theorie der Grundrechte*, at 268.

[87]See L Schneider, *Der Schutz des Wesensgehalt* ... at 82 and 84; see Stelzer, *Das Wesensgehaltsargument* ... at 54.

violation of the essential content of the right in question[88]. This incoherence can only be avoided if the subjective essential content is defined in relative terms.

Of course, the above incoherence does not arise if the essential content is interpreted in objective terms. Moreover, not every objective interpretation can be accused of disregarding the individual as the centre of protection of fundamental rights. Indeed, the protection of the individual can be the ultimate target of objective interpretations of the essential content where this is not defined in purely quantitative terms but on the basis of some substantive criteria[89]. In particular, one can take the view that it belongs to the essential content of a right as an institutional guarantee (whether defined in absolute or in relative terms) that this essential content be respected in every individual case as far as this proves possible. This objective approach to the essential content of rights is, I believe, a valid alternative to the relative-subjective approach referred to above, since it avoids both the criticisms raised against objective theories and the incoherence of absolute-subjective theories. As a matter of fact, both the relative-subjective approach and the objective approach here proposed lead to very similar conceptions of the essential content of rights; this is particularly so if also within the objective approach the essential content is conceived as a relative concept, an interpretation which, for the reasons given above, is to be preferred.

(C) The above pages should have illustrated the doctrinal debate which surrounds the definition of the essential content of fundamental rights and should have destilled the essential points at issue; I also hope to have explained clearly and convincingly my position with respect to these issues. I will now turn to the position of the Constitutional Court in this discussion. In the context of the relative/absolute debate, the Court was initially inclined to favour a relative definition of the essential content[90], yet it soon changed position and adopted an absolute definition in very explicit and resolute terms[91]. In the context of the objective/subjective debate, the Court has expressed its preference for the subjective interpretation of the essential content[92]. In sum, the Court interprets the essential content of fundamental rights in absolute subjective terms, an interpretation which was criticised above. However, the Court has not been able to sustain its absolute subjective interpretation of the essential content in every instance; this is something which should not come as a surprise, because, as

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[88]See L. Schneider, *Der Schutz des Wesensgehalt* ... at 81.
[89]As for the justification of an objective essential content upon substantive criteria, see Stelzer,*Das Wesensgehaltsargument* ... at 54, 63 et seq.
[90]BVerfG judgement of June 11, 1968, (1968) *NJW*, pp. 1035 at 1039.
[91]See, e.g., BVerfGE 6, 32 at 41; 10, 302; 27, 1 at 6; 27, 344 at 351; 32, 373 at 378; 34, 238 at 245; 35, 35 at 39; 52, 131 at 175; 61, 82 at 113; 80, 367 at 373.
[92]See Herbert, "Der Wesensgehalt der Grundrechte" at 326; R. Alexy, *Theorie der Grundrechte*, at 268.

pointed out above, this interpretation often proves totally unfeasible. For there are rights of which individual deprivations can only take place in an absolute and definitive manner (such as the right to life) or situations (such as imprisonment or state of emergency) in which it seems uncontroversial that individuals may be completely deprived of certain rights. In such cases, the essential content of the rights concerned can only receive absolute protection if it is defined in objective terms, that is, with a view to keeping the right recognisable as an institutional guarantee. These circumstances have led the Court to sustain an eclectic position and to choose between the subjective and the objective interpretation of the essential content on the basis of the particular characteristics of the right at stake, always with a preference for the subjective one[93]. In other words, the Constitutional Court conceives the essential content as an absolute concept which must be protected in the context of subjective rights in as far as this proves possible.

The position of the Constitutional Court has two theoretical flaws. First of all, the Court conceives the essential content of rights in *absolute* terms, yet the idea that it must be respected in every possible individual case is defended on the grounds that the essential content is primarily *subjective*. As has been reasoned above, a subjective interpretation of the essential content can only be sustained if this is also interpreted in relative terms, whilst an absolute interpretation can only be sustained if the essential content is primarily defined with respect to rights as institutional guarantees. A combination of an absolute and a subjective interpretation does not hold theoretically, nor can it be actually applied in practice. The second flaw concerns the idea that the essential content of rights must be regarded as a subjective concept whenever this is possible and as an objective one only when this is not the case. This eclectic position theoretically can find support in an objective interpretation of the essential content such as the one suggested above, i.e. that the essential content of a right as an institution requires that this essential content be protected in every possible individual case. The problem is, however, that the Court defends its eclectic position within the context of a subjective approach to the essential content of rights, that is within a context in which there is no solid theoretical background for an eclectic position; as a matter of fact, this eclectic position is merely defended as an easy way to patch up the deficiencies of its absolute-subjective approach to the essential content.

On account of these weaknesses, it should not come as a surprise that the Court's theoretical position has not been consistently followed in practice. As a matter

[93]See BVerfGE 2, 266 at 285; 10, 302; 22, 180 at 219; 31, 58 at 69; 45, 187 at 270-271. See also Pieroth/Schlink, *Grundrechte* at 77-78; G. Herbert, "Der Wesensgehalt der Grundrechte" at 326.

of fact, the Court applies the essential content in terms which correspond more to a relative than to an absolute interpretation of this concept; in addition, the essential content tends to be protected in the context of rights as institutions, rather than in the context of rights as subjective claims of the individual. Let me explain what I mean by this.

First, the essential content of rights may be theoretically defined as an absolute concept, yet in order that it is precise to say that rights enjoy absolute protection within a certain area of their coverage the Court ought to have defined this area or, at least, it ought to have given certain indications as to its boundaries. With one single exception, the Court has never undertaken any such thing. The exception concerns art. 2.1 general right of personality at the time when the Court still divided up its object into three spheres, a sphere of intimacy or seclusion of an individual from society (*Intimsphäre*), a sphere of privacy wherefrom society was not completely excluded (*Geheimnisphäre*) and a sphere of one's personality which is developed in society. At that time, the Court used to identify the essential content of the right of personality in the sphere of intimacy or seclusion (*Intimssphäre*)[94]. As was explained in chapter 1, this theory of the three spheres is no longer maintained. Beyond this case, the Constitutional Court has been approaching the essential content of rights on a case-by-case basis: it has been deciding in every particular case, on the basis of the particular circumstances, whether or not the essential content of a right has been infringed upon, without drawing more general conclusions as to the scope of the absolute protection of a right[95]. The practical attitude of the Court towards the essential content of particular rights thus seems closer to a relative than to an absolute conception of this concept.

Second, it would seem that the Court accords more importance to the objective aspect of fundamental rights than it is willing to admit. This should become clearer if we note that the role played by the essential content in the solution of individual cases (subjective essential content) has been reduced to a minimum, in the sense that the Court has hardly ever considered that the essential content of a right was actually infringed. This was first of all the case in the context of art. 2.1 general right of personality at the time when its essential content was actually defined by the Court. The Court defined the essential content of this right as the intimate sphere of individuals (*Intimshpäre*) and consistently insisted that this sphere deserves absolute protection; yet this area was interpreted in very narrow terms, to the extent that in no individual case

[94]BVerfGE 6, 32 at 41; 6, 389 at 433; 27, 1 at 6; 27, 344 at 350; 32, 373 at 379; 34, 238 at 245; 35, 35 at 39; 35, 202 at 220 (cases referred to by G. Herbert, "Der Wesensgehalt der Grundrechte" at 327).
[95]See, e.g., BVerfGE 22, 180 at 220; 27, 344 at 352; 30, 47 at 53; 61, 82 at 113. Also on this point, see G. Herbert, "Der Wesensgehalt der Grundrechte" at 327.

did the Court think that it was actually at stake[96]. Even in all other cases, that is in cases where the essential content is actually being dealt with in relative terms, the Court generally reaches the conclusion that the essential content has not been violated[97]. In sum, the essential content of rights has hardly played any role in the context of fundamental rights as subjective claims of the individual. All the weight of individual decisions concerning the protected scope of fundamental rights has been laid upon the principle of reasonableness, which therefore stands as the central point of reference for the definition of the protected scope of fundamental rights[98].

[2] It is now time to turn our attention to the rights recognised in art. 10, i.e. the rights to the secrecy of the post, letters and telecommunications. The three of them, however, appear as good examples of rights the essential content of which can only be defined by reference to their institutional dimensions; for there are situations, in particular, imprisonment, in which individuals are completely deprived of the secrecy of all their post, letters and telecommunications, hence where there is no possibility that the essential content of these rights be respected in individual cases. This circumstance seems to have been grasped by the Constitutional Court, for this has never approached the question of whether or not the essential content of art. 10 rights had been infringed upon. Decisions on the legitimacy of individual restrictions have thus never been taken with reference to whether or not their essential content was at stake; the Court has plainly overlooked this issue and focused exclusively on the principle of reasonableness.

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[96]See, e.g., BVerfGE 6, 389 at 433; 27, 1 at 7; 27, 344 at 351; 32, 373 at 379; 34, 238 at 245; 35, 35 at 39; 35, 202 at 220.

[97]G. Herbert ("Der Wesensgehalt der Grundrechte" at 328) points to a single case (BVerfGE 30, 47 at 53) where the Court concluded that the essential content of a right (art. 2.2.2 right to personal freedom) had been violated, whereas Stelzer (*Das Wesensgehaltsargument* ... at 53) points to yet another such case (BVerfGE 22, 180, also in the context of art. 2.2.2).

[98]See G. Herbert, "Der Wesensgehalt der Grundrechte" at 327; M. Stelzer,*Das Wesensgehaltsargument* ... at 52. .

2.2 The Principle of Reasonableness[99]

Though not explicit in the Constitution, 'reasonableness' is uncontroversially regarded as a second constitutional 'limit to the limits' of fundamental rights, that is, as a second element in the definition of their protected scope. 'Reasonableness' would appear to play a secondary role with respect to the essential content in the definition of the protected scope of rights, in the sense that it only applies within the sphere of rights which is not defined as essential. For the reasons given above, however, the principle of reasonableness has proven to be much more central to the definition of the protected scope of rights than the guarantee of their essential content. Once again, in the analysis of this issue I will first concentrate on the definition of 'reasonableness' and, second, on the way the principle that restrictions of rights must be reasonable applies in the context of art. 10 rights to the secrecy of telecommunications.

[1] The German Constitutional Court has readily adopted 'reasonableness' as a point of reference in the definition of the protected scope of fundamental rights. Reasons for this can be found in the German legal context. In Germany, the principle of reasonableness has long been applied in the fields of administrative and criminal law, where it has appeared as a means to prevent arbitrariness in the action of the public power; moreover, in these contexts the application of this principle has been considered a requirement of the Constitutional State. Relying on this background, it was an easy task for the Constitutional Court to enlarge the range of this principle so that it could apply it in the solution of conflicts involving fundamental rights[100], or even to regard it as a constitutional principle of the Constitutional State (*Rechtsstaatsprinzip*) or as part of the essence of fundamental rights[101]. At present, it is in the context of constitutional conflicts where the principle of reasonableness plays its most characteristic role.

The principle of reasonableness is a fruit of the idea that principles (in our case fundamental rights) are commands to optimalise, that is that in a particular legal and

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[99]On the principle of proportionality, see E. Grabitz, "Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts" 98 *AÖR* 568, (1973); B. Schlink, *Abwägung im Verfassungsrecht*, Berlin 1976; H. Schneider, *Die Güterabwägung des Bundesverfassungsgericht bei Grundrechtskonflikten*, Nomos Verlagsgesellschaft, Baden-Baden 1979; B. Schlink, "Freiheit durch Eingriffsabwehr - Rekonstruktion der klassischen Grundrechtsfunktion" (1984) *EuGRZ*, p. 457 et seq.; Pieroth/Schlink, *Grundrechte* at 72 et seq; A. Bleckmann, *Staatsrecht II* at 295 et seq.; Manzer Stelzer, *Das Wesensgehaltsargument ...*

[100]See, e.g., BVerfGE 1, 167 at 178; 2, 1 at 79; 2, 121 at 123; 2, 266 at 280; 6, 389 at 439; 7, 377 at 402 et seq.

[101]BVerfGE 38, 348 at 368 and 65, 1 at 44, respectively.

factual context principles must be enforced to the greatest extent possible[102]. This idea that principles must be optimalised controls even the selection of the conflicting principles, in our case the selection of the aims which may justify a restriction of fundamental rights, which could be regarded as a phase preceding the application of the principle of reasonableness itself[103]. Let us for a moment concentrate on this phase.

The selection of the principles (these including fundamental rights) which may restrict fundamental rights implies that a balance must be struck between the importance of the restriction in question and the aim that this restriction pursues[104]. The Constitution stands as a more or less direct point of reference for this balance. It stands as a direct point of reference when it provides the rules on which basis this balance must be struck. It, for examples, demands that aims contrary to the constitutional order must be discarded as illegitimate. Similarly, the Basic Law conditions the limitation of certain rights to the pursuance of particular aims, something it sometimes does explicitly[105], sometimes only implicitly; this latter is the case with the rights recognised without legislative reservation of power, that is of the rights which only find their limits in the Basic Law itself, hence which may only be restricted in order to protect some outbalancing constitutional right or value. Most often, however, the Basic Law only appears as an indirect constitutional basis for limitations, that is it does not relate the

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[102]R. Alexy, *Theorie der Grundrechte*, at 75; 100 et seq. This idea is generally expressed by reference to the so-called 'principle of practical concordance' -*'praktische Konkordanz'*- (see K. Hesse, *Grundzüge des Verfassungsrechts* at 127).

[103]Note that this previous step could be avoided and that the balance here proposed could alternatively be struck as part of the principle of reasonableness itself -in particular as part of the condition of proportionality (in this sense, see e.g. Stelzer,*Das Wesensgehaltsargument* ... at 99). The decision for either solution does not have practical consequences (See Schlink, "Freiheit durch.." at 459 et seq.; Herbert, "Der Wesensgehalt der Grundrechte" at 329; Bleckmann, *Staatsrecht II*. at 300), yet I find it clearer to separate the selection of the aim which may justify a restriction, on the one hand, and the decision on the proportionality between this restriction and the aim it pursues, on the other.

[104]In this respect, E. Grabitz ("Der Grundsatz der Verhältnismäßigkeit ..." at 600 et seq.) has suggested that in its case-law the Constitutional Court implicitly classifies rights into four groups. Within a first group there are rights (those recognised without a legislative reservation of power -with the exception of art. 12.1.1- and the art. 2.2.2 right to personal freedom) which may be limited only to give force to some outbalancing constitutional right or interest (*'legislatorische Konkretisierungskompetenz'*). The second group includes rights (the art. 12.1.1 objective rules concerning the choice of profession; the art. 2.2.1 right to physical integrity; the art. 2.1 right of privacy, this including more concrete manifestations such as the inviolability of domicile and the secrecy of telecommunications) which may be limited for the sake of some general interest defined by the law-maker, provided that it outbalances the importance of the limited right (*'positiv gebundene legislatorische Qualifikationskompetenz'*). The third group includes rights (the art. 12.1.1 subjective conditions concerning the choice of profession and the art. 14 right to property) which may be limited to attain some interest defined by the law-maker, as long as this interest is legitimate, that is, as long as it does not go against the public interest or the constitutional order (*'negativ gebundene legislatorische Qualifikationskompetenz'*). Finally, the fourth group includes rights (the art. 2.1 freedom of enterprise -*'Wirtschftsfreitheit'*- and the art. 12.1 rules concerning the practice of trades, occupations and professions) which may be limited as a policy option, as long as this reasonably aims at the general good, that is, as long as the limitation is not arbitrary (*'willkürfreie legislatorische Qualifikationskompetenz'*).

[105]*Qualifizierter Gesetzvorbehalt*: arts. 5.2, 9.2, 10.2, 11.2, 13.2.

limitation of rights to particular aims, but merely authorises the law-maker to carry out these limitations. In these cases, limitations may only be imposed for the pursuance of aims which need not be of a constitutional character, yet which on balance must prove to outweigh the importance of the right to which protection is denied.

Once it has been shown that the pursuance of a particular aim justifies the restriction of a right, this restriction must pass the triple test imposed by the principle of reasonableness. As conceived by the Constitutional Court, this principle requires that restrictions on constitutional rights be suitable (*geeignet*), necessary (*erforderlich*) and proportionate (*verhältnismäßig im engeren Sinne, proportional* or *nicht übermaßig*) in the pursuance of their aims. Again, this triple test is based on the idea of the optimalisation of principles: the condition of proportionality seeks a factual optimalisation of the protection granted to fundamental rights, whereas the conditions of suitability and necessity seek the optimalisation of this protection at the theoretical level[106]. Let us now look at each of the elements of this test.

(a) The limitation of a right is suitable if it can achieve the goal which justifies it[107]. The Constitutional Court has qualified this definition in several ways. First of all it has ruled that in order to be suitable a limitation must only be able to carry out a *partial* achievement of its goal[108]. Second, the suitability of a limitation to achieve its aim is independent of the actual achievement of the aim; in other words, the suitability of a limitation is measured in the *abstract*. This means that limitations are not considered unconstitutional on the mere grounds that their claimed aims have not yet been accomplished; instead, attention is focused on whether these aims can actually be accomplished at all[109]. Third, in order to decide on the suitability of a limitation, the Constitutional Court places itself in the position of the law-maker. The crucial question it asks is whether the limiting measure at stake reasonably appeared as suitable to the the law-maker, on the basis of the elements of judgment this could dispose of at the time[110]. Of course, the ex-ante judgement of the law-maker acts as the point of reference in as far as the suitability of a particular measure has not been proven in practice. A limiting measure which actually proves unsuitable to reach its aim must be

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[106]R. Alexy, *Theorie der Grundrechte*, at 100 et seq.

[107]See BVerfGE 33, 171 at 187; 67, 157 at 173. This condition of suitability is more "suitable" a means to prevent arbitrariness than to seek proportionality in the restriction on rights. Not surprisingly, some authors have not included it together with necessity and proportionality amongst the conditions of proportionality (see, e.g., von Krauss, *Der Grundsatz der Verhältnismäßigkeit in seiner Bedeutung für die Notwendigkeit des Mittels im Verwaltungsrecht*, Hamburg 1955; Lerche, *Übermaß und Verfassungsrecht. Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit und der Erforderlichkeit*, 1961 -ref. from B. Schlink, *Abwägung* ... at 143).

[108]BVerfGE 16, 147 at 183.

[109]BVerfGE 67, 157 at 175.

[110]BVerfGE 25, 1 at 12; 30, 250 at 263.

held unconstitutional, whatever the ex-ante judgement of the law-maker. However, and this is the fourth qualification to be made, the Court has also taken the part of the law-maker in this context. It has stated that limitations on a right are suitable as long as the possibility is not excluded that they can actually achieve their aim[111]. In other words, according to the Court limitations on fundamental rights enjoy a kind of 'presumption of suitability'.

(b) A limitation is necessary if its aim cannot be reached through alternative means which, being equally effective, imply a lesser encroachment upon the right in question[112]. The condition of necessity accords the law-maker a certain margin of freedom to choose the means to reach the aim it pursues. To begin with, the law-maker can choose among all the restricting measures which equally limit a fundamental right. Additionally, the Constitutional Court decides whether a limiting measure is necessary on the basis of a negative judgment, that is, it decides whether alternative, less intrusive limiting measures are *not* as effective as the one at issue. Moreover, as was the case with the condition of suitability, the Constitutional Court accords great importance to the ex-ante judgment of the law-maker in this context; yet, as in that case, a measure that actually proves unnecessary must be considered unconstitutional, whichever the ex-ante judgment of the law-maker[113].

(c) A limitation is proportionate if it does not go beyond what is needed to achieve the aim it pursues[114]. The condition of proportionality is thus meant to strike a balance between the limitation of a right (means) and the right or value which justifies its limitation (aim). Striking this balance implies the active involvement of both aim and means. Under the condition of proportionality, therefore, both the aim and the means of limitation are conceived as variables in an 'inter-conditioning' relationship[115]. As in the case of the condition of necessity, a judgment on the proportionality of a measure implies a negative proof. The Court, in fact, does not require that means and aim be in an adequate relationship. The Court is satisfied that a limitation is proportionate when it is shown that the relationship between means and aim is *not* inadequate[116].

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[111]BVerfGE 67, 157 at 175. On this issue, see E. Grabitz, "Der Grundsatz der Verhältnismäßigkeit ..." at 573.
[112]BVerfGE 19, 330 at 337 et seq.; 25, 1 at 17 et seq.; 30, 292 at 316; 67, 157 at 176.
[113]BVerfGE 17, 269 at 279; 21, 261 at 270 et seq.
[114]BVerfGE 22, 180 at 218 et seq.; 30, 292 at 316; 48, 396 at 402; 67, 157 at 178.
[115]See E. Grabitz, "Der Grundsatz der Verhältnismäßigkeit ..." at 575.
[116]See BVerfGE 7, 377 at 407; 16, 194 at 202; 17, 108 at 117; 25, 236 at 247; 27, 211 at 219; 27, 344 at 352; 28, 66 at 88; 28, 264 at 280; 48, 396 at 402; 67, 157 at 178.

This triple test of reasonableness confronts limitations of constitutional rights with the aims they pursue in three different ways. The condition of suitability, to begin with, establishes an absolute means-aim relationship: given a certain aim, measures are either suitable or unsuitable to reach it. The condition of necessity also establishes such an absolute relationship, yet, it confronts a limiting measure not only with the aim it pursues but also with other alternative means which can lead to the same end. Finally, the condition of proportionality describes a relative means-aim relationship, in the sense that aim and means inter-condition each other[117].

[2] Let us now turn our attention to the way the principle of reasonableness defines the protected scope of art. 10 rights; that is, we must now first of all ascertain which aims may justify a restriction of these rights and, second, how the reasonableness test has been applied in this context.

Art. 10 subjects restrictions to the secrecy of telecommunications to a legislative reservation of power and, for the most part, does not impose a requirement that such restrictions be subordinated to the pursuit of any particular aim. To the extent that this is the case, the secrecy of telecommunications may be limited in order to protect some general interest defined by the law-maker, provided that the importance of this interest proves to outweigh the importance of the interest in the protection of art. 10 rights. In the context of law enforcement, for example, this condition is not fulfilled by the interest in the prosecution of just any crime, but only by the interest in the prosecution of crimes considered particularly serious[118].

To some extent, however, the legitimacy of restrictions on the secrecy of telecommunications is subordinated to the pursuit of some concrete aim. To be more precise, restrictions on this right may include a provision that "the person affected shall not be informed of any such restriction" and that "recourse to the courts shall be replaced by a review of the case by bodies and auxiliary bodies appointed by Parliament", but only if they aim at "the protection of the free democratic basic order or the existence or security of the Federation or a *Land*" (art. 10.2.2). Such a provision, however, mostly affects the art. 19.4 right to judicial recourse and only affects art. 10

[117]See E. Grabitz, "Der Grundsatz der Verhältnismäßigkeit ..." at 571; here the absolute and relative means-aim relationships are referred to as 'quantitative' and 'qualitative', respectively. In this author's view (pp. 581 et seq.), the suitability and necessity requirements are 'rules' ('*Entscheidungsregeln*'), whereas the requirement of proportionality is a 'principle' ('*offenes Prinzip*'), since it merely offers indications as to the way decisions ought to be taken (for the distinction between rules and principles, see Alexy *Theorie der Grundrechte*, at 71 et seq.).

[118]BVerfGE 34, 238 at 249. Although this decision concerns a case of unlawful recording of a person-to-person conversation, its conclusions also apply in the context of telecommunication surveillance.

right to the secrecy of telecommunications in as far as the existence of this right requires that remedies be provided against its violation. On account of this, art. 10.2.2 will be commented on at length in chapter 6.

As for the application of the test of reasonableness to art. 10, the case-law of the Constitutional Court on the issue is not rich enough to let us draw general conclusions. It can only be said that in all cases where the Court has applied the principle of reasonableness it has upheld the constitutionality of the restriction in question as applied in the particular case and, more broadly, as regulated by law. The short number of cases on art. 10 decided by the Court, the fact that in most of these cases the Court has confirmed the constitutionality of the legal restriction in question, but above all the fact that the law-maker is in charge of defining the protected scope of the right to the secrecy of telecommunications within the limits analysed above, all these circumstances make it necessary to look at the various legal restrictions of the constitutional right to the secrecy of telecommunications. Indeed, a glance at these restrictions is a necessary step in the study of the protected scope of this right.

3. Legal Restrictions on the Protected Scope of Article 10

[1] A first restriction on the exercise of the right to the secrecy of telecommunications is laid down by the Basic Law itself in art. 18, which reads as follows:

> Article 18:
> "Those who abuse their ... privacy of correspondence, posts and telecommunications (Article 10) ... in order to undermine the free democratic basic order, shall forfeit [this] basic right. Such forfeiture and its extent shall be determined by the Federal Constitutional Court"

However, art. 18 does not allow a *restriction* of the protected scope of the right to the secrecy of telecommunications, but the *forfeiture* of this right: it allows the Constitutional Court to deprive a holder of this right in any case of abuse. In other words, art. 18 does not limit the protected scope of the right to the secrecy of telecommunications but the possibility of being a holder of this right. Be that as it may, this constitutional provision has not yet been applied in the context of art. 10. A sufficient check that the right to the secrecy of telecommunication is not abused for

undemocratic purposes is rather carried out on a statutory basis[119]. This basis is provided for by the statutes to which reference will now be made.

[2] As far as statutory restrictions to the secrecy of telecommunications are concerned, let me first refer to those imposed by the postal and telecommunication services as part of their normal functioning. Such restrictions, which can be referred to as 'structural', can be imposed both on the secrecy of the post and on the right to the secrecy of telecommunications but not on the right to the right to the secrecy of letters, since this right covers the lapse of time in which letters are not in the hands of the postal service. § 5.2 of the 'Law of the Postal Service' (*Postgesetz* -PostG) permits structural restrictions on the protected scope of the right to the secrecy of the post with respect to both the content and the surrounding circumstances of an act of postal sending. For its part, § 14a (1) of the 'Law on Telecommunications' (*Fernmeldeanlagengesetz* -FAG) authorises structural restrictions on the right to the secrecy of other kinds of telecommunication, yet it only permits such restrictions to be imposed upon the content of them. No legal provision authorises restrictions of the secrecy of the circumstances surrounding an act of telecommunication, hence according to art. 10.2.1 of the Basic Law such restrictions may not be imposed.

Note however that no legal authorisation is needed in order that telecommunication employees take notice of the circumstances surrounding an act of telecommunication entrusted to them or even of the very content of the act of telecommunication in as far as those circumstances or that content lie open to their view. The reason is that, as explained in chapter 4, such cases do not fall under the coverage of art. 10 right, because this right only covers the *secrecy* which is inherent in telecommunications. Legal authorisation is needed only in the context of situations in which secrecy exists but must be broken for the sake of the normal functioning of the post or telecommunication services (a most typical example is the authorisation given to postal authorities to open a closed object sent in the post which is to be returned to the sender if the sender cannot be identified from details on the cover -§ 61.3.2 *Postordnung* -PostO). In addition, recall that the Constitutional Court has ruled that, temporarily at least, restrictions on the right to the secrecy of telecommunications need not fulfil the requirement of legality. There is therefore a good chance that the Court will uphold the constitutionality of structural restrictions imposed upon the circumstances surrounding an act of telecommunication even if such restrictions lack any legal basis.

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[119]See Schuppert, *Kommentar zum Grundgesetz für die Bundesrepublik Deutschlands*, Band 1 "Art. 10", Par. 32, p. 42, Luchterhand 1984.

As part of the structural restrictions that may be imposed upon the secrecy of telecommunications, post and telecommunication services may prevent the illegal use of these services. On this basis, postal communications can be checked by custom officers in order to prevent the misuse of telecommunications (§ 6.7 ZollG). They can also be checked by postal authorities if they seek to prosecute a crime committed using the postal service, i.e. a crime which could not have been committed, at least not in the same way, without the use of the postal service (§ 5.3.1 PostG)[120]. Similarly, postal authorities may check the post of someone against whom the postal service might have a judicial or non-judicial claim related to the use of the postal service (e.g. because the postal rules concerning the packing of goods or the payment of fees were violated) (§ 5.3.2 PostG).

In the context of other means of telecommunication, structural restrictions for the prevention of the illegal use of telecommunication services are allowed by §§ 7 and 8 of the 'Order Concerning Data Protection in the German TELEKOM' (*TELEKOM-Datenschutzverordnung* -TDSV). The problem is however that the TDSV is not a formal 'law' in the sense of art. 10.2.1, nor is it clearly grounded on a formal law. Some basis for it could be found in § 30 of the *Postverfassungsgesetz* (PostVerfG), yet this provision does not explicitly authorise a limitation on the right to the secrecy of telecommunications, hence it does not fulfil the requirements imposed by art. 10.2.1 and art. 19.1 of the Basic Law for the limitation of this right. Let me however recall that the Constitutional Court in certain circumstances authorises the termporary suspension of the requirement of legality normally imposed upon restrictions on the right to the secrecy of telecommunications; moreover, this authorisation has been confirmed in a case concerning precisely the controls imposed by telecommunication authorities as part of the normal functioning of a telecommunication service and, in particular, within the context of a regulation aimed at preventing telephone harassment[121].

[3] Statutory restrictions are also imposed on the telecommunications of prisoners. On this point, prisoners on remand must be distinguished from prisoners who have already been sentenced. We will refer to them in turn.

According to § 119.3 of the Code of Criminal Procedure (*Strafprozeßordnung* -StPO), the rights of prisoners on remand may be subject to restrictions in as far as they prove necessary to the aims of their imprisonment or to order in the institution. This

[120]See Schuppert, *Kommentar zum Grundgesetz*, Par. 69, p. 42.
[121]BVerfGE 85, 386.

provision does not cite any particular fundamental right, hence it would seem to go against the constitutional provision that limiting laws must cite the right they limit and the constitutional article where it is recognised (art. 19.1.2 of the Basic Law); yet the Constitutional Court has ruled that art. 19.1.2 of the Basic Law does not apply in this context for, though enacted in 1965, § 119.3 StPO merely reproduces pre-constitutional law. § 119.3 StPO thus provides the legal basis for the restriction of all fundamental rights of prisoners on remand, hence also for the restriction of their right to the secrecy of telecommunications[122].

§ 119.3 finds an exception in § 148 StPO. This provision protects the verbal and written communication of these prisoners with their lawyers, unless the former are accused of having committed a crime listed in § 129a of the Criminal Code (*Strafgesetzbuch* -StGB), that is a crime connected with terrorism and covers both the freedom to engage in such communications and the secrecy of such communications[123]. This latter may only be violated in order to ascertain whether or not the communication in question is in a given situation actually being held with the prisoner's lawyer. In any case, written and other types of postal communications must first be submitted to a judge to be opened; if the parties have not clearly agreed to this, the letter or parcel in question may be sent back (§ 148.2).

In the case of convicted prisoners, laws only authorise the surveillance of written telecommunications and only in as far as this proves necessary to the functioning, security or order in prison (§ 29.3 *Strafvollzugsgesetz* -StVollzG). German law however does not allow the surveillance of written communications of prisoners to the Ombudsman, to the European Commission of Human Rights (§ 29.II StVollzG) or to their lawyers; in the last mentioned there is, again, an exception for a case where the prisoner has been convicted of the commission of a crime listed in § 129a (§ 29.1 StVollzG).

[4] An important group of restrictions on the secrecy of telecommunications is regulated in §§ 94 - 111 of the StPO, which permit the surveillance of written and other kinds of telecommunications for the purpose of obtaining evidence within the context of a criminal investigation process (§ 94 StPO)[124].

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[122]See BVerfGE 35, 35; 42, 234.

[123]See BHGSt 33, 347 at 349; see also BHGSt 36, 205.

[124]Because they aim at obtaining criminal evidence, these restrictions can be clasified among the so-called "authentic criminal law restrictions of fundamental rights" ("echte strafprozessuale Grundrechtseingriffe") (see Knut Amelung, "Zur dogmatischen Einordnung strafprozessualer Grundrechtseingriffe" (1987) *JZ* 737 at 739).

According to § 99 of the StPO, written telecommunications -letters, telegrams, telegraphs and any other act of sending by post- may be intercepted for the investigation of any crime if addressed to or sent by the person accused of its commission. The surveillance of other modalities of telecommunication, on the other hand, is authorised in § 100a only in cases where there are solid grounds for the suspicion that certain criminal acts of particular gravity have been committed, as long as it would be futile or there would be a serious impediment to the carrying out of the investigation or to the finding out of the whereabouts of the person charged with the commission of the crime in question by any other means.

As originally drafted, the wording of § 100a only allowed for the "recording of telecommunications in a magnetophone", on which basis this provision could not serve as a basis for the surveillance of non-oral telecommunications. At present, § 100a allows for the "registration of [any] telecommunications"[125]. This change in the wording of § 100a was doubtless needed on account of the development of new forms of telecommunication, notably through computer networks. Yet this provision does not deal with all the possibilities of computer surveillance. To begin with, § 100a disregards the fact that today computer telecommunications often take place in a codified form, for it does not explicitly authorise the deciphering and evaluation of the data collected through surveillance[126]. Unless decoding an intercepted message is interpreted as implicitly authorised with the interception, this act constitutes an infringement on the secrecy of telecommunications which is not authorised on legal grounds, hence it is an act which cannot be carried out in accordance with the Basic Law. It is however rather likely that the Constitutional Court will allow that the legislative reservation of power be temporarily dispensed with in this case, as it has done on different occasions. In addition, note that § 100a only applies in the context of art. 10 of the Basic Law to justify the surveillance of *telecommunications*, that is it only applies in as far as there is a *transmission* of information between two parties. It therefore does not authorise public authorities to regulate individual computer work, to copy computer stored data or the like[127]. These circumstances are covered by the right to privacy recognised within art. 2.1 of the Basic Law, a right restrictions to which are not subject to a legislative reservation of power.

§ 100a authorises surveillance of telecommunications if there is a suspicion, based on articulable facts, that a person has committed or attempted to commit (if the

[125]This new wording of § 100a was introduced by art. 4.17 of the *Poststrukturgesetz* (PostStruktG) of the 8th June 1989 (BGBl I S. 1026).
[126]W. Bär, "Die Überwachung..." at 583.
[127]Ibid. p. 582.

attempt is punishable) one of the crimes that this provision proscribes (from high treason to some drug-related offences). No particular degree of suspicion is required; in fact, courts have interpreted this requirement rather flexibly[128]. The addressee of a measure of surveillance may be the person charged with the commission of just one of these crimes or a third person with whom he is reasonably believed to communicate or whose telecommunication connexion he is reasonably believed to use (§ 100a). An exception to this rule is a lawyer's conversations with his client. The basis for this exception is § 148.1 StPO, which guarantees free oral communication between lawyers and their clients. This provision has been interpreted as saying that lawyers cannot have their oral communications with their clients intercepted on the grounds of the investigation of crimes of which these latter are suspected. Rather, a lawyer's oral telecommunications can only be intercepted if he (i.e. the lawyer in question) is suspected of the planning or commission of one of the listed criminal acts[129]. Some commentators even claim that a suspect's conversations with other attorneys, clergy or doctors, that is with people who may refuse to testify on the basis of the confidential character of the conversations (§ 53 StPO), also ought to be considered exempted from interception[130].

Both the interception of the post and the surveillance of other modalities of telecommunication must be ordered by a judge. Exceptionally, should no delay seem advisable, they may also be ordered by a public prosecutor, yet this order expires after three days unless confirmed by a judge (§§ 100.1-2 and 100b.1 respectively). An intercepted act of postal sending may only be opened with the permission of the judge who ordered or confirmed the interception (§ 100.4.2); indeed, it is this judge who must open the object that has been intercepted, unless she decides to authorise a public prosecutor to do it in order to avoid delay which might endanger the prosecution (§ 100.3.1-2). A judicial order of telecommunication surveillance must specify the name and address of the person against whom it is addressed, together with the kind, scope and duration of the measure; the duration may not be longer than three months and may only be renovated for another period of three months (§ 100b.2). As soon as the conditions under which surveillance was ordered stop existing, the measure must be immediately brought to an end (§ 100b.4). Similarly, the information thereby collected must be destroyed as soon as it proves no longer relevant (§ 100b.6). The persons affected by any of the above measures (interception of the post or surveillance of telecommunications) must be informed thereof as soon as doing so ceases to be a

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[128]T. Weigend, "Using the Result of Audio-Surveillance as Penal Evidence in the Federal Republic of Germany" 24 *Stanford J. Int'l L.*, 21 at 40 (1987).
[129]See BGHSt 33, 347.
[130]T. Weigend, "Using the Result ...", note 102 and accompanying text.

danger to the success of the investigation in question, to public security, to a person's life or physical integrity or to the ability of an undercover agent to continue operating effectively (§ 101).

[5] Special attention deserves to be given to the law "restricting the secrecy of the mail, post and telecommunications (law supplementing Art. 10 of the Basic Law)" (*Gesetz zu Artikel 10 Grundgesetz*), usually referred to as G 10[131]. This law was introduced to develop art. 10.2.2 of the Basic Law, on which basis the right to the secrecy of telecommunications can be subject to rather significant restrictions when these are needed for the protection of national security and the democratic system. In particular, art. 10.2.2 allows that, in the context of telecommunication surveillance carried out for these purposes, those who suspect that they are being victims of surveillance can be denied access to the judiciary and must raise their claims in front of a non-judiciary independent body created ad hoc. This circumstance will be explained in detail in the next chapter. For the moment I will concentrate on the way G 10 defines the protected scope of the right to the secrecy of telecommunications and, in particular, on how this definition differs from the one made by the StPO.

G 10 regulates the surveillance and registration of telecommunications of any kind[132] provided that someone is suspected of planning, committing, or having already committed one of certain crimes against the security of the state or of the democratic system, crimes which are exhaustively listed in art. 1 § 2 G 10. The main characteristics of G 10 surveillance are the following:

1. As in the case of § 100a StPO, surveillance can only be ordered when carrying out the investigation by any other means appears to be impossible or significantly more difficult. Similarly, a measure of surveillance may only be imposed upon the person suspected of the commission of the crime in question or a third person with whom he is reasonably believed to communicate or whose telecommunication connexion he is reasonably believed to use.

2. Surveillance can only be ordered upon petition. This may be made by the federal office for constitutional protection, by *Land* authorities for constitutional

[131]Gesetz zur Beschränkung des Brief- Post- und Fernmeldegeheimnisses v. 13. 8. 1968. Note that art. 2 of this law introduced §§ 100a and 100b into the StPO, to which reference has been made above.

[132]In its original version, art. 1 § 2 G 10 authorised that written telecommunications could be read and oral telecommunications overheard, hence its applicability to forms of telecommunication such as Satellite telecommunication or telecommunication through computer networks was doubtful. As § 100a StPO, art. 1 § 2 G 10 was amended by the PostStrukt G (art. 4.16), which thus enlarged the scope of the G 10 to all means of telecommunication.

protection, by the service of counter-intelligence (if the activity being investigated affects the German Federal Armed Forces) or by the federal service of information (if the activity being investigated affects this service). Petitions must specify in writing the kind, scope and duration of the requested surveillance and offer grounds for such requests; they must also show that, the investigation of the case in question would be impossible or considerably more difficult through any other means (art. 1 § 4; § 2.2.1).

3. The order of surveillance must be issued by a minister whom the Prime Minister has entrusted with this task or, if petition is made by Land authorities for constitutional protection, by the competent highest authority of that Land (art. 1 § 5 (1)). Federal and other authorities for constitutional protection of the corresponding Land must keep one another informed of the measures of surveillance adopted (art. 1 § 5 (4)).

4. The person affected by a measure of surveillance under this law must be informed thereof as soon as it has been adopted, unless notification proves to be of danger for the success of the investigation in question; in this latter case, notification is required as soon as this danger disappears; yet if this condition is not fulfilled five years after the adoption of a measure, notification is no longer required (art. 1 § 5 (5)). Until notification has been made, the person affected by a measure of surveillance under this law has no recourse to the judiciary, but only to a Commission created ad hoc (art. 1 §§ 5 (5) and 9). This latter point will be developed in detail in the next chapter.

Finally, G 10 also authorises the random interception of telecommunications with a view to gathering the information necessary for German authorities to guarantee national security against foreign armed attacks (art. 1 § 3.1). This is so-called 'strategic surveillance'. Strategic surveillance does not concern any person in particular. The persons whose telecommunications are intercepted are selected at random on geographical grounds, or because they engage in telecommunications with a suspicious office or address. Since the identity of the persons actually subject to 'strategic surveillance' is irrelevant, such persons need not be informed that their telecommunications are being intercepted; conversely, if the identity of these persons be known, it may not be used in any way. In order that their identity can be used, the persons in question must be suspected of planning, being committing or having committed one of the crimes listed in art. 1 § 2; in other words, the requirements must be met that justify a personal surveillance under art. 1 § 3.2 of the G 10.

The effect of strategic surveillance appears particularly sweeping[133]. It allows that whole series of telecommunications be surveyed on the grounds that they might eventually give some useful hints for the protection of national security. The protection of national security thus appears as an asset in the hands of the public power to subject whole sectors of the German population to surveillance of their telecommunications without ever informing them thereof. In spite of its sweeping effects, one might agree that strategic surveillance is an important tool, arguably even a necessary one, to guarantee external national security. One might also agree that the protection of national security justifies relatively serious restrictions of the right to the secrecy of telecommunications. Nonetheless, on account precisely of its sweeping effects, strategic surveillance must be subject to a particularly strict application of the principle of reasonableness, so that the interference with the secrecy of telecommunications carried out on its basis be reduced to a minimum. For example, permanent surveillance of every piece of telecommunication linking Germany with potential political enemies might be of great help to the identification of plans for possible armed attacks upon Germany, yet such permanent surveillance must be considered unacceptable because out of proportion with its aim[134]. Particularly important is that information gained through strategic surveillance not be used against private individuals, unless the conditions for personal prosecution imposed by the G 10 are fulfilled. Equally important is that personal information gained through strategic surveillance be destroyed as soon as it is no longer needed.

[6] Let me now mention the restrictions on the right to the secrecy of telecommunications imposed by § 12 FAG. According to this provision, a judge and, in a danger of delay, also an Attorney ("*Staatsanwaltschaft*"), can in criminal proceedings require that information about pieces of telecommunication addressed to the accused, or about pieces of telecommunication which seem likely to come from the accused or to be directed to her, be brought to the judge or attorney, provided that information about these pieces of telecommunication appears to be relevant for the investigation.

The scope of the application of § 12 FAG differs from that of the two previous sets of provisions in at least four different ways. First, as opposed to § 100a StPO and to art. 1 § 2 G 10, but similarly to § 99 StPO, § 12 FAG authorises judges to obtain

[133]Indeed, it has been criticised on these grounds. See G. Frankenberg, "Die Freiheit und die Verhältnisse. Anmerkungen zu den Beschlüssen des BVerfG zur Kunstfreiheit ("Anachronistischer Zug") und zur "strategischen Überwachung" gemäß § 3 G 10", 17 *Kritische Justiz* 437 at 440 et seq. (1984).

[134]BVerfGE 67, 157 at 174.

information on telecommunication in the context of any criminal procedure, that is in the context of the investigation of any crime at all. Second, § 12 FAG does not authorise judges to obtain information concerning future pieces of telecommunication; but information concerning pieces of telecommunication which have taken place. Third, in relation to this temporal definition of the scope of application of § 12 FAG, this provision only authorises judges to obtain the information about telecommunications which is automatically registered as part of the normal functioning of the telecommunication company in question. Finally, the literal wording of § 12 FAG suggests that it only allows the collection of information concerning the *circumstances surrounding* a piece of telecommunication ("Auskunft *über* Fernmeldeverkehr"); yet some commentators argue[135] that § 12 FAG can be interpreted in the sense that it embraces the acquisition of information about the content of telecommunications in as far as this information is automatically registered as part of the normal functioning of telecommunication companies (i.e. on the basis of § 14a (1) FAG).

Until recently, § 12 FAG had hardly had any grounds for application, for until recently, information on telecommunications was automatically registered only in the context of the mobile telephone network, whereas information concerning conventional telephone conversations could only be registered with the help of surveillance devices explicitly installed for this purpose[136]. § 12 FAG has only developed its potential as a basis for telecommunication surveillance with the introduction of digital telecommunication. The reason is that the circumstances surrounding every piece of digital telecommunication (i.e. the number dialed, the duration of the communication and the date when it took place) are automatically registered and may be kept by telecommunication companies for 80 days (§§ 6.2.2 (1); 6.3 TDSV). § 12 FAG thus permits the drawing up of an accurate picture of all digital telecommunications engaged in and received on a certain line during a period of nearly three months, this including not only telephone but all other telecommunications attached to a computer network. The importance of § 12 FAG as a limitation of the protected scope of the secrecy of telecommunication will become most significant with the enlargement of the digital network, which in fact is meant to replace the traditional telephone system and to be the source of all telecommunications.

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[135]See W. Bär, "Zugriff au Fernmeldedaten der Bundespost TELEKOM oder Dritter - Strafprozessuale Eingriffsmöglichkeiten in den Datenverkehr" (1993) *Computer und Recht* (*CR*) 634 at 636-637, note 16.

[136]See S. Walz, "Datenschutz und Telekommunikation (II) - Konsequenzen des Poststrukturgesetz", (1990) *CR* 138 at 140.

§ 12 FAG has thus become a powerful tool for investigation. Moreover, its importance is strengthened by the fact that it allows the collection of information for the investigation of any crime at all, a circumstance which has often been criticised[137]. In principle, however, I do not find this an unreasonable limitation of the protected scope of art. 10. It should not be forgotten that finding out these circumstances does not entail as significant an invasion of privacy as uncovering the content of a piece of telecommunication, hence it seems reasonable that the former limitation of art. 10 be allowed in cases where the latter is not. Problems might only arise in the context of digital telecommunications the content of which is also automatically registered. Such problems can however be easily avoided if, because of its sweeping effects, § 12 FAG is interpreted in narrow terms, that is, if it is interpreted as a provision which allows the collection of information concerning the surrounding circumstances of digital telecommunications but not the content of such telecommunications, even if this should be automatically registered. This interpretation seems demanded by the European Commission in its recent "Amended proposal for a European Parliament and Council Directive concerning the protection of personal data and privacy in the context of digital telecommunication networks, in particular the Integrated Services Digital Network (ISDN) and digital mobile networks"[138]. Art. 5 of this proposal allows telecommunication services to process data concerning the subscriber and surrounding the acts of telecommunication she has used only for the purpose of billing and up to the end of the statutory period during which the bill may be challenged, which as was mentioned above in Germany is 80 days. According to art. 6 of this proposal, these data must in any case be erased as soon as they are no longer necessary to provide the service required (art. 6).

[7] Finally, let me end by bringing up a different kind of limitation which may be imposed on the protected scope of the right to the secrecy of telecommunications, i.e. the possibility that the holder of this fundamental right renounces its exercise. It seems uncontroversial that the protection to the right to the secrecy of telecommunications can freely be waived in individual cases[139]. This opens the possibility that the lawfulness of telecommunication surveillance may be based upon the consent given thereto. The question that arises now is who may consent to a measure of surveillance? To be more precise, is a measure of surveillance lawful if it is consented

[137]See S. Walz, "Datenshutz und Telekommunikation..." at 140.
[138]COM(94) 128 final - COD 288, Brussels, 13 June 1994.
[139]See Pappermann, "Art. 10" in Ingo von Münch (ed.), *GGKommentar*, München 1981, p. 433 at 434; Badura, "Art. 10" in *Kommentar zum Bonner GG*, p. 16; Maunz-Dürig-Herzog, "Art. 10" in *GGKommentar*, C.H. Beck'sche Verlagsbuchhandlung, München 1993, Band I, p. 21; W. Bär, "Überwachung des Gemmeldeverkehrs - Strafprozessuale Eingriffmöglichkeiten in den Datenverkehr" (1993) *CR* 578 at 585. See also BVerfGE 85, 386 at 398.

to by only one of the parties taking part in the piece of telecommunication surveyed or is the consent of all the parties involved therein needed?

In order to answer this question two different considerations must be kept in mind. On the one hand, the right to the secrecy of telecommunications (at least to the secrecy of the content of telecommunications) does not apply vis-à-vis communication partners because this right only covers the *secrecy* of telecommunications, secrecy which does not exist between communication parties (see chapter 4). On this basis, a party to an act of telecommunication may disclose the content or the circumstances of telecommunications she has engaged in[140]. By doing so, she might violate some other fundamental right of the person affected (provided of course that disclosure is carried out by the public power), such as the rights to privacy or to one's own word recognised within art. 2.1 of the Basic Law; she might even be committing a crime (§ 201 StGB). Yet disclosure does not amount to an infringement upon the right to the secrecy of telecommunications.

This is so as far as disclosure of the secrecy of a piece of telecommunication is concerned. On the other hand, the case of consent to an interference cannot be solved on the above premises. For there is an important difference between the act of disclosing the secrecy of a piece of telecommunication and the act of consenting to a third party's interfering with that secrecy. This difference becomes clear if we depart from a basic idea: the exercise of a fundamental right can only be waived by the holder of this right, hence every individual can only consent to interferences with her own fundamental rights. In every instance of telecommunication each of the parties taking part therein is the holder of an independent right to the secrecy of telecommunications. Each party can therefore consent to interferences with her right, yet she may not consent to the interference with the right of the other party. The conclusion therefore is that in order that no violation of art. 10 be involved surveillance must be consented to by all the parties to an act of telecommunication.

The Constitutional Court has been confronted with the question of consented surveillance in a case concerning the secrecy of the circumstances surrounding telephone conversations[141]. The reasoning of the Court and the conclusion it reached coincide with the considerations that have just been made above: in order that the lawfulness of telecommunication surveillance can be based on consent, the consent must be given by all the parties involved in the piece of telecommunication surveyed. It

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[140]BVerfGE 85, 386 at 399.
[141]Ibid.

is inherent in the reasoning of the Court that this conclusion is not restricted to the circumstances surrounding telephone conversations but that it can be applied both to the circumstances and to the content of every modality of telecommunication[142].

Conclusion

The protected scope of the right to the secrecy of telecommunications in Germany is defined in rather clear terms. This is mostly due to the fact that its definition is ultimately left in the hands of the law-maker and that the legal regulation of the protected scope is rather precise. In addition to being clearly regulated, restrictions of the right to the secrecy of telecommunications are subject to strict limits. They are constitutionally required to fulfil both a formal and a substantial condition. Formally, the law-maker must make it explicit that a particular law intends to limit the protected scope of the right to the secrecy of telecommunication. Substantially, the law-maker may only impose limitations upon the protected scope of the right to the secrecy of telecommunications which comply with the so-called 'principle of reasonableness' (*Grundsatz der Verhältnismäßigkeit*). In order to comply with this principle, limitations must pursue a legitimate aim, they must be suitable and necessary for attaining that aim and they must not be out of proportion with the aim they pursue.

All the restrictions listed above would seem to be pursuing a legitimate aim. They also seem suitable to attaining this aim (they all certainly seem suitable to attaining it at least partially) and, we can also accept, they seem necessary to attaining the aim. Yet some of them have such sweeping effects that they might create problems of proportionality unless they are interpreted and applied in restrictive terms. This is particularly the case with two provisions, namely with art. 1 § 3 of the G 10 and with § 12 FAG. The former can subject whole sectors of the German population to the 'strategic surveillance' of their telecommunications for the sake of the protection of national security. The latter allows the collection of information concerning telecommunications which have taken place for its use in any criminal prosecution, in as far as this information is automatically registered by telecommunication companies. In order that these two provisions allow for restrictions which respect the principle of reasonableness, they must be subject to particularly strict interpretation and their effects must be minimised. Heavier criticism is deserved by the G 10 in as far as it precludes the possibility that victims of a measure of surveillance carried out under the G 10 can

[142]Fears that only one party's consent might be valid in the context of computer telecommunications are therefore unjustified (see W. Bär, "Überwachung...", at 585 et seq.)

have recourse to the judiciary against such measures before they have been officially informed of their existence. This criticism will be developed in detail in chapter 6.

I would also like to recall a particularly regrettable doctrine of the Constitutional Court, i.e. that the law-maker has a certain margin of time to authorise the limitation of a right, hence that limitations of a right may temporarily not be in accordance with the law. This doctrine, which is plainly unconstitutional, has sometimes been applied in the context of the right to the secrecy of telecommunications. Moreover, the danger that it be applied for longer and longer periods is particularly great with respect to the restrictions imposed as part of the normal functioning of telecommunication services (what I have called 'structural restrictions'), since not all such restrictions are yet authorised by law. This is notably the case for structural restrictions to the secrecy of the circumstances surrounding a piece of non-written telecommunication. Similarly, structural restrictions for the prevention of the illegal use of telecommunication services are only authorised by §§ 7 and 8 of the TDSV, which are not legal provisions.

Beyond these criticisms, the protected scope of the right to the secrecy of telecommunications seems defined in terms which are rather clear and rather reasonable, as corresponds to the clear definition of its coverage.

Section 3: The United States

1. The Scope of Protection of the Fourth Amendment

Fourth Amendment
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The fourth amendment recognises a right against all searches and seizures, yet it offers protection only against some of them. It is the purpose of this section to ascertain which searches and seizures are banned by the fourth amendment, thus defining the boundaries of the protected scope of this provision. It will be seen that the protected scope of the fourth amendment is strongly influenced by considerations as to the level of protection which privacy ought to be granted. Indeed, the definition of the scope of privacy which is worthy of protection will appear as the main criteria in the definition of the scope of protection of the fourth amendment. It will also come to light that the level of protection that privacy deserves is decided on policy grounds. All of this will prove to be to the detriment of the protected scope of the fourth amendment, the definition of which will appear as shaky and subject to policy restrictions. Let us however proceed step by step and look at the protected scope of the fourth amendment with some order.

The basic points of reference in the definition of the protected scope of the fourth amendment are provided by the amendment itself. According to its wording, lawful searches and searches must comply with two requirements. First, they must be reasonable; second, they can only be backed by warrants issued upon probable cause and particularly describing the place to be searched and the persons or things to be seized. Let me first comment on this latter requirement.

Warrants which back searches and seizures must fulfil two conditions, which are a direct product of the history of the fourth amendment: as explained in chapter 2, this provision was enacted as a reaction against the practice of issuing general search warrants and aimed at preventing arbitrariness in the issuing of warrants and at making the scope of these as well defined as possible. The first condition aims to control the lawfulness of searches and seizures at their origins and states that search warrants can only be issued upon 'probable-cause'. As interpreted by the Supreme Court, 'probable cause' requires that before a search warrant is issued there must be evidence which

would lead a prudent and cautious man to believe that an offence has been or is being committed, that the items sought are to be found in the place or on the person searched and that those items will aid in a particular apprehension or conviction of some person[143]. The second condition, on the other hand, aims to control the lawfulness of searches and seizures while they are being carried out, for indeed "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope"[144]. The condition is that lawful warrants particularly describe the object of the searches and seizures they authorise; in particular, warrants must specify the places, persons and items to be searched for and seized, so that only those thus specified can be the object of a lawful search and seizure[145].

The requirement that searches and seizures be reasonable is much looser in scope, hence much more difficult to define, than the warrant requirement. It is not merely one among the cumulative requirements of constitutionality that the fourth amendment imposes upon searches and seizures. Rather, 'reasonableness' has been taken by the Court as the only requirement of the kind that this amendment really imposes or, more precisely, as the requirement which comprehends all others. Searches and seizures are constitutional if they are reasonable, yet, in order to be thus, they must fulfil certain conditions, in particular they must not be backed by an invalid warrant. The provision that searches and seizures must not be invalidly warranted is the only criterion of reasonableness provided by the fourth amendment. This, however, is clearly insufficient: taken by itself the criterion implies that every warrantless search and seizure is reasonable per se; the requirement of 'reasonableness' must entail more than a bare provision that searches and seizures be 'not invalidly warranted'. It has been the task of the Supreme Court to define the scope of this requirement.

As a first observation in this respect, note that 'reasonableness' has not been read to imply any kind of 'less-intrusive-means rule'. Unlike the German Constitutional Court and the European Court of Human Rights, the Supreme Court of the United States has discarded the application of any such rule: "the reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence

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[143]See *Grau v. US*, 287 US 124 at 128 (1932); *Go-Bart Importing Co. et al. v. US*, 282 US 344 at 355 (1931). The above guide-lines have also been induced from cases in which probable cause is demanded from warrantless searches and seizures (see footnotes 156, 158 below).

[144]*Terry v. Ohio*, 392 US 1 at 19 (1968).

[145]See *Marron v. US*, 275 US 192 at 196-197 (1927); *Coolidge v. New Hampshire*, 403 US 443 at 471 (1971), where the seizure of items under terms not described in a valid warrant is deemed lawful only if covered by one of the exceptions to the warrant requirement. See also *Marcus v. Search Warrant*, 367 US 717 at 724 (1961); *Stanford v. Texas*, 379 US 476 at 480 (1965); *Roaden v. Kentucky*, 413 US 496 at 502 (1973); *Marshall v. Barlow's Inc.* 436 US 307 at 311 (1978); *Lo-Ji Sales, Inc. v. NY*, 442 US 319 at 322, 325 (1979), where the Court has disapproved general or open-ended warrants.

of alternative 'less intrusive' means"[146]. Beyond this point, the question of the scope of the reasonableness requirement will be faced in the following paragraphs. In particular, I will focus upon two issues: first, whether the 'reasonableness' requirement has any substantive content; second, whether the issuance of a valid search warrant, not only the validity of such a warrant when issued, is a condition on the reasonableness of a search and seizure.

1.1 Are Valid Warrants Sufficient?: [a] 'Reasonableness' as a Substantive Requirement

Let me start by noting that the warrant requirement does not have substantive content. The warrant requirement only demands that search warrants comply with certain formalities, that is, it protects the right to privacy merely by way of imposing formal or procedural requirements upon restrictions of the right. Admittedly, the issuance and scope of a valid warrant must be based on some substantive considerations concerning, in particular, the existence of probable cause. Yet, strictly speaking, probable cause does not impose substantive restrictions upon the content of warrants; the restrictions it imposes are merely functional, that is, they are related to the factual circumstances of a case. Once this is clear, I would like to point out that, under the privacy reading of the fourth amendment, the Supreme Court has not interpreted the requirement of reasonableness to mean the imposition of any other requirement than the warrant requirement upon searches and seizures. If probable cause exists and a warrant is duly issued on these grounds, then a restriction of the right to privacy through search and seizure is lawful. As a result, under the privacy reading of the fourth amendment, searches and seizures are not subject to any kind of substantive requirements.

With this position the Supreme Court seems to assume that the right to privacy can *always* be subordinated to the interest in law enforcement, independently of the importance that privacy and law enforcement respectively have in a particular case. All the Court requires is that an interest in law enforcement is really at stake, that the violation of privacy helps to make law enforcement effective (probable cause) and that both these points be decided by courts (search warrant). Reasonableness is not thought to require that the aim of law enforcement be of any particular degree of importance in order to justify infringement upon privacy interests; nor is it thought to require that limitations of privacy be necessary to attain their aim (as noted above, the violation of

[146]See *Illinois v. Lafayette*, 462 US 640 at 647 (1983); cifr. *Colorado v. Bertine*, 479 US 367 at 374 (1987). See also *Cady v. Dombrowski*, 413 US 433 at 447 (1973); *US v. Martinez-Fuerte*, 428 US 543 at 557 (1976).

privacy need not pass the test of being the least intrusive means to an end) or that they be proportionate to the aim they pursue. Instead, the protection of privacy is simply subordinated to law enforcement and its limitation is considered reasonable provided that a court confirms that it is a suitable means to attain this aim. This restrictive approach to privacy confirms an idea that I have developed in previous chapters: in the United States the right to privacy is regarded as suspect, because it safeguards purely individualistic interests which often go against more general interests of society, interests which for this reason are considered more valuable than privacy. When these two kinds of interests clash against each other, then the Supreme Court assumes that it is reasonable that privacy be automatically sacrificed to the common good, without any further considerations. Such a clash between privacy interests and the common good is notably present in the context of law enforcement.

The low importance that the right to privacy is thought to deserve contrasts with the importance the Supreme Court used to accord to the protection of private property when this dominated the interpretation of the fourth amendment. Indeed, recall that the fourth amendment offered private property absolute protection, so that legitimate private property could under no circumstances be searched. This explains that, when the fourth amendment was regarded as a means for the protection of private property, the purely formal warrant requirement could not suffice to account for the reasonableness of searches and seizures, it could by no means grant private property the absolute protection against searches and seizures that it was thought to deserve. Some additional substantive requirement, indeed some absolute substantive requirement, was thus needed and this was found in the so-called 'mere-evidence rule'. Indeed, as explained in chapter 2, the 'mere-evidence rule' defined what could be considered the 'essential content' of the provision, since it defined a sub-area within the coverage of the fourth amendment infringement of which was always considered unconstitutional.

The abandonment of the 'mere-evidence rule' signified the abandonment of the property reading of the fourth amendment and the definite prevalence of the privacy reading. Since then, no other substantive requirement, whether or not absolute, has come to replace the 'mere-evidence rule'. In fact, in the case of *Zurcher v. Stanford Daily* the Court stated that "[u]nder existing law valid warrants may be issued to search *any* property ... at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found"[147]. Nevertheless, in this very case the Court left the door open for the eventual imposition of a substantive requirement of 'reasonableness' by saying that "[t]his is not to ... assert that searches, however or

[147]*Zurcher v. Stanford Daily*, 436 US 547 at 554 (1978) (emphasis in original).

whenever executed, may never be unreasonable if supported by a warrant issued on probable cause and properly identifying the place to be searched and the property to be seized"[148]. It thus seems that the Court has not discarded the idea that, eventually, searches and seizures might be made to comply with material requirements of reasonableness under a privacy rationale[149]. Unfortunately, this idea has not yet been developed.

1.2 [b] The Issuance of a Warrant as a Condition of 'Reasonableness'

1.2.1 The Issuance of a Warrant as a Rule

The fourth amendment does not literally require that search warrants be issued. It only requires that, should a search and seizure be based on a warrant, this latter must comply with certain conditions (warrants must be based on probable cause, they must describe the target of the search and seizure, etc). As was explained in chapter 2, the amendment came as a reaction against general search warrants, not against warrantless searches and seizures[150]. Nevertheless, in the end, these two circumstances can give rise to a similar evil, namely too wide discretion for law-enforcing officers. This evil becomes more evident in a society where, like in present American society, law-enforcing agents have a great deal of factual and legal power over ordinary citizens, hence where law-enforcing agents are in a position from which they can and do endanger the exercise of civil rights to an extent unknown to the drafters of the fourth amendment[151]. Taking these considerations into account, the Supreme Court has always considered the issuance of a warrant as a part, a very important part indeed, of the requirement of reasonableness. The Court is of the opinion that, on balance, the interest behind the avoidance of a search warrant -more efficient law enforcement and the like- is outweighed by "the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities"; for only magistrates "possess the detachment

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[148]Ibid. at 559-560.

[149]In this context, it has been suggested that searches and seizures of "the most private matters" -one's own thoughts and their physical embodiment in the form of communications to oneself- should be considered unreasonable when carried out upon third parties, unless supported by probable cause not only that the object of the search or seizure is linked to the commission of a crime but, additionally, that the owner of the object of the search is also involved in the crime in question (C.M. Bradley, "Constitutional Protection for Private Papers" 16 *Harv. C.R.-C.L.L. Rev.*, 461 (1981)).

[150]The particular circumstances and the legal background which justified the wording of the fourth amendment have been analysed by Akhil Reed Amar, "Forth Amendment First Principles" 107 *Harv. L. Rev.* 757 (1994).

[151]See Carol S. Steiker, "Second Thoughts About First Principles", 107 *Harv. L. Rev.* 820 at 830 et seq. (1994).

and neutrality with which the constitutional rights of the suspect must be viewed"[152]. In other words, the Court has thought it advisable that neutral and independent magistrates judge on the constitutionality of searches and seizures not only ex post, that is, not only once a search and seizure has already occurred, but also before they have been carried out. Without a judicial warrant, such a prior decision is left in the hands of law enforcing officers, with the obvious risk of abuse.

The warrant requirement is not unconditionally regarded as a requirement of reasonableness, however. There are cases where, on balance, the Court has thought it advisable to avoid the procedure of issuing a search warrant. To be sure, the Court has always asserted that, as a rule, search warrants must be issued, yet it has admitted that under certain exceptional circumstances the needs of law-enforcement outweigh interests in the issuance of a search warrant. In this context, it does not suffice to show that a warrantless search and seizure has been properly carried out or that it was backed by probable cause, hence that a warrant would have been obtained if it had been applied for[153]. The purpose of the warrant requirement is that there be a prior independent judgment on the constitutionality of a search and seizure and that this not be replaced by the opinion of police officers, even if ex post their opinion turns out correct. A warrantless search and seizure can be deemed reasonable only under exceptional circumstances[154].

The decision that a particular search and seizure need not be warranted results in the loss of the central criterion with which to measure the reasonableness of a search and seizure. This loss has become more significant since the fourth amendment started to be read exclusively in privacy terms, for this implied the abandonment of the 'mere-evidence rule' as a substantive condition of reasonableness which complemented the warrant requirement. Thus, the Court has had to set alternative conditions of reasonableness for the cases where the warrant requirement does not apply. In

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[152]*Trupiano et al. v. US*, 334 US 699 at 705 (1948). See also, e.g., *Agnello et al. v. US*, 269 US 20 at 32-33 (1925); *Taylor v. US*, 286 US 1 at 6; *Johnson v. US*, 333 US 10 at 13-15 (1948); *Chapman v. US*, 365 US 610 at 615 (1961); *Aguilar v. Texas*, 378 US 108 at 110-115 (1964); *Berger v. NY*, 388 US 41 at 54- 60 (1967); *Katz v. US*, 389 US 347 at 354-357 (1967); *Payton v. NY*, 445 US 573 at 588 (1980).

[153]*Agnello et al. v. US*, 269 US 20 at 33 (1925); *Taylor v. US*, 286 US 1 at 6; *Johnson v. US*, 333 US 10 at 13-15; *Trupiano et al. v. US*, 334 US 699 at 705 (1948); *Rios v. US*, 364 US 253 at 262 (1960); *Chapman v. US*, 365 US 610 at 615 (1961); *Katz v. US*, 389 US 347 at 354-357 (1967); *US v. US District Court*, 407 US 297 at 317 (1972); *Arkansas v. Sanders*, 442 US 753 at 759 (1979); *Payton v. NY*, 445 US 573 at 588 (1980). As will be seen below, such considerations help to sustain the constitutionality of a warrantless search and seizure once its warrantless character has been justified. They are substitutes for the warrant requirement when this is not needed, but offer no grounds for doing without a warrant.

[154]As commented on in chapter 3, the attitude of the Supreme Court with respect to the 'exceptionality' of such circumstances has become less and less strict as privacy became a more and more important interest in the context of the amendment.

particular, it has stated that "the notions which underlie the warrant procedure and the requirement of probable cause remain fully relevant in this context [of warrantless searches and seizures]"[155]. It would therefore seem that, in principle, warrantless searches and seizures must be based on probable cause[156] and that their object must be particularly described, so that warrantless searches and seizures can also be controlled both at their origins and while they are being carried out.

However, these two requirements do not apply in the context of warrantless searches and seizures in the same terms as in the context of warranted searches and seizures. This is true, first of all, of the requirement that the object of searches and seizures be precisely defined, because this requirement is, for obvious reasons, impossible to fulfil in the absence of the explicit prior authorisation of a search. In its stead, the Court has had to content itself with an equivalent demand, namely that the scope of a warrantless search and the seizure arising therefrom be strictly tied to and justified by the circumstances which rendered its initiation permissible[157]. The same is also true of the probable cause requirement. Probable cause is not an absolute requirement; it is not a requirement compliance with which can only be measured in absolute, all-or-nothing terms which are the same in every situation. Rather, compliance with this requirement appears as a matter of degree. It is only too normal that certain searches and seizures are thought to require a higher degree of probable cause than others in order to be considered reasonable. The degree of probable cause required can vary according to the level of intrusion of a search, to the importance of the crime it aims at investigating, even to the imminence of the crime it is aimed to prevent. These circumstances must certainly be taken into account before issuing a search warrant upon probable cause; yet they become even more important in the context of the evaluation of the reasonableness of warrantless searches and seizures. For one thing, the reasons that suggest that a warrant be dispensed with often also suggest that probable cause be required only to a lesser degree.

The Supreme Court has admitted that certain searches and seizures need not be subject to strict probable cause. It has ruled, for example, that the presence of "special needs, beyond the normal need for law enforcement, make [not only] the warrant [but

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[155] *Terry v. Ohio*, 392 US 1 at 20 (1968).

[156] See *Carroll et al. v. US*, 267 US 132 (1925); *Wilson v. Schnettler*, 365 US 381 at 383 (1961); *Wong Sun v. US*, 371 US 471 at 479 (1963); *Beck v. Ohio*, 379 US 89 at 96-97 (1964); *Warden v. Hayden*, 387 US 294 at 307 (1967); *Terry v. Ohio*, 392 US 1 at 21 (1968).

[157] *Agnello et al. v. US*, 269 US 20 at 30-31 (1925); *Go-Bart Importing Co. et al. v. US*, 282 US 344 at 356-358 (1931); *US v. Di Re*, 332 US 581 at 586-587 (1948); *Kremen v. US* (Per Curiam), 353 US 346 at 347-348 (1957); *Preston v. US*, 376 US 364 at 367-368 (1964); *Warden v. Hayden*, 387 US 294 at 310 (1967); *Terry v. Ohio*, 392 US 1 at 19 (1968); *Sibron v NY and Peters v. NY*, 392 US 40 at 66 (1968); *Chimel v. California*, 395 US 752 at 762 (1969).

also the] probable cause requirements impracticable"[158]; similarly, it has ruled that searches and seizures which may be warrantless because they only marginally intrude upon fourth amendment interests may also be carried out without probable cause[159]. However, the Supreme Court does not like to regard probable cause as a relative requirement which can be complied with by degrees. Rather, it regards probable cause as an absolute requirement which imposes equal standards upon all searches and seizures, be these warrantless or warrant based. The differences between these two approaches are more a matter of style than a matter of substance: the Supreme Court never speaks of *lessening* the level of application of the probable cause requirement; instead, the Court speaks of *excepting* the application of probable cause, often replacing it by a different, less stringent requirement. One such requirement is, for example, that searches and seizures must rely upon the 'reasonable suspicion' that an offence had been, was being or was about to be committed[160].

1.2.2 The Exceptions to the Warrant Requirement

Throughout its case-law on the fourth amendment, the Supreme Court has drawn a list of exceptions to the warrant requirement. At first sight, this list would appear to be exhaustive. Indeed, the Court has required that the authorities seeking to do without a search warrant show that a particular case fall under one of the exceptions categorised as such within the Court's list[161]. Yet the Court has not been completely closed to accepting new grounds for exceptions to the warrant requirement. To begin with, it has never precluded the possibility that new circumstances can be included in the list of exceptions. There have been, in fact, late additions to that list (the 'good-faith' and the 'inventory-search' exceptions, for example). Thus whenever the circumstances of a case do not fall within a pre-established exception to the warrant requirement, the public authorities can always try to convince the Supreme Court that

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[158]*New Jersey v. T.L.O.*, 469 US 325 at 351 (1985) (disciplinary searches and seizures of students by school officials); *Griffin v. Wisconsin*, 483 US 868 at 873 (1987) (searches and seizures carried out within the state probation system); *Treasury Employees v. Von Raab*, 489 US 656 (1989) (application of the US Custom Service drug testing program to employees who apply for positions involving illegal drugs or requiring the carrying of firearms); *Skinner v. Railway Labor Exec. Assn*, 489 US 602 (1989) (employee drug testing); *Michigan State Police v. Stiz*, 496 US 444 (1990) (searches in sobriety check points).

[159]As will be seen below, this is generically the case of the stop-and-frisk, the consent and all the administrative-search exceptions.

[160]The Supreme Court understands 'reasonable suspicion' as the "likelihood of facts justifying the search" (*Griffin v. Wisconsin*, 483 US 868 at 877 (1987)). For sound criticisms of the absolute, unflexible understanding of the probable cause requirement by the Supreme Court, see A.R. Amar, "Forth Amendment First Principles" at 782 et seq.

[161]*Jones v. US*, 357 US 493 at 499; *US v. Jeffers*, 342 US 48 at 51; *Rios v. US*, 364 US 253 at 261 (1960); *Coolidge v. New Hampshire*, 403 US 443 at 455, 474 (1971).

these circumstances stand for a new exception worth establishing. Furthermore, the Court has admitted a so-called 'exceptional-circumstances exception', thus providing a rather flexible fall-back argument for public authorities which seek to do without the warrant requirement.

In the following paragraphs I will analyse the list of exceptions to the warrant requirement. To this end I will divide these exceptions into two main groups. To the first group [1] belong exceptions the rationale of which lies in the existence of compelling circumstances which demand that no time is wasted in obtaining a warrant. To the second group [2] belong exceptions to the warrant requirement justified by the fact that invasion of privacy implied by some particular types of searches and seizures will be slight. Note that belonging to one of the following categorised exceptions does not automatically dispense with the warrant requirement. In order that this is so, the rationale that justifies a particular exception must be present in the particular circumstances of an individual case, something which has to be proven by the public authorities who argue that a warrantless search and seizure be nonetheless declared reasonable[162].

[1] Exceptions Justified by the Existence of Compelling Circumstances

The Supreme Court has ruled that the warrant requirement can be dispensed with in the presence of exceptional circumstances which prove so compelling that no delay in obtaining a warrant is advisable. The Court has not followed a clear line when interpreting the exceptionality rationale. Initially, when this rationale was introduced, the Court read it in the sense that the warrant requirement can only be dispensed with when a warrant is not "reasonably practicable"[163]. Shortly after having been established, however, this doctrine was explicitly overruled by the doctrine that the reasonableness of a warrantless search and seizure under the exceptional circumstance exception must be decided on all its facts, and not merely on the criterion whether a warrant would have been practicable[164]. This latter doctrine granted law-enforcing agents a much greater discretion to decide on the issuance of a warrant. Yet even this doctrine has not been consistently followed by the Court. Whilst the Court has adhered

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[162]*Jones v. US*, 357 US 493 at 499; *US v. Jeffers*, 342 US 48 at 51; *Rios v. US*, 364 US 253 at 261 (1960); *Chimel v. California*, 395 US 752 at 762 (1969); *Coolidge v. New Hampshire*, 403 US 443 at 455, 474 (1971); *Arkansas v. Sanders*, 442 US 753 at 761 (1979); *Payton v. NY*, 445 US 573 at 586-587 (1980).
[163]See *Trupiano v. US*, 334 US 699 at 705-706 (1948).
[164]*US v. Rabinowitz*, 339 US 56 at 62 (1950).

to it in many cases[165], it has rejected it in many others in favour of the 'reasonably-practicable' rule[166], a position to which it seems to have grown more inclined. It is significant, in this respect, that in a recent Annotation on the arrest exception, the 'reasonably-practicable' rule has simply been taken for granted[167].

As examples of compelling circumstances accepted by the Court we can cite, for example, the cases of hot pursuit and of investigative stops or stops and frisks[168]. These exceptions allow the police to stop a person if they believe that criminal activity might be afoot and to carry a patdown search of the person for weapons if they believe the person may be armed and presently dangerous[169]. Under such compelling circumstances the police need not even rely on probable cause that the person is involved in criminal activity; 'reasonable suspicion' is considered sufficient. Other instances of the compelling-circumstance exception are the so-called 'automobile exception' and the 'incident-to-arrest exception'. These two instances require more detailed explanations.

[a] The Automobile Exception

Warrantless searches and seizures of vehicles that are constantly movable are reasonable when any delay to obtain a warrant can allow the vehicle to escape and the object of the search and seizure to be destroyed[170]. The automobile exception thus appears as an emergency measure to avoid the destruction of the object of the search

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[165]See *Harris v. US*, 331 US 145 at 150 (1947); *Abel v. US*, 362 US 217 at 236-239 (1960); *Ker v. California*, 374 US 23 at 42 (1963); *U.S. v. Caruso*, 358 F2d 184, 185-186, cert. denied 385 US 862 (1966); *Cooper v. California*, 386 US 58 at 62 (1967); *US v. Edwards*, 415 US 800 at 805 (1974); *US v. Chadwick et al.*, 433 US 1 at 9 (1977).

[166]See *Chapman v. US*, 365 US 610 at 615 (1961); *Preston v. US*, 376 US 364 at 367 (1964); *Stoner v. California*, 376 US 483 at 487 (1964); *Warden v. Hayden*, 387 US 294 at 299 (1967); *Katz v. US*, 389 US at 357-358 (1967); *Terry v. Ohio*, 392 US 1 at 19 (1968); *Chimel v. California*, 395 US 752 at 762-763 (1969); *Coolidge v. New Hampshire*, 403 US 443 at 460-462 (1971); *Arkansas v. Sanders*, 442 US 753 at 761 (1979).

[167]Tim A. Thomas, J.D., "Constitutionality of Searching Premises Without Warrant as Incident to Valid Arrest" -Annotation, *United States Supreme Court Reports*, 108 LEd 2d 987 at 990 (1992).

[168]See *Warden v. Hayden*, 387 US 294 (1967) and*Terry v. Ohio*, 392 US 1 (1968), respectively. For an analysis of and further cases on the stop-and-frisk exception, see the Annotation by John F. Wagner Jr, J.D., "Law Enforcement Officer's Authority, Under Federal Constitution's Fourth Amendment, to Stop and Briefly Detain, and to Conduct Limited Protective Search of or 'Frisk', for Investigative Purposes, Person Suspected of Criminal Activity -Supreme Court cases", *United States Supreme Court Reports*, 104 L Ed 2d 1046 et seq. (1991).

[169]The seizure of incriminatory evidence other than weapons, such as contraband, is lawful only if a lawful patdown search lays the object in question in plain view for the police officer carrying out the search (see *Michingan v. Long*, 463 US 1032; *Minnesota v. Dickerson*, 124 L. Ed. 2d 334 (1993) (pending publication)). The open-view exception will be explained below.

[170]See *Carroll et al. v. US*, 267 US 132 (1925); *Preston v. US*, 376 US 364 (1964); *Cooper v. California*, 386 US 58 (1967); *Chimel v. California*, 395 US 752 (1969); *Chamber v. Maroney*, 399 US 42 (1970); *Coolidge v. New Hampshire*, 403 US 443 (1971); *US v. Chadwick et al.*, 433 US 1 (1977); *Arkansas v. Sanders*, 442 US 753 at 761 (1979); *Colorado v. Bannister*, 449 US 1 (1980); *Robbins v. California*, 453 US 420 (1981), *New York v. Belton*, 453 US 454 (1981).

and seizure. Accordingly, it has only been upheld to the extent that obtaining a warrant would have significantly endangered the search and seizure of the automobile in question, due to its mobility. Thus, e.g., the automobile exception may justify the warrantless seizure of closed pieces of luggage, containers or even of sealed letters found inside a searched car and probably related to a crime, but not their opening without a search warrant[171].

[b] The Incident-to-Arrest Exception.

A person lawfully arrested and the place where the arrest is made may be lawfully searched without a warrant[172]. This exception to the warrant requirement, the one most frequently applied, is supported by a double rationale. First, it aims to protect the arresting agent; second it aims to prevent an escape from custody of the person arrested and to avoid the concealment or destruction of items connected with the crime in question during the delay needed to obtain a warrant. On the basis of this double rationale, the arrest exception imposes two conditions of lawfulness upon searches and seizures. First, searches and seizures must be carried out within the 'area of immediate control' of the person arrested. Such searches and seizures are always allowed. The arresting agents are not required to establish that weapons or destructible evidence may be involved[173]; their potential existence is always presumed and considered dangerous enough to justify a warrant exception. The Court, however, has not given clear indications on the scope of this area[174].

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[171]See *US v. Chadwick et al.*, 433 US 1 (1977); *Arkansas v. Sanders*, 442 US 753 at 761 (1979); *Robbins v. California*, 453 US 420 (1981). To the contrary, however, see the more recent opinion of the Court in *California v. Acevedo*, 114 L Ed 2d 619 (1991).

[172]*Weeks v. U.S.*, 232 US 383 (1914); *Carroll v. U.S.*, 267 US 132 (1924); *Agnello et al. v. US*, 269 US 20 (1925); *Marron v. U.S.*, 275 US 192 (1927); *Go-Bart Importing Co. v. US*, 282 US 344 (1931); *US v. Lefkowitz et al.* 385 US 452 (1932); *Harris v. US*, 331 US 145 (1947); *Trupiano v. US*, 334 US 699 (1948); *US v. Rabinowitz*, 339 US 56 (1950); *Wilson v. Schnettler*, 365 US 381 (1961); *US v. Jeffers*, 342 US 48 (19); *Preston v. US*, 376 US 364 (1964); *Beck v. Ohio*, 379 US 89 (1964); *James v. Louisiana*, 382 US 36 (1965); *Schmerber v. California*, 384 US 757 (1966); *Terry v. Ohio*, 392 US 1 (1968); *Chimel v. California*, 395 US 752 (1969); *US v. Edwards*, 415 US 800 (1974); *US v. Chadwick et al.*, 433 US 1 (1977); *Michigan v. DeFillippo*, 443 US 31 (1979); *Robbins v. California*, 453 US 420 (1981); *New York v. Belton*, 453 US 454 (1981); *Colorado v. Bertine*, 479 US 367 (1987); *Maryland v. Buie*, 494 US 325 (1990).

[173]*Terry v. Ohio*, 392 US 1 at 26-27 (1968); *US v. Robinson*, 414 US 218 at 235 (1973); *US v. Chadwick et al.* 433 US 1 at 15 (1977).

[174]The position of the Court is in fact subject to significant fluctuations, fluctuations which run parallel to those concerning the argument of whether warrants must be issued whenever reasonably practicable or whether account must be taken of all the circumstances of the case, to which reference has been made above. In particular, under the 'reasonably-practicable' rule, the 'area of immediate control' has been deemed much more restricted than under the 'account-of-all-circumstances' rule. In fact, this latter rule has justified actual general exploratory searches of the premises where an arrest was made, even though these searches have not been openly described thus (see, e.g., *Harris v. US*, 331 US 145 at 151 (1947)).

Second, searches and seizures must be 'incident to arrest'. This expression has been defined by the Court as 'contemporaneous to arrest' and interpreted in rather strict terms[175]. However, the Burger Court expanded this expression to cover the situation of custody which might follow an arrest, so that searches and seizures carried out while the arrestee is in custody have since been considered 'incident to arrest'[176]. The Court has also faced the question whether the 'incident-to-arrest' condition precludes the seizure of items related to a crime different to the one that justified the original arrest. The lawfulness of such seizures has been judged on the basis of the so-called open-view exception[177], which will be commented on below.

The lawfulness of warrantless searches and seizures incident to arrest still depends on a third condition, i.e. the lawfulness of the arrest itself. In order to be lawful, an arrest must fulfil one of two alternative conditions: either it is based on a valid arrest warrant, or it must be based on probable cause, judged by the arresting agents, that the person arrested has committed or is committing an offence[178]. Therefore, the arrest exception does not always amount to substituting an arrest warrant for a search warrant: often the lawfulness of searches and seizures incident to arrest will be justified on the grounds that the arresting officer had probable cause to carry out the arrest.

[2] Exceptions Justified as a Lesser Invasion of Privacy

In several instances, the Supreme Court has looked at the level of invasion of privacy that a particular search and seizure entails in order to decide whether the search and seizure in question must be based on a warrant. The definition of privacy and, more particularly, of the right to privacy, thus acts as one of the central criteria in the definition of the protected scope of the the fourth amendment right against searches and seizures.

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[175]See, e.g., *Stoner v. California*, 376 US 483 at 486 (1964); *Preston v. US*, 376 US 364 at 367-368 (1964); *Schmerber v. California*, 384 US 757 at 770-771 (1966); *US v. Chadwick et al.*, 433 US 1 at 14 (1977).

[176]See, e.g., *Cooper v. California*, 389 Us 58 at 61-62 (1967); *Harris v. US*, 390 US 234 at 236 (1968); *Cady v. Dombrowski*, 413 US 433 at 447-448 (1973); *US v. Edwards*, 415 US 800 at 807-808 (1974); *US v. Chadwick et al.*, 433 US 1 at 14-15 (1977); *New York v. Belton*, 453 US 454 (1981); *Colorado v. Bertine*, 479 US 367 at 372 (1987). However, custodial interrogation is considered too long and intrusive to be lawful if not pursuant to an arrest based on probable cause (*Dunaway v. NY*, 442 US 200 (1979)).

[177]See *US v. Edwards*, 415 US 800 at 806 (1974), and cases cited therein.

[178]*Wilson v. Schnettler*, 365 US 381 (1961). For the definition of probable cause, see text accompanying footnote 143 above.

[a] The Administrative-Search-and-Seizure Exception

Although the fourth amendment draws no distinction between criminal and other kinds of searches and seizures, the Supreme Court holds that this provision primarily protects against criminal searches and seizures. The Court sustains the position that it is these searches and seizures that primarily endanger individual privacy, hence that the basic requirements of reasonableness it imposes are primarily intended to control searches and seizures aimed at obtaining fruits, instrumentalities or evidence of crime. Administrative searches and seizures, on the other hand, are less intrusive upon privacy than their criminal equivalents; they therefore need not be so heavily penalised, which according to the Court means that the warrant requirement and even the probable-cause requirement can be dispensed with in this context. In order to be reasonable under the fourth amendment, administrative searches and seizures only need comply with the particular administrative rules upon which they are based.

Certain searches and seizures have been explicitly included within the administrative exception. Amongst these, there are, e.g., searches relating to closely regulated industry[179], searches at road inspection points[180], work-related searches[181] and inventory searches[182]. Border searches[183] can also be added to this list, although more than administrative they could be called 'political' searches, grounded on the "recognised right of the sovereign to control ... who and what may enter the country"[184].

[b] The Open-View Case

The open-view rule was analysed in chapter 3. There it was explained that this rule defines the scope of coverage of the fourth amendment with respect to searches, whilst it defines the protected scope of this provision with respect to seizures. Items lying in open view cannot be considered the object of a real 'search' (the act of taking notice of such items is not a search strictly speaking), whilst they can perfectly well be

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[179] *Camara v. Municipal Court*, 387 US 523 at 538 (1967); *Colonnade Corp. v. US*, 397 US 72 (1970); *US v. Biswell*, 406 US 311 (1972); *Marshall v. Barlow's, Inc.* 436 US 307 at 312-313 (1978); *Donovan v. Dewey*, 452 US 594 at 598-599 (1981); *NY v. Burger*, 482 US 691 (1987). The alternative conditions of reasonableness imposed on these searches are specified in *NY v. Burger*, at 702-703.

[180] *Delaware v. Prouse*, 440 US 648 (1979).

[181] *O'Connor v. Ortega*, 480 US 709 (1987).

[182] *South Dakota v. Opperman*, 428 US 364 at 370 (1976); *US v. Chadwick et al.*, 433 US 1 at 10, note 5 (1977); *Illinois v. Lafayette*, 462 US 640 at 643 (1983); *Colorado v. Bertine*, 479 US 367 at 371 (1987); *Florida v. Wells*, 495 US 1 (1990). For an analysis of this exception, see J.F. Wagner Jr., J.D.'s Annotation "Supreme Court's Views as to Constitutionality of Inventory Searches", *United States Supreme Court Reports*, 109 L Ed 2d 776 et seq. (1992)

[183] *Almeida-Sanchez v. US*, 413 US 266, 272-273 (1973); *US v. Brignoni-Ponce*, 422 US 873, 880-881 (1975); *US v. Ramsey*, 431 US 606 (1977).

[184] *US v. Ramsey*, 431 US 606 (1977).

the object of a seizure. I would now like to add that, according to the doctrine of the Supreme Court, the seizure of items lying in open view is not subject to a warrant requirement, for the simple reason that there is no right to privacy in such items. To put it differently, by way of laying an item in open view, the Court reasons, someone is waiving his right to privacy upon the item in question. Since no interest in privacy is involved, then seizures can be warrantless. This is the case when this object is in a public place, or when it is in a private place to which the police had lawful access, be it on the basis of a warrant or within the scope of one of the admitted exceptions to it[185]. However, the Supreme Court has not excepted the application of the probable cause requirement in open-view cases; in order that the warrantless seizure of an item lying in open view be lawful, the police must have probable cause to believe that the object was associated with criminal activity[186].

[c] The Consent Exception

Holders of the right to the protection of privacy can renounce the protection of this right. On this basis, the Supreme Court has ruled that warrantless searches and seizures are not unreasonable if made pursuant to a valid act of consent[187]. As was explained in chapter 4, although sometimes regarded as a limitation on the coverage of the fourth amendment, consent is most commonly considered a limitation on the protected scope of this provision. In other words, by way of consenting to a search and seizure an individual does not give up being the holder of the fourth amendment right; rather, he merely gives up enjoying the protection of this right in a particular case.

Since consent amounts to a waiver of the fourth amendment right, consented searches and seizures can be carried out with neither a warrant nor probable cause. This, of course, presumes that consent has been validly given. In order to be valid, consent must, first of all, be voluntarily given. There is no real consent if the apparent act of consent comes as a result of the use of force or coercion: this is, for example, the

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[185]See, e.g., *Harris v. US*, 331 US 145 at 151 (1947); *Alderman v. US*, 394 US 165 (1969); *Chimel v. California*, 395 US 752 (1969); *Cady v. Dombrowski*, 413 US 433 (1973); *US v. Edwards*, 415 US 800 at 806 (1974); *G.M. Leasing Corp. v. US*, 429 US 338 at 354 (1977); *Michigan v. Tyler*, 436 US 499 (1978); *Mincey v. Arizona*, 437 US 385 (1978); *Delaware v. Prouse*, 440 US 648 (1979); *Jo-Li Sales, Inc. v. NY*, 442 US 319 (1979); *Arkansas v. Sanders*, 442 US 753 at 764, note 13 (1979); *Payton v. NY*, 445 US 573 at 586-587 (1980); *Colorado v. Bannister*, 449 US 1 (1980); *Washington v. Chrisman*, 455 US 1 (1982); *Illinois v. Andreas*, 463 US 765 (1983); *Maryland v. Buie*, 494 US 325 at 330 (1990); *Horton v. California*, 496 US 128 (1990).

[186]*Coolidge v. New Hampshire*, 403 US 443 at 465 (1971); *Arizona v. Hicks*, 480 US 321 (1987); *Maryland v. Buie*, 494 US 325 at 330 (1990); *Horton v. California*, 496 US 128 (1990).

[187]See *Zap v. US*, 328 US 624 (1946); *Bumper v. North Carolina*, 391 US 543 (1968); *Frazier v. Cupp*, 394 US 731 (1969); *Schneckloth v. Bustamonte*, 412 US 218 (1973); *US v. Matlock*, 415 US 164 (1974); *US v. Watson*, 423 US 411 (1976); *US v. Chadwick*, 433 US 1 (1977); *US v. Mendenhall*, 446 US 544 (1980); *Washington v. Chrisman*, 455 US 1 (1982); *Florida v. Royer*, 460 US 491 (1983); *Illinois v. Rodriguez*, 497 US 177 (1990); *Florida v. Jimeno*, 114 L Ed 2d 297 (1991).

position in the case of consent given under arrest or after the police have affirmed that they possess a valid search warrant[188]. The burden of proving that free and voluntary consent existed lies with the law-enforcing agents seeking to justify a search and a seizure[189]. Second, a search and a seizure must be consented to by the person who, as a result of it, is accused of a crime. It can only be consented to by a third person if that person possesses common authority with the accused over the property to be searched, or if, at the time of the search, the police reasonably believed that person to have that authority[190]. The police's 'objectively reasonable belief' is also taken as a criterion to measure the scope of consent validly given[191]. Both these cases, however, should rather be regarded as examples of the good-faith exception to the application of the so-called exclusionary rule, an issue which will be examined in chapter 6[192].

1.3 Privacy in the Balance

As was observed above, under its privacy reading the fourth amendment is not thought to impose a substantive requirement of reasonableness upon searches and seizures, i.e. upon restrictions of the interest in the protection of privacy. Rather, the protection of privacy is always and automatically subordinated to the interest in law enforcement and reasonableness is only thought to impose formal requirements upon restrictions of privacy, i.e. the requirement that restrictions be carried out on the basis of a warrant validly issued. We have also seen that even these formal requirements can under certain circumstances be dispensed with. I would now like to point out that, in this latter context, considerations as to the level of infringement upon privacy interests do enter and condition whether or not a particular invasion of privacy can be carried out without a valid warrant. In other words, the level of invasion of privacy does not condition whether or not a search or a seizure can be carried out at all, but it does condition whether or not a search or a seizure can be carried out without a valid warrant.

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[188]*Bumper v. North Carolina*, 391 US 543 (1968); *Lo-Ji Sales Inc. v. NY*, 442 US 319 (1979); *Florida v. Royer*, 460 US 491 (1983).

[189]The police, on the other hand, need not show that the person affected by a search and seizure knew that refusing consent to it was possible, although this showing may help to prove the voluntariness of the consent (see *Bumper v. North Carolina*, 391 US 543 (1968); *Schneckloth v. Bustamonte*, 412 US 218 (1973); *Florida v. Royer*, 460 US 491 (1983)).

[190]*Frazier v. Cupp*, 394 US 731 (1969); *US v. Matlock*, 415 US 164 (1974); *Illinois v. Rodriguez*, 497 US 177 (1990). See also *Chapman v. US*, 365 US 610 (1961) (a landlord has no authority to consent to the search of a tenant's premises) and *Stoner v. California*, 376 US 483 (1964) (the police could not have reasonably believed that a hotel clerk had authority to consent to the search of a customer's room).

[191]*Florida v. Jimeno*, 114 L Ed 2d 297 (1991).

[192]In a search of a motor vehicle, the Court has decided that each of its occupants has authority to consent (*Schneckloth v. Bustamonte*, 412 US 218 (1973); *Florida v. Royer*, 460 US 491 (1983)).

The influence that privacy has upon the application of the warrant requirement can primarily be felt in the existence of warrant exceptions based upon the rationale that privacy be hardly infringed upon. Yet the influence of privacy is also present in exceptions based on the existence of compelling circumstances: the argument that there is only a marginal infringement of privacy interests underlies the automobile exception, the arrest exception as well as the exception in the case of stops and frisks, to the extent that one could speak of exceptions grounded doubly on the existence of compelling circumstances and of a minimal invasion of privacy[193]. In sum, considerations as to the extent to which an interest in privacy is at stake in each particular case and as to the protection that this interest ought to be granted control decisions whether searches and seizures can be carried out without a warrant.

Taking account of the circumstances of a case is thus crucial to decide on the application of the warrant requirement, so crucial that the Supreme Court itself has considered a "demand for specificity ... the central teaching of this Court's Fourth Amendment jurisprudence"[194]. Laying so much importance upon this 'demand for specificity' entails one danger, however. It entails the danger that the Court might forget, as it often does, that the reasonableness of a warrantless search and seizure should be decided with account taken of all the circumstances of the case, yes, but as a result of a balance between principles (the right to privacy, on the one hand, against the State's duty to guarantee security through effective law enforcement, on the other). Instead, the Court often adopts what has been called a "fact style of adjudication"[195] and makes the applicability of the warrant requirement a matter of policy preference. As was to be expected given the general attitude of the Court toward privacy, privacy is most often subordinated to the interest in law enforcement. Moreover, the decision on the reasonableness of a particular search or seizure is likely to be influenced, more or less explicitly, by ex post considerations as to the result of this search or seizure, i.e. as to its success. If a warrantless invasion of privacy resulted in the apprehension of a criminal or in the obtention of evidence of crime to be used at trial, then it is likely that the invasion of privacy will be upheld on policy grounds. This policy approach to the question of the warrant requirement is therefore very restricted toward the scope of

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[193]See, respectively, *Cardwell v. Lewis* (471 US 583 (1974)), *U.S. v. Robinson* (414 US 218 (1973)) and *Pennsylvania v. Mimms* (98 SCt. 330 (1977)) (references taken from M. Shapiro & Rocco J. Tresolini, *American Constitutional Law*, 5th ed., New York - London, 1979, pp. 625-627).

[194]*Terry v. Ohio*, 392 US 1 at 21, note 18 (1968).

[195]R.B. Dworkin, "Fact Style Adjudication and the Fourth Amendment: the Limits of Lawyering", 48 *Indiana L. J.* 329 (1973). For more general criticism of this style of adjudication, see H. Wechsler, "Toward Neutral Principles of Constitutional Law" 73 *Harv. L. Rev.* 1 (1959); H.H. Wellington, "Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication", 83 *The Yale L. J.* 221 (1973).

protection of the fourth amendment and, in addition, subjects the definition of its protected scope to great uncertainty.

Incidentally, I would like to note that the present stress on casuistic considerations is typical of the interpretation of privacy as the interest behind the right against searches and seizures. At the time when the protection of property was the underlying interest of the fourth amendment, case-by-case considerations had less weight than they do now. At that time, the style of judicial adjudication in fashion consisted of a highly mechanical application of legal rules and principles, something well suited to the protection of the right to property. For that right is rather well defined in the abstract and ascertaining whether or not it has been violated can often be a rather automatic operation. In any case, since private property was thought to deserve absolute protection against searches and seizures, the bulk of case-by-case considerations had to be limited to cases where no interest in private property was thought to be at stake, hence in cases the solution of which was controlled by the interest in the protection of privacy.

Thus, case-by-case considerations have always been under the control of the concept of privacy as the interest protected by the fourth amendment, even when the property interpretation of the fourth amendment still prevailed[196]. Indeed, the ill-defined character of privacy makes it particularly suitable for a casuistic accommodation of policy needs and explains why the 'demand of specificity' in the context of the fourth amendment grew hand in hand with the evolution from a property to a privacy reading of this provision. However, this is not to say that private property does not contribute to the definition of the protected scope of the fourth amendment through balance. It does contribute to its definition, yet it does so only indirectly, in as far as it helps to define the extent to which an expectation of privacy ought to be protected by the amendment: according to the Court, an expectation of privacy is more worthy of protection if it regards one's own private property than if it regards somebody else's property[197] or commercial premises[198]. In these latter cases, the position of privacy in the balance is, therefore, weaker[199].

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[196]See, during the property period, *Lefkowitz v. US*, 285 US 452 (1932); *Harris v. US*, 331 US 145 (1947); *Trupiano v. US*, 334 US 699 (1948); *McDonald v. US*, 335 US 451 (1948); *Wolf v. Colorado*, 338 US 25 (1949).

[197]In *Rakas v. Illinois* (439 US 128 (1978)) the Court emphatically denied that there was any expectation of privacy related to somebody else's property (see also *Payton v. NY*, 445 US 573 (1980)). This position was overruled in *Minnesota v. Olson* (495 US 91 (1990)), where the Court accepted that one could have some expectation of privacy in somebody else's property.

[198]*Marshall v. Barlow's, Inc.* 436 US 307 (1978); *NY v. Burger*, 482 US 691 (1987).

[199]Moreover, in a recent case the Court has affirmed that the fourth amendment protects property intersts even where privacy is not implicated (*Soldal v. Cook County*, 121 L. Ed. 2d 450 (1992) (pending publication)). The case concerned the removal of a trailer home from the place where it was

The above considerations should have given us a rather accurate idea of the terms in which the Supreme Court draws the protected scope of the fourth amendment right against searches and seizures. With these considerations in mind, let us now see how the definition of the protected scope of this right applies in the context of the fourth amendment right to the secrecy of telecommunications.

2. The Protected Scope of the Secrecy of Telecommunications

2.1 The Protected Scope Defined in the Case-Law of the Supreme Court on the Fourth Amendment

As is known, since the case of *Katz v. US*[200], the fourth amendment is thought to cover and protect a constitutional right to the secrecy of wire telecommunications and, more generally, of all types of oral communications with respect to which there is a reasonable expectation of privacy as secrecy (see chapter 4). The protected scope of this constitutional right is drawn on the basis of the criteria which generally determine the protected scope of the fourth amendment. In order to be lawful, the interception of telecommunications must be reasonable. Generally speaking, the condition of reasonableness requires that surveillance be based on a warrant issued by an independent judge upon probable cause and particularly describing the object to be seized or tapped. Probable cause presents no peculiarities in the interception of wire communications, whereas the particular-description requirement does. According to the Supreme Court, this requires that the conversations to be recorded and, in the case of wire-tapping, the telephone line to be tapped, be particularly described. In this respect, naming the person or persons whose communications are to be overheard or recorded is not sufficient. "This does no more than identify the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized"[201]. Moreover, identifying those persons is not even necessary. The Court has considered that "it is not a constitutional requirement that all those likely to be overheard engaging in incriminating conversations be named"[202].

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located without ever entering it. In spite of this circumstance, however, this case could also have been solved by reference to the right to privacy: in my view, the very fact that a trailer home is seized and driven away amounts to a privacy wrong, even in the absence of trespass.

[200] *Katz v. US*, 389 US 347 (1967).

[201] *Berger v. NY*, 388 US 41 at 59 (1967).

[202] *US v. Donovan*, 429 US 413 (1977).

Under certain circumstances, the warrant requirement for surveillance can be dispensed with. In principle, it can be dispensed with in the same cases and under the same conditions as other searches and seizures, yet the characteristics of some of the exceptions to the warrant requirement make them inapplicable in the context of telecommunications. Thus exceptions based on the existence of exigent circumstances, such as the automobile or the arrest exceptions, can justify the seizure but not the opening of sealed letters. Other exigent circumstances can arguably justify warrantless electronic surveillance, although this possibility is rather limited, since such surveillance cannot be carried out without the carrying out of certain formalities[203]. The administrative search, the consent and the open-view exceptions are the ones which best apply in this latter context[204].

'Ordinary administrative divulgence' has explicitly been regarded by the Supreme Court as an exception to the warrant and even to the probable cause requirement in the context of wire telecommunications[205] and also finds grounds for application in the context of written telecommunications (as will be seen below, this exception is explicitly admitted at the statutory level). This comes across as a case of non-coverage rather than as a case of non-protection, however, at least to the extent that the 'ordinary administrative divulgence' exception refers to situations where, in order for a telecommunication to take place, secrecy cannot exist; for, as was explained in chapter 4, the fourth amendment only covers telecommunications in as far as their *secrecy* is concerned. The Court has also explicitly accepted the 'consent' exception to both the warrant and the probable-cause requirements[206]. It has even made it clear that consent only need be given by one of the parties to the communication, a position which complements the fact that the secrecy of wire telecommunications is not

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[203]*Katz v. US*, 389 US 347 at 357-358 (1967).

[204]In *Katz v. US*, 389 US 347 at 357-358 (1967) the Court thought that the consent exception could not apply to wire-tapping. The precedent of Section 605 shows, however, that there is no reason for that exclusion.

[205]See *US v. NY Telephone Co.*, 434 US 159 (1977). Protection against the ordinary administrative divulgence entailed in wire communication had already been denied in Section 605 of the Communication Act of 1934, which forbade persons receiving or transmitting interstate or foreign wire communication from divulging or publishing their content or mere existence to persons external to the communication "except through authorised channels of transmission or reception" and "to a person employed or authorised to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centres over which the communication may be passed".

[206]Most examples of the consent exception can be found in the context of eavesdropping (*US v. Caceres*, 440 US 741 (1979); *US v. White*, 401 US 745 (1970)). With reference to wire communications, see *Rathburn v. US*, 355 US 107 at 110-111 (1957), produced within the context of the Communication Act of 1934. Within the context of this Act, the Court had developed the doctrine that consent must refer to the intercepting activity in its full scope and that, in the case of interceptions followed by divulgence, the interception and the divulgence had to be specifically and independently consented to (see *Weiss v. US*, 308 US 321 at 330 (1939)). This doctrine can still be considered applicable.

guaranteed vis-à-vis the other parties taking part in it. As for the open-view exception, there is no doubt about its suitability to be applied in the context of wire-tapping or eavesdropping. Here, it justifies the overhearing and later use of conversations not originally described as part of the object of the search but which appear with probable cause related to a crime. In the context of telecommunications, the Supreme Court has even admitted yet another exception to the warrant requirement for telecommunication surveillance. In its *Katz* decision, the Court explicitly stated that surveillance carried out in the context of foreign intelligence for the purpose of preserving national security does not require judicial warrant[207], a possibility that was later regulated by statute.

In sum, the protected scope of the constitutional right to the secrecy of telecommunications basically coincides with the protected scope of the more general right against searches and seizures, hence the comments that were made above with respect to this latter right are valid also in this context. The interest in law enforcement is always regarded as sufficient ground for restricting the constitutional right to the secrecy of telecommunications. This is true regardless of any casuistic considerations concerning the importance of the interest in privacy inherent in telecommunications, on the one hand, and of the interest in law enforcement, on the other. Moreover, restrictions need be neither necessary nor proportionate to their aim in order to be considered reasonable. The only requirement imposed upon telecommunication surveillance is purely formal: a measure of surveillance is constitutional as long as it is backed by a judicial warrant issued upon probable cause that there is an interest in law enforcement and that the measure of surveillance in question is suitable to satisfy this interest. Exceptionally, however, if the interest in law enforcement appears to be significantly stronger than the interest in privacy inherent in telecommunications, then even this formal requirement may be dispensed with. Furthermore, ex post considerations as to the actual success of a warrantless measure of surveillance might play some implicit role in the decision whether a warrant was at all needed.

At this point, I would like to look at the statutory regulation of the restrictions of the right to the secrecy of telecommunications. When dealing with this statutory regulation, it may seem that one is dealing with a definition of the protected scope of the constitutional right to the secrecy of telecommunications, in the way that German statutes define the protected scope of this right as recognised in the German Basic Law. Yet, there is a crucial difference between Germany and the United States in this regard. The difference is that the fourth amendment does not contain a legislative reservation of

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[207] *Katz v. US*, 389 US 347 at 358, note 23; see also Justice White's concurring opinion, ibidem at 363-364.

power for the definition of the protected scope of this right. That is, in the United States the law-maker is not accorded the last word in the definition of the protected scope of this right; rather, this is left in the hands of courts and, above all, in the hands of the Supreme Court. The case-law of the Supreme Court on the scope of protection of the constitutional right to the secrecy of telecommunications thus stands over and above any statutory definition of this scope.

In spite of this, it is important to look at the statutory regulation of this right, because statutes turn out to play some role, an important role indeed, in the definition of the protected scope of this right at the constitutional level. Indeed, it is not unusual for the Court to follow statutory indications when defining this scope. This is only natural. For one thing, the Court prefers to solve cases on the secrecy of telecommunications on a statutory rather than on constitutional grounds because, as has been pointed out on other occasions, it has the policy of avoiding constitutional issues as far as it can. Moreover, even when a constitutional case of this right does arise the Court tends to introduce patterns of reasoning provided by statutes; for, as we will see below, statutes define the protected scope of the right in terms which are more clear and complete. Indeed, since the Court has jurisdiction over both constitutional and the statutory issues, it need not draw a clear line between these two levels and can combine them both at will[208]. The result is that pure constitutional cases on the secrecy of telecommunications are few. In practical terms, therefore, the statutory definition of the protected scope of the right to the secrecy of telecommunications provides valuable information for the understanding of what is likely to be the protected scope of this right at the constitutional level. Note however that this is more the result of practical coincidence than the result of a theoretical identification of the statutory and the constitutional right. In theory, these two rights are regarded as two different ones even by the Supreme Court[209]. Keeping these reservations in mind, I will now look at the statutory limitations to the scope of the protection of the right to the secrecy of telecommunications.

[208]Examples of the complementary role played by the U.S.C. can be found in *Alderman v. US*, 394 US 165 (1969); *US v. Kahn*, 415 US 143 (1974); *US v. Donovan*, 429 US 413 (1977); *Scott v. US*, 436 US 128 (1978).
[209]See *US v. Donovan*, 429 US 413 (1977); *Dalia v. US*, 441 US 238 (1979).

2.2 The Influence of the U.S.C. upon the Protected Scope of the Constitutional Right to the Secrecy of Telecommunications

The United States Code (U.S.C.) authorises both the opening of first class mail (the only mail covered under the fourth amendment) and the surveillance of wire and electronic telecommunications. According to Title 39, section 3623 (d) of the U.S.C., first class mail may be opened "under authority of a search warrant authorised by law or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered, or pursuant to the authorisation of the addressee". Thus this bare provision of § 3623(d) does not develop the fourth amendment, but simply overlaps with it, in as far as that they both imposes a warrant requirement upon restrictions to the right to the secrecy of telecommunications and they both admit a 'consent' exception and an 'ordinary administrative divulgence' exception to the warrant requirement.

The U.S.C. is more detailed when it regulates the possible interception of wire and electronic telecommunications both in the context of ordinary law enforcement and in the context of foreign intelligence investigations carried out for the protection of national security. It is to the regulation of these interceptions that we shall now turn.

2.2.1 Ordinary Law-Enforcement Surveillance

Chapter 119 of Title 18 of the USC (Sections §§ 2510-2520) regulates the interception of interstate or foreign telecommunications or telecommunications which affect interstate or foreign commerce (§ 2510 (1)). Chapter 119 embraces both wire and electronic telecommunications. Enacted in 1968 by Title III of the Omnibus Crime Control and Safe Streets Act (Omnibus Act), Chapter 119 of Title 18 initially regulated the interception of wire telecommunications. In 1986, the Electronic Communications Privacy Act broadened the scope of Chapter 119 so that it would also embrace the interception of electronic telecommunications, as well as the interception of wireless telephone conversations.

The way Chapter 119 defines the protected scope of the right to the secrecy of telecommunications is very similar to the way the Supreme Court defines the protected scope of this right on the basis of the fourth amendment. To begin with, the warrant requirement is the central condition to be fulfilled by a lawful interference with oral communications, that is, telecommunication surveillance is allowed only upon previous judicial authorisation. Of course, the conditions under which a warrant can be obtained

and the steps to be followed in order to obtain it are much more closely regulated in Chapter 119 than they are in the case-law of the Supreme Court on the fourth amendment. I will now refer to some of these conditions and steps.

First, as in Germany, interception is only allowed if there is probable cause that such interception may provide evidence of one of the crimes listed in § 2516. Second, both the application for a warrant and the warrant itself must specify the facts and circumstances which support the belief that an order should be issued (§ 2518), this including a description of the offence to be investigated, of the type of communication, of the identity of the persons, if known, committing the offence and whose communications are to be intercepted and of the nature and location of the facilities from which or the place in which the communication is to be intercepted. However, this last requirement need not be fulfilled: (a) if it is shown that such specification is not practical (e.g. because the telecommunications are likely to be carried out from a mobile telephone), or (b) if it is shown that the person believed to be committing the offence and whose communications are to be intercepted intends to thwart interception by changing facilities, provided, in both these cases, that the person committing the offence and whose communications are to be intercepted are specified. Third, both the application and the judicial order must specify the period of time for which the interception is required or authorised, respectively. This must not last longer than necessary, and in any case, never longer than thirty days. Extensions of no longer than thirty days may be authorised if duly applied for, according to the above requirements. Fourth, Title 18 contemplates the possibility that a communication is in a code or foreign language and tacitly contemplates the act of deciphering the code or foreign language as implicitly authorised along with the interception. Finally, note that Title 18 requires that, in order that surveillance can be authorised, it must be shown that other ("normal") investigative methods have failed, are likely to fail or might be too dangerous; in other words, Title 18 regulates a condition of necessity for the interception of wire or electronic telecommunications.

As with the case-law of the Supreme Court on the fourth amendment, Chapter 119 admits some exceptions to the judicial-order requirement. First, § 2511 (2) admits a 'normal-administrative-interception' exception to the prohibition of surveillance of telecommunications (yet, as was said in the context of the fourth amendment, this appears more as a case of non-coverage rather than as a case of non-protection, at least to the extent that the exception refers to situations in which, in order for a telecommunication to take place, secrecy cannot exist). This exception allows an officer, employee or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire communication, to intercept,

disclose or use telecommunications in the normal course of his employment while engaged in any activity which is a *necessary incident* to the rendition of his service, or to the protection of the rights or property of the provider of that service (see also § 2511 (3)(b)(iii)); yet a provider of wire communication services may not utilise service observing or random monitoring except for mechanical or service quality control checks. Second, § 2511 (2)(d) allows the interception of telecommunications carried out with the consent of one of the parties in it (see also § 2511 (3)(b)(ii))[210]. Third, § 2517 (5) recognises an open-view exception: it authorises the warrantless interception and later use of information obtained by lawful wire or electronic surveillance even if it relates to offences other than those specified in the order of authorisation or approval; the only requirement is that the original interception be lawful. This 'open-view rule' also applies to the providers of an electronic communication service to the public: if they inadvertently obtain information which appears to pertain to the commission of a crime, then they may divulge this information to a law enforcement agency. Finally, there is an exceptional-circumstance exception: in cases involving immediate danger of death or serious physical injury to a person, conspiratorial activities threatening national security interests or conspiratorial activities characteristic of organised crime, previous judicial authorisation of the interception is not needed, provided that there are grounds upon which an order could be entered to authorise interception; yet, an ex post application for approval must be made within forty-eight hours of the start of the interception, so that, if approval is denied, the interception can be immediately terminated.

2.2.2 Foreign Intelligence Surveillance

The Foreign Intelligence Surveillance Act or FISA (Title 50, Chapter 36, Sections §§ 1801-1811 of the U.S.C.) was enacted in 1978 in order to regulate the surveillance of telecommunications for national security purposes, provided that a foreign power is involved in them. This issue had been avoided by Title III of the Omnibus Act, which thus created the so-called 'national security exception' to the statutory requirements imposed upon telecommunication surveillance. The FISA was enacted to fill this gap: it for the first time subjected the Executive to statutory restraints in conducting electronic surveillance of foreign powers for foreign intelligence

[210]However, Congress is presently working on a Bill (Telephone Privacy Act of 1993) to amend section 2511 so that surveillance of a piece of oral, wire or electronic communication made by a person not acting under colour of law can only be lawfully consented to by all parties to this act of communication.

purposes[211]. Note however that Title 50 only authorises the interception of *wire* telecommunications: contrary to Title 18 of the U.S.C., Title 50 has not been updated since its enactment to cover the secrecy of non-wire electronic telecommunication.

As in the context of the fourth amendment and of Title 18 of the U.S.C., the interception of telecommunications must generally be authorised by the judiciary. In particular, it must be authorised by one of the members of the so-called Foreign Intelligence Surveillance Court (FISC), which is composed of seven members designated by the Chief Justice of the Supreme Court from among federal district court judges. The Chief Justice also designates three federal appeal court judges to review denials of applications for warrants. Members of these two courts are designated for periods of seven years (§ 1803).

Applications for a judicial order must be presented by a Federal officer once authorisation of the Attorney General and of the President of the United States has been obtained. As Title 18, Title 50 regulates the conditions under which a court order may issue and the steps to be followed in order to obtain it. Let me now refer to some of these conditions and steps (§ 1804). First, applications must contain the identity, if known, of the target of the surveillance. Second, they must specify the facts and circumstances that justify the belief that the target of the surveillance is a foreign power and that the facilities or places under surveillance are being or about to be used by a foreign power; in addition, applications must contain some certification by an assistant of the President or by an executive branch official for National Security that the certifying official deems the information sought to be foreign intelligence information and that the purpose of the surveillance is to obtain such information. Third, applications must also contain some certification from this latter official that the information sought cannot reasonably be obtained by normal investigative techniques and, further, a proposal for 'minimisation procedures'. Title 50 defines 'minimisation procedures' as those designed to minimise the acquisition and retention of information through surveillance and to prohibit its dissemination (§ 1801 (h)). Fourth, applications must specify the period of time for which the electronic surveillance is required. This period of time cannot be longer than one year or than ninety days, depending on whether the target is a foreign power, and may be renewed for up to the same period of time. In any case, surveillance may not continue once the information sought is

[211]The history and precedents of Chapter 36 of the U.S.C., as well as the content and potentialities of its provisions, have been commented on by A. R. Cinquegrana, "The Walls (and Wires) Have Ears: the Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978", 137 *Univ. Pa. L. Rev.* 793 (1989). See also J. B. Anderson, "The Constitutionality of the Foreign Intelligence Surveillance Act of 1978", 16 *Vanderbilt J. of Transnational L.*, 231 (1983).

obtained, unless applications show sufficient justification that additional information of the same type will be obtained thereafter (see also § 1805 (d)(1)).

Court orders must, first of all, make it clear that there is probable cause to believe that the target of the surveillance is a foreign power and that the facilities or places under surveillance are being used or about to be used by a foreign power. Second, they must specify the identity, if known, of the target of the surveillance, the nature and location of the facilities and places at which electronic surveillance will be directed, the type of information sought and the type of communications subjected to surveillance, the means by which surveillance will be effected and whether physical entry will be used. Third, orders must specify that the proposed minimisation procedures can indeed be considered minimisation procedures under Title 50. Finally, courts must specify the period of time during which surveillance is to be approved.

A court order is not always required in the context of foreign intelligence surveillance, however. A first exception to the judicial order requirement is the case of surveillance directed solely at communications among or between foreign powers or which is targeted at property under the open and exclusive control of a foreign power, provided that it is highly unlikely that communications of a United States person is affected (§ 1802). Title 50 defines 'United States persons' as citizens and permanent resident aliens, as well as groups composed largely of such persons and United States corporations (§ 1801). Second, following a declaration of war, the President, through the Attorney General, may acquire foreign intelligence information without a court order for a period of up to fifteen calendar days following a declaration of war (§ 1811). Third, no judicial order is needed in emergency cases. In such cases, the Attorney General may approve warrantless surveillance provided that, first, she immediately informs the FISC of this decision and, second, that she applies for a court order as soon as practicable and, in any case, within twenty-four hours. If approval should be denied, surveillance must terminate immediately or after the expiration of the twenty-four hour period mentioned above, whichever is earlier. Further, if approval is denied, the FISC must provide that any United State person named in the application or subject to electronic surveillance be informed of the application, of the period of the surveillance and of whether or not information was obtained during that period; yet, on an ex parte showing of good cause, the court may suspend this provision for up to ninety days or may even forgo ordering it. Fourth, § 1801 (f)(2) recognises a consent exception to the warrant requirement. Finally, note that Title 50 recognised only a very limited open-view exception to the warrant requirement: it states that information accidentally obtained in the context of foreign telecommunication surveillance must be

destroyed unless the content of the information thus obtained indicates a threat of death or serious bodily harm to any person (§ 1806 (i)).

The primary purpose of FISA is the gathering of foreign intelligence information, yet it also allows the use as evidence of information obtained through foreign intelligence surveillance. In this case, the Government must notify both the person against whom the evidence will be used and the court in which it intends to introduce the evidence (§§ 1807-1808). The court must then decide on the legality of the surveillance, even if no motion to suppress has been made. If the Attorney General files an affidavit stating that an adversary hearing or disclosure of information would jeopardise national security, then the court must make an in camera, ex parte determination of the legality of the surveillance; it may only disclose portions of materials concerning the surveillance where such disclosure is necessary to make an accurate determination of the legality of surveillance.

This analysis of the USC shows that the statutory regulation of the right to the secrecy of telecommunications corrects much of the flexibility and of the restrictive terms of the protected scope of the right. At this level, the protected scope of this right is much clearer and more favourable to the right. In addition, as with the case of Germany, the USC only allows the interception of telecommunications for the prosecution of some listed crimes considered particularly serious. Further, the USC subjects telecommunication surveillance to a condition of necessity: surveillance is only allowed in as far as the same information cannot be obtained by other ('normal') investigative techniques, that is only when there is a genuine need for it and only to the extent that it is needed (in terms of the persons affected and of the duration of the measure)[212]. In the context of foreign intelligence surveillance the USC even requires that a proposal for 'minimisation procedures' be presented together with applications for judicial orders of surveillance. Finally, it is true that both Titles 18 and 50 of the USC recognise exceptions to the requirement that surveillance be authorised by the judiciary, yet either they are common-place exceptions (such as the consent, the open-view and the normal-administrative-interception exceptions), or they are exceptions justified by issues such as a declaration of war, or otherwise the USC requires that judicial authorisation be obtained immediately after the interception, as in the case of the exceptional-circumstance exception.

This now concludes my study of the protected scope of the right to the secrecy of telecommunications in the United States. The conclusions one can draw from the

[212]See *Scott v. US*, 436 US 128 (1978); *Dalia v. US*, 441 US 238 (1979).

terms in which this protected scope is defined will be analysed by way of comparing them with the conclusions reached in the two preceding sections, that is in the context of the ECHR and Germany.

Conclusions

As the three sections of this chapter show, the ECHR, the German Basic Law and the Constitution of the United States define the protected scope of the right to the secrecy of telecommunications externally, that is they define the sphere within the coverage of this right in terms of what may go without protection. In these three systems this sphere is defined through the imposition of certain requirements upon lawful interferences with the right to the secrecy of telecommunications. These requirements can be of two types. To begin with, interferences can be subject to substantive requirements or limits, which means that they may only be imposed within a certain sphere of the right to the secrecy of telecommunications (strictly speaking, this requirement defines the sphere of non-protection of the right). In addition to this, lawful interferences can be made to comply with a formal requirement. As the three sections above also show, these requirements are not regulated in the same terms in the ECHR, in Germany and in the United States. I will now try to point out the most important differences in the definition of the protected scope of the right to the secrecy of telecommunications in these three systems.

In the first place, the three systems under consideration subject restrictions of the right to the secrecy of telecommunications to *formal requirements*, yet these formal requirements differ very much in character from one system to the other: whereas the Constitution of the United State merely requires that restrictions of this right be imposed pursuant to a judicial warrant, the ECHR and the German Basic Law require that restrictions of this right be imposed pursuant to a law. The absence of a legislative reservation of power in the United States is to be regretted, for this requirement entails at least two important advantages: first, the legislative reservation of power contributes to making it clear what the protected scope of this right is and, second, it places the definition of this protected scope in the hands of the representatives of the people.

Indeed, the legislative reservation of power plays the important role of allocating the task of deciding on the scope of protection of this fundamental right with the representatives of the people. It is equally important is to insist upon clarity, particularly since Constitutions allow for different possible definitions of the protected scope of rights and let ordinary laws and courts choose one among them. Knowing that this choice must be primarily made by the law-maker makes it easier to identify the terms in which it has been made: it identifies the scope of constitutional protection of the right to the secrecy of telecommunications with the scope of its legal protection. In

the absence of a legislative reservation power, as is the case in the United States, the protected scope of the constitutional right to the secrecy of telecommunications must be primarily defined by the judiciary, hence on a much less solid basis. Moreover, in the United States the right to the secrecy of telecommunications is recognised as part of the right to privacy, so that the the definition of the protected scope of this right is bound to be subject to ill definition, as indeed is the case.

A quest for clarity is present in the legislative reservation of power imposed both in the ECHR and in the German Basic Law. In the ECHR, the Convention's organs have ruled that interferences are only lawful if they are allowed by law and, more particularly, by a law that makes interferences sufficiently foreseeable and is adequately accessible. In Germany, art. 19.1 of the Basic Law states that interferences are only lawful if they are made pursuant to a law which explicitly mentions the right interfered with (the right to the secrecy of telecommunications) and the constitutional provision in which the right is recognised (art. 10). Recall, however, that the German Constitutional Court has developed the very unfortunate doctrine that compliance with the legislative reservation of power may sometimes be 'temporarily' dispensed with, in clear contradiction to the wording and the spirit of the Basic Law on this point.

One important thing should remain clear, however: the protected scope of a fundamental right should not only be defined by the imposition of formal requirements upon restrictions of the right, but also by subjecting its restrictions to substantive requirements. Thus, neither the legal reservation of power nor the judicial warrant requirement should be regarded as the sole condition to be fulfilled by telecommunication surveillance, that is, neither of the two should be regarded as a blank authorisation to the law-maker or to courts to impose any restriction at all upon privacy. Over and above having a particular source of authorisation, restrictions of this right should also be made to comply with substantive requirements. Let us now examine the extent to which the imposition of such substantive requirements has been respected in each of the three systems under consideration.

From the point of view of the *substantial requirements*, and secondly, the protected scope of the right to the secrecy of telecommunications appears to be defined in very similar terms in the three systems under consideration, i.e. on the basis of a balance. However, this balance is struck in different terms in the ECHR and Germany, on the one hand, and in the United States, on the other, so that the definition of the protected scope of the right to the secrecy of telecommunications is significantly broader in the two former systems than in the latter.

Both the organs of the Convention and the German Constitutional Court strike a balance in two phases. In the first phase, a balance is struck between the extent to which the exercise of the right to the secrecy of telecommunications is restricted and the aim its restriction pursues. In the second phase, once a restriction has thus been justified, it must be evaluated on the basis of certain criteria. These criteria, which in Germany constitute the so-called 'principle of reasonableness' (*Grundsatz der Verhältnismäßigkeit*), are the following: first, an interference with the right to the secrecy of telecommunications must be adequate to reach its aim; second, it must be necessary for reaching this aim (i.e. there must not be a less intrusive and equally effective means to reach this aim); third, it must be proportionate to the aim in question. This pattern for a balance makes the protected scope of the right to the secrecy of telecommunications rather broad and well defined.

Balance in the United States is defined in much simpler terms. The Supreme Court departs from the assumption that any interest in law enforcement justifies an invasion of the right to privacy protected by the fourth amendment, hence of the right to the secrecy of telecommunications included therein. The Court thus omits the step of the selection of the aims that may restrict the protected scope of the right to the secrecy of telecommunications or, rather, it regards the pursuance of any interest in law enforcement a legitimate aim. Once a judge has ascertained that an interest in law enforcement actually exists, then restrictions to the right to the secrecy of telecommunications are automatically justified, irrespective of whether they are necessary and proportionate to the aim of law enforcement. The only requirement is that they be adequate to reach this aim (i.e. that there is probable cause). In sum, apart from the existence of an interest in law enforcement and from requiring that the measure of surveillance in question be adequate for fulfilling this interest, the Supreme Court does not impose any substantial requirement upon telecommunication surveillance.

In the United States, therefore, the protection of the right to the secrecy of telecommunications is always subordinated to the interest in law enforcement and the protected scope of this right is mostly defined on formal grounds, i.e. by the warrant requirement. Moreover, even this requirement need not always apply. Exceptions to the application of the warrant requirement have been devised by the Supreme Court, most of which are justified on the grounds that in certain cases of searches and seizures the interest in law enforcement outweighs the interest in the protection of privacy that lies behind the issuance of a warrant, either because the former interest is very strong, or because the latter interest is very weak, or both. Most of these exceptions apply to telecommunication surveillance. Furthermore, decisions on whether a warrant exception applies in a particular case are often policy orientated and often end up

subordinating to the interest in privacy to the needs of law enforcement, particularly if it appears ex post that the interference with privacy produced the desired results.

As a result, the Supreme Court has made the scope of protection accorded to the constitutional right to the secrecy of telecommunications into something both ill-defined and very restrictive. This restrictive approach to the protected scope of the constitutional right to privacy and to the secrecy of telecommunications is consistent with the more general attitude of the Supreme Court with respect to privacy: privacy is regarded as suspect, because it aims at safeguarding purely individualistic interests at the expense of the more general and valuable interests of society, such as the interests in law enforcement. The Supreme Court thus takes the view that the interest in law enforcement always outweighs the interest in the protection of privacy, to the extent that it even allows occasionally that restrictions of privacy not be subject to any formal restrictions.

In the end, much of the flexibility and of the restrictive terms of the protected scope of the right to the secrecy of telecommunications in the United States is avoided in as far as it is also recognised and protected by statute. The protected scope of this right at the statutory level is defined in clearer and more permissive terms: restrictions of it are only allowed in certain particularly important cases of law enforcement and provided that they are the least intrusive means to reach their aims. Even the formal requirement that restrictions be authorised by the judiciary cannot be so easily dispensed with. Now, it is true that, unlike in the context of the ECHR and Germany, United States statutes do not define the protected scope of the secrecy of telecommunications as a constitutional right. Yet the statutory regulation of the protected scope of this right has great influence upon its constitutional regulation. The reason is that the Supreme Court has established a reciprocal relationship between the statutory regulation of the secrecy of telecommunications and the fourth amendment, so that often they combine in the solution of cases of telecommunication surveillance. By drawing this relationship, the Supreme Court seems to have made up for the lack of the legal reservation of power. One ought to bear in mind, however, that this relationship is not a constitutional command and that it has been established by the Supreme Court of its own will. The constitutional and the statutory rights to the secrecy of telecommunications thus remain two different rights, so that strictly speaking the protected scope of the former is not defined on the basis of the latter.

Finally, I would like to draw attention to a problem which poses itself both in Germany and in the United States, namely whether technology should be allowed to guarantee an area of absolute protection of the right to the secrecy of

telecommunications. The problem is posed by certain modalities of telecommunication which can offer an end-to-end encryption of the messages transmitted, so that third parties to an act of telecommunication cannot decipher the message in question. The question that is raised here is: should the encryption code be chosen and only known by the parties to an act of telecommunication, or should it on the other hand be allocated by the companies providing the telecommunication service? The crux of the question lies in the fact that only in this latter case can the government eventually have access to the content of an encrypted message. This circumstance speaks for the second solution, provided, of course, that an encrypted act of telecommunication be only interfered with on compliance with the same conditions which control the interception of a non-encrypted one.

CHAPTER 6: THE CONTENT OF THE RIGHT TO THE SECRECY OF TELECOMMUNICATIONS

Introduction

The previous chapters have been concerned with the object of the right to the secrecy of telecommunications. In them I have tried to define both the coverage of this right and the sub-sphere within its coverage to which protection is theoretically granted. I have also tried to establish what structure the object of this right has, i.e. the relationship between its coverage and its protected scope. Now that the object of the right to the secrecy of telecommunications has been dealt with, I would like to enter an altogether different kind of consideration. In particular, I would like to concentrate on the extent to which the exercise of this right is actually accorded protection. This question is of central importance, for the recognition of a right and even the definition of its protected scope remain at the level of fruitless declarations of intentions if mechanisms are not devised to provide for the actual protection of this right. To be more precise, the holders of a fundamental right must be given the possibility of legal recourse against interferences with its exercise, so that it can be decided whether the protected scope of the right has been infringed upon and whether redress can eventually be obtained. This combination of the effective legal recourse actually available and the remedies eventually provided indicates the extent to which fundamental rights are actually protected, thus, the extent to which they are more than mere forms of words. Such a combination will be here referred to as *the content* of fundamental rights[1].

Thus, whenever I refer to the content of fundamental rights, I will be referring to two elements. The first element is the ensemble of kinds of legal recourse that can be interposed against interference with the exercise of these rights. The availability of legal recourse is crucial for the actual protection of fundamental rights, to the extent that Constitutions tend to recognise an independent fundamental right to access to such recourse. Moreover, providing someone with legal recourse against violations of a fundamental right can be and has often been regarded as part of the objective positive obligations that this right imposes upon public authorities[2]. Furthermore, the question is still open of whether or not individuals have a *subjective claim* to the existence and

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[1]See J. Jiménez Campo, "La Garantía Constitucional del Secreto de las Comunicaciones", 20 *REDC* 35 at 38 (1987).

[2]In the BVerfGE 30, 1 at 12, the Government of Hesse even claimed that the right to judicial recourse was part of the *essential core* of fundamental rights.

availability of effective legal recourse against violations of their fundamental rights, be this claim part of each fundamental right, or of the specific fundamental right to recourse or of both[3]. The truth is that Constitutions usually do recognise a right to have recourse against the violation of fundamental rights and specify that this recourse be had *before a public authority*. This could not be otherwise given that, as will be discussed in the next chapter, public authorities are the only direct addressees of fundamental rights. As such, public authorities are obliged not only to refrain from interfering with the exercise of these rights, but also positively to provide for their actual protection even against public authorities themselves; providing recourse to violations of fundamental rights is therefore part of their duty in this field.

The existence and availability of legal recourse against interferences with the exercise of fundamental rights does not suffice for the actual protection of the rights, however. To this end, recourse must also be *effective*. Recourse is effective if it leads to a fair decision on the violation of a fundamental right and, if it is decided that the protected scope of the right has been infringed, to the provision of fair redress. Moreover, a fair decision and fair redress cannot result purely coincidentally; legal recourse can be called 'effective' only if they are *designed* systematically to produce fair decisions and provide fair redress[4]. This means, among other things, that recourse must be interposed before public authorities whose decisions can offer certain guarantees of independence and neutrality, guarantees which are characteristic, though perhaps not necessarily exclusive, of the judiciary branch of the State.

The second element of the content of fundamental rights consists of the remedies provided in cases where the protected scope of these rights has been violated. It is this second element that constitutes the real core of the content of rights. For fundamental rights can be regarded as such and not as mere declarations of intention only in as far as there is a guarantee that redress can be obtained upon every violation of their protected scope; the existence and availability of effective mechanisms to react against interferences are just the means to reach this end. The existence of remedies is therefore the condition of existence of fundamental rights. A result of this dependence of rights upon remedies is that courts are under an obligation to provide these latter as part of their duty to enforce the Constitution and constitutional rights. On the basis of this duty, courts must first of all try to prevent violations of rights when this is still possible; they must also try to put an end to violations which have been initiated but not

[3]See Robert Alexy, *Theorie der Grundrechte*, Nomos Verlagsgesellschaft, Baden-Baden, pp. 444 et seq. The possibility that rights enshrine positive subjective claims to their actual protection has been discused in section 1 of chapter 3.

[4]In this context, see R. Alexy, *Theorie der Grundrechte*, at 446.

yet completed (the so-called on-going wrongs). Finally, in cases where a violation has already occurred, courts must try to minimise its consequences, that is, they must seek to ensure that the fact that a right has been violated alters the exercise of this right as little as possible[5].

Ideally, remedies should consist of a complete reparation of violations of fundamental rights, that is, ideally courts should seek to replace things in the state they were before a violation ever occurred, so as to erase the consequences of the violation completely. Total reparation is impossible, however; for as soon as a violation is committed some irreparable harm has already been done, i.e. somebody has been deprived of one of her rights for a certain period of time. Only the prevention of violations can be complete, whilst the reparation for violations which have already occurred must necessarily be partial[6]. Of course, even if total reparation is not possible, courts are still under the obligation to bring things back to the state they were in before a violation occurred *as far as this is still possible*, that is, courts must erase the consequences of the violation of rights *as much as possible*. Yet, given that reparation can only be partial, additional compensation for violations is often provided, which generally consists of some pecuniary satisfaction.

In this chapter I will analyse the content of the secrecy of telecommunications as regulated in the European Convention on Human Rights, in Germany and in the United States. Generally speaking, the content of a fundamental right is not defined on the basis of recourse and remedies which are specific to the particular right alone but, rather, on the basis of recourse and remedies which a system generically provides for the protection of all or, at least, of a number of fundamental rights or of rights in general. However, some recourse and remedies available for violations of the right to the secrecy of telecommunications *are* specific to this right. Specific to this right is, first of all, the German system of recourse against measures of telecommunications surveillance adopted for reasons of national security and for the protection of the democratic order; secondly, even more characteristic is the so-called 'exclusionary

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[5]It has been noted that on the basis of its duty to enforce constitutional rights "the judiciary has a more limited range of choice in determining how to respond to litigants who complain about threatened or on-going wrongs than it does in determining how to respond to those complaining about fully accomplished wrongs". Whereas threatened and on-going wrongs must be, respectively, prevented and stopped, completed wrongs can only be compensated for, a field where courts enjoy wider discretionality (William C. Heffernan, "On Justifying Fourth Amendment Exclusion", (1989) *Wis. L. Rev.* 1193, at 1196). However, this distinction forgets that completed wrongs can give rise to on-going consequences and that stopping these consequences is as much a part of a court's duty to enforce constitutional rights as stopping on-going violations of rights (see page 33 below).

[6]In this context, on-going violations can be regarded as continuous sequences of independent completed wrongs. Under these premises, stopping an on-going wrong amounts to preventing the commission of future wrongs, whereas the past wrong remains completed, hence impossible to repair.

rule', a remedy provided both in Germany and in the United States against unlawful interference with the right to the secrecy of telecommunications and which consists of the inadmission as evidence at trial of information obtained through unlawful telecommunication surveillance.

Most of this chapter will concentrate on these two specific elements and, above all, on the exclusionary rule. The exclusionary rule is not only a specific remedy against telecommunication surveillance; it is indeed the most important remedy against such measures, hence it is the most important element in the definition of the content of the right to the secrecy of telecommunications. A comparison between the German and the American exclusionary rule is therefore crucial in the comparison of the content of this right in these two systems. Moreover, studying the exclusionary rule is crucial because it adds further considerations to some of the ideas defended in the preceding chapters. It will show that understanding the right to privacy as a purely individualistic interest, disregarding the importance it has as a condition for free participation in society and at the political level in general leads to serious disadvantages for the protection of the right.

Section 1: Formal Claims

Introduction

Each one of the three systems under consideration (the ECHR, Germany and the United States) has its own mechanisms for dealing with right violations. These mechanisms respond to a common principle: namely, that those who consider themselves victims of a violation of a right must be able to raise a complaint before an independent body, so that the body in question can decide whether or not the violation complained of actually occurred. In the following pages I will look at the aspects of these mechanisms which most directly affect the protection of the right to the secrecy of telecommunications in the ECHR, Germany and the United States. This will lead me to analyse, first, the way the concept of being a victim of a violation of this right has been interpreted in each of these three systems and, second, the peculiarities of the German system of available recourse to remedies against certain measures of telecommunications surveillance, namely against those measures adopted for reasons of national security and for the protection of the democratic order.

1. The Concept of Victim

1.1 The European Convention on Human Rights

The ECHR prescribes that victims of a Convention wrong must be able to raise a claim before a national authority of the Contracting Party which is being accused of the violation in question (art. 13) and, eventually, also before the organs of the Convention (art. 25). Before analysing how the term victim is interpreted let me make two comments. Let me first of all point out that, in the context of domestic recourse, the ECHR (art. 13) does not specify the nature of the national authority in question; in particular, it does not require that this authority be part of the judiciary. It only requires that remedies be effective; yet the Court has ruled that in order to be "effective" according to art. 13 remedies must entail certain guarantees[7], amongst which the independence of the authority in question has been taken to be particularly important[8].

[7]See *Golder v. U.K.*, judgment of 21 Feb. 1975, Series A, vol. 18, Par. 33, p. 16; *Klass and others v. Germany*, judgement of 6 sep. 1978, Series A, vol. 28, Par. 67, p. 30.
[8]See *Silver and others v. U.K.*, judgment, Series A, vol. 61, Par. 116, p. 43; *Campbell and Fell v. U.K.*, judgment of 28 June 1984, Series A, vol. 80, Par. 127, p. 52.

Second, note that the regulation of claims before the organs of the Convention has been altered by Protocol No. 11 to the ECHR[9], which reforms the organic structure of the Convention. Protocol No. 11 introduces fundamental changes in the means made available for victims of a Convention wrong to raise a complaint against it before the organs of the Convention, with a view to improving the possibilities for individuals of exercising the right to raise such claims. Signed last May by all the High Contracting Parties except Italy, Protocol No. 11 will come into force one year after it has been ratified by all of them (art. 3 of Protocol No. 11).

Victims of a Convention wrong thus have a right to raise a complaint both before a national authority and, eventually, before the organs of the Convention, so that if the opportunity to make such a complaint is not made available to them, then they are victims of a second and independent Convention wrong. The question now is how the term 'victim' has been interpreted. The Convention organs have interpreted the term 'victim' as embracing both direct and indirect victims of a Convention wrong. *Direct victims* of a Convention wrong are those who have suffered harm as a result of the violation of one of the Convention rights. *Indirect victims* are those who have not suffered direct harm, yet who have a special personal relation with the direct victim of a violation and can show that the violation in question has affected them in their personal interests[10]. Direct victims can be both actual and potential. *Actual victims* are those who have been the object of a particular measure and have an arguable claim that this measure violates one of their rights as recognised in the Convention[11]. This is generally the case when a norm is actually applied to the applicant; yet the Convention's organs have also admitted that a person may be considered 'victim' by the mere existence of legislation which arguably violates the Convention and is applicable to him[12]. *Potential victims* are those who believe that they reasonably risk a violation of their rights as recognised in the Convention, yet they have no way to find out about this violation (for example, they fall under the scope of application of a provision that they think contrary

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[9]For the text of Protocol No. 11, the new text of the Convention and comments on the reform, see Andrew Drzemczewski & Jens Meyer-Ladewig, "Principal Characteristics of the New ECHR Control Mechanism, as established by Protocol No. 11, signed on 11 May 1994" 15 *H. R. L. J.* p. 81 (1994).

[10]See Ap. No. 1478/62, 13 *Coll. Dec.* 71, at 89 (cifr. Henri Delvaux, "The Notion of Victim under Article 25 of the European Convention on Human Rights" in Irene Maier (ed.), *Protection of Human Rights in Europe. Limits and Effects. Proceedings of the Fifth International Colloquy about the European Convention on Human Rights*, Heidelberg 1982, p. 31 at 52-53).

[11]See *Klass and others v. Germany* judgement, Series A, vol. 28, Par. 64-65, p. 29.

[12]In the judgment to *Dudgeon v. U.K* (22 Oct. 1987, Series A, vol. 45), the Court stated that "the maintenance in force of ... legislation [prohibiting homosexual acts among consenting adults] constitutes a continuing interference with the applicant's right to respect for his private life", even though the legislation in question had never been applied to him; for "either he respects the law ... or he ... becomes liable to criminal prosecution" (Par. 41, p. 18). See also *Norris v. U.K.* (judgment of 26 Oct. 1988, Series A, vol. 142, Par. 38, pp. 17-18) and *Modinos v. Cyprus* (judgment of 22 April 1993, Series A, vol. 259, Par. 24, p. 11).

to the Convention and there is a reasonable likelihood that this provision has been, is being or will be applied to them, yet they have no way to find out whether or not this is the case). Such a situation is not infrequent in the context of the right to the secrecy of telecommunications, since it belongs to the rationale of telecommunication surveillance that its victims may not, or at least not in every case, be informed thereof[13].

It should however remain clear that arts. 13 and 25 only apply to 'victims' of Convention wrongs, however broadly this term is defined. This means that they do not allow for abstract claims that a certain national measure violates a particular right recognised in the Convention (*actio popularis*); nor do they recognise a right to a domestic remedy against any alleged grievance, however ill-defined this might be: it recognises a right only to those who have an *arguable* complaint that they have been victims of a wrong recognised by the Convention, that is to those whose complaint in this respect is not "manifestly ill-founded"[14]. Whether or not these conditions are fulfilled must be decided on the basis of the particular circumstances of each individual case[15].

1.2 Germany

The German Basic Law grants victims of violations of fundamental rights recourse to the judiciary and, eventually, also to the Constitutional Court. The scope of each of these two different claims will be analysed below. Now I will only concentrate on the interpretation of the term 'victim'. In Germany, the term 'victim' has been interpreted exclusively as 'direct' victims, whether they are actual or potential. Actual victims are all those who claim that one of their rights has been infringed[16]. In order to be considered 'actual victims' of a violation, holders of fundamental rights are not required to show that they have suffered a violation of one of these rights but only to present an arguable claim; in other words, claimants can be considered actual victims of a constitutional violation if the possibility that this violation has occurred cannot be excluded beforehand[17]. Potential victims, on the other hand, are all those who fall

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[13]*Klass and others v. Germany*, judgement of 6 Sep. 1978, Series A, vol. 28, Par. 34 et seq.; see also Ap. No. 12175/86, Dec. Adm. Com. of 9 May 1989, 67 *D&R* 88 at 99; Ap. No. 12327/86, Dec. Adm. Com. of 9 May 1989, 67 *D&R* 123 at 131.

[14]See *Leander v. Sweden*, judgment of 26 March 1987, Series A, vol.. 116, Par. 77 (a), p. 29. Within the context of the right to correspondence, see *Boyle and Rice v. U.K.*, judgment of 8 July 1987, Series A, vol. 121, Par. 52-57, p. 23-24.

[15]*Boyle and Rice v. U.K.*, judgment, Series A, vol. 121, Par. 58, p. 24.

[16]See, e.g., BVerfGE 13, 132 at 150; 27, 297 at 305.

[17]See W.-R Schenke, Art. 19 Abs 4, Par. 283-284, pp. 152-153, in *Bonner Kommentar zum GG*; Hans-Uwe Erichsen, *Staatsrecht und Verfassungsgerichtbarkeit I*, 2. Auflage, München 1976, p. 90; S. Heindrichs, *GG-Kommentar*, Band I, München 1981, Art. 19 Abs. 4, Par. 44 p. 708;

within the scope of a provision, the application of which could violate one of their fundamental rights, but who have no way of finding out whether or in what terms this provision is actually being applied to them[18]. As noted in the context of the ECHR, this latter is often the case in the context of the secrecy of telecommunications, for a condition for the success of a measure of surveillance is that its victims may not be informed thereof. In fact, an obligation to inform victims of such measures only exists from the moment when informing them does not endanger the pursuance of the aim that justified the surveillance[19]. So long as this is not the case, recourse to the judiciary against a measure of surveillance can only be had by potential victims, that is by those who believe that they are being victims unduly of such a measure of surveillance.

1.3 The United States

According to the fifth and fourteenth amendments, nobody may be deprived of life, liberty or property without due process of law. Since the fourth amendment right and the right to the secrecy of telecommunications recognised therein are part of liberty (the general, negative liberty of the individual against the State), victims of measures of surveillance considered unlawful have a constitutional right to raise a formal claim against such measures. In particular, they can bring criminal action against the violators, an action for damages against them directly under the fourth amendment[20] or even a civil suit for trespass under state law.

The terms in which the Supreme Court has interpreted the word 'victim' are very similar to the terms in which this word is interpreted by the European Court of Human Rights and by the German Constitutional Court. According to the Supreme Court, in order to be considered the 'victim' of a constitutional wrong (i.e. in order to have standing to challenge the constitutionality of a measure), a person must show that he has directly suffered the consequences of a constitutional violation; in other words, the Supreme Court has interpreted the term 'victim' as direct victims. Direct victims are above all actual victims, that is, they are persons who suffer or have suffered injury in the context of one of their constitutional rights. According to the Court, injury can be caused both by a particular executive measure and directly by the operation of the law. In this latter case, an allegedly unconstitutional legal provision can only be challenged

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Alternativekommentar zum GG für die BRD, Band I, Luchterhand 1984, Art. 19 Abs. 4, Par. 28 p. 1237.

[18]BVerfGE 30, 1 at 16-17; 67, 157 at 169.

[19]Art. 1 § 5.5 G 10; § 101 StPO, also cites the protection of public security and of somebody's personal security or life as reasons to avoid the giving of the relevant information.

[20]See 18 U.S.C. § 242 and 42 U.S.C. § 1983, respectively.

by someone who shows "not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement"[21]. To my knowledge, the Supreme Court has not yet had to decide whether there can be potential victims of a constitutional wrong, at least not in the context of searches and seizures. Victims of a fourth amendment violation are therefore only direct and have so far been only actual.

Yet the question of whether there can be potential victims of fourth amendment wrongs is crucial for the protection of the right to the secrecy of telecommunications. As has been mentioned above, most often the persons who have suffered a measure of surveillance do not have a right to be informed thereof, on the grounds that the confidentiality of a measure of surveillance is a condition for the very success of this measure. In this context, it is particularly important that individuals are allowed to seek recourse against unlawful measures of surveillance which they only suspect have taken or are taking place, that is, it is particularly important to allow potential victims of a measure of surveillance to seek recourse against it. This is even more important in the United States, for here victims of a measure of surveillance have no 'right to be informed' under any circumstance. There is only one exception to this rule: Section 1806 of Title 50 of the USC provides that United States persons who have been subject to foreign intelligence surveillance carried out without a judicial order on the basis of an emergency must be informed thereof if the surveillance in question is not subsequently authorised by the Foreign Intelligence Surveillance Court, unless there is an ex parte showing of good cause not to do so.

Apart from that case, victims of telecommunication surveillance need never be informed of its existence, even though confidentiality is not always and indefinitely justified. In the end, surveillance usually comes to light only when it leads to the seizure of incriminating information by law-enforcing authorities who seek to introduce this information as evidence at a trial. This helps to explain why the right to the secrecy of telecommunications and, more generally, the right against searches and seizures, is often understood as a right to the suppression of incriminatory evidence unlawfully obtained: only under these conditions do victims of such measures have a clear chance to object to them; otherwise, claims against measures of surveillance can only be raised on the basis of some suspicion.

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[21] M. Shapiro & Rocco J. Tresolini, *American Constitutional Law*, 5th ed., New York - London, 1979, p. 69 (quoting Justice Brandeis concurring in *Ashwander v. Tennessee Valley Authority*, 297 US 288 at 346 (1936)).

Being directly injured by a measure of surveillance or by the regulation of measures of surveillance is therefore a necessary condition to be considered the 'victim' of a violation of the right to the secrecy of telecommunications (whether injury need be 'actual' or can also be 'potential'), yet it is not a sufficient condition. Victims of a measure of surveillance have to comply with yet another requirement, a requirement which is characteristic of the fourth amendment. As was explained in detail in chapter 4, fourth amendment wrongs (these including telecommunication surveillance) only occur in as far as a 'reasonable expectation of privacy' has been violated. As a result, 'victims' of a fourth amendment violation are those against whom a search and seizure is directed provided that they had a "legitimate expectation of privacy" in the place searched or in respect of the item seized or, in our case, in the act of telecommunication subject to surveillance[22].

2. The peculiarities of the German Case

As announced above, direct victims of violations of constitutional rights can raise a claim before the ordinary courts and, eventually, before the Constitutional Court. The scope of each of these two different claims will be analysed in turn in the following pages.

2.1 Recourse to Ordinary Courts

2.1.1 Art. 19.4 of the Basic Law

> Art. 19.4
> "Where rights are violated by public authority the person affected shall have recourse to law. In so far as no other jurisdiction has been established such recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by the provisions of this paragraph."

Art. 19.4 recognises a fundamental right to have recourse to ordinary courts to all those who have been victims of the violation of one of their rights by a public authority, whether or not the right in question is recognised in the Basic Law or in ordinary legislation. On the basis of this right to recourse, victims of a measure of telecommunication surveillance can challenge it if they think that the measure violates

[22]See *Jones v. US*, 362 US 257 at 265 (1960); *Alderman v. US*, 394 US 165 at 172 et seq. (1969); *Rakas v. Illinois*, 439 US 128 at 143 (1978). Note that this definition of the term 'victim' has been incorporated at the statutory level (*Alderman v. US*, 394 US 165 at 172 et seq. (1969)).

their right to the secrecy of telecommunications. This possibility is regulated in §§ 23 et seq. of the *Einführungsgesetz zum Gerichtsverfassungsgesetz* (EGGVG), on which basis measures or decisions adopted by judicial authorities can be challenged before the *Oberlandesgericht* (OLG) by those who believe that such measures or decisions violate one of their rights[23]. In addition, victims of measures of surveillance can also interpose criminal action if they think that the surveillance complained of amounted to a crime (§§ 201, 202 or 354 of the Criminal Code).

The right recognised in art. 19.4 is not protected in every instance, however. According to the third sentence of this provision, there are certain circumstances under which the protected scope of the art. 19.4 right to recourse can be narrower than its coverage. This restriction of the protected scope of the right to judicial recourse is of particular importance to us, because it affects, precisely, the right to the secrecy of telecommunications: the third sentence of art. 19.4 defines the scope of non-protection of the right it recognises by reference to art. 10.2 of the Basic Law, that is by reference to the provision where the right to the secrecy of telecommunications is recognised. Let us now see what this reference implies.

2.1.2 Art. 10.2.2 of the Basic Law

> Art. 10.2.2:
> "Where a restriction serves to protect the free democratic basic order or the existence or security of the Federation or a *Land* the law may stipulate that the person affected shall not be informed of such restriction and that recourse to the courts shall be replaced by a review of the case by bodies and subsidiary bodies appointed by parliament."

Art. 10.2.2 was introduced together with the third sentence of art. 19.4 by the federal law of 24 June 1968, which amended the Basic Law. The circumstances under which art. 19.4 does not apply in the context of art. 10 have been specified and regulated by the law "restricting the secrecy of the mail, post and telecommunications (supplementing Art. 10 of the Basic Law)", of 13 of August 1968 (*Gesetz zu Artikel 10 Grundgesetz* -G 10), a law about which something has already been said in the previous chapter. In order to understand the reasons for the enactment of art. 10.2.2,

[23] As used in this context, the expression 'judicial authorities' (*Justizbehörden*) embraces courts in as far as they do not act with judicial independence, but it also embraces public prosecutors and even the police, these latter in as far as they act as law-enforcing officers (see Kleinknecht/Meyer, *Kommentare zum Strafprozeßordnung*, 40. neubearbeitete Auflage, Verlag C.H. Beck, EGGVG, § 23 at 2). This means that §§ 23 et seq. cover, first of all, the possibility of recurring against orders of surveillance, be these issued by courts or by the public prosecutor (see chapter 5 above) and, second, the possibility of recurring against measures of surveillance carried out by the police without the corresponding order.

art. 19.4.3 and the G 10 it is imperative to look back to the very particular political context of post-war Germany.

Since the surrender of Germany at the end of the Second World War, the protection of German national security and its democratic system had been guaranteed by the three occupying powers, i.e. France, Great Britain and the United States. In as far as needed to guarantee such protection, these three powers had also been entrusted with the surveillance of German telecommunications. This was still the situation in the 1960s. By then, however, two ideas had become clear: first, time seemed ripe for German authorities themselves to undertake surveillance activities in the fields of national security and the protection of democracy; second, in a State dominated by the rule of law, the surveillance of telecommunications, even if linked to the above-mentioned fields, had to be subject to certain guarantees.

According to the Convention on the Relations between the Three Powers and the Federal Republic of Germany of 26 May 1952, the prerogatives of the Three Powers in security matters would only be released upon the enactment of German legislation conferring similar prerogatives to German authorities. In other words, the creation of an efficient system of surveillance of telecommunications in the field of national security run by German authorities was a precondition for the expiration of the prerogatives of the Three Powers in the field. In the context of a constitutional State such as Germany, this new system of control had to be subject to certain constitutional guarantees; the trouble however was that the system also had to be to the satisfaction of the occupying powers and that these considered that the normal restrictions on the secrecy of telecommunications were inadequate in the context of restrictions justified for reasons of national security or for the protection of the democratic system. Some compromise was therefore needed: in order that the surveillance of telecommunications carried out for the protection of national security and democracy could be run by German authorities and subject to constitutional guarantees, the guarantees had to be less strict than those imposed in the context of ordinary telecommunications surveillance. The enactment of art. 10.2.2 and its complementary G 10 was a result of this compromise. In sum, art. 10.2.2 and the G 10 came to complement the existing restrictions on the art. 10 rights, so that those imposed for reasons of national security or for the protection of the democratic system could be the object of specific regulation.

The constitutionality of the federal law introducing arts. 10.2.2 and 19.4.3 of the Basic Law, as well as that of some provisions of the G 10 (art. 1 § 2.2.2, § 5.5 and

§ 9.5, now § 9.6[24]) was challenged before the Constitutional Court[25]. Recourse was sought against a background consisting of two point: first, that the person affected by surveillance never need be informed of this circumstance and, second, that those believing they are under surveillance have no recourse to the judiciary. The claim was that these two points violated art. 1 (right to the dignity of men), the essential core of art. 10.1[26], art. 19.4, art. 20 (principle of separation of powers), art. 79.3 (constitutional amendments cannot affect the principles enunciated in arts. 1 and 20), art. 101.1.2 (right to one's lawful judge) and art. 103.1 (right to be heard before a court).

In a very controversial decision[27], the Constitutional Court upheld the constitutionality of the amending law and of the G 10 in all but one point, i.e. the rule that the person under surveillance must not be informed thereof (art. 1 § 5.5). On the basis of the principle of proportionality, the Court stated that the prohibition against informing the victim of a surveillance must not be imposed in categorical terms: in order to be in agreement with the Basic Law and even with the law amending the Basic Law, this prohibition may only be imposed as long as it proves necessary for the success of the investigation in course. Once this is no longer so, the principle of proportionality requires that the person affected be informed and given the possibility of recourse to the judiciary against the surveillance in question[28].

The above point of the decision of the Court seems reasonable. It appears as the result of a fair balance between two interests at stake, that is the protection of the art. 10 right and of the art. 19.4 right to a judicial recourse, on the one hand, and the protection of national security and the democratic order, on the other. Much more debatable is the rest of the decision, in particular the conclusion that in the context of the G 10 a person

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[24]Act of 13th Nov. 1978, BGBl. S. 1546.

[25]BVerfGE 30, 1. Three parallel claims of unconstitutionality were raised against the above provisions: the first one was raised by the Government of the *Land* of Hesse, the second by a group of judges and lawyers from Mannheim and the third by a lawyer from Frankfurt. The two latter claims were considered admissible on the grounds that the claimants had been made potential victims of the alleged constitutional violation (see p. 15 below) by the mere existence of the law (see BVerfGE 30, 1 at 16-17).

[26]The Government of Hesse claimed that the right to judicial recourse is part of the essential core of fundamental rights (see BVerfGE 30, 1 at 10).

[27]This decision has been the object of many a critical comment. See, e.g., Peter Häberle, "Die Abhörentscheidung des Bundesverfassungsgerichts vom 15. 12. 1970" (1971) *JZ*, pp. 145 et seq.; Hans Heinrich Rupp, "Anmerkung zum Rechtsprechung", (1971) *NJW*, pp. 275 et seq. Of special interest is the dissenting opinion of three respective members of the Court, particularly since this was the first time that members of the Court signed a separate opinion on the basis of § 30 (2) of the BVerfGG (introduced by law of 21st of February 1970).

[28]BVerfGE 30, 1 at 21. This rule only applies, by definition, to surveillance addressed to particular persons, not to so-called strategic surveillance, where no relevance is accorded to the identity of the persons whose telecommunications are intercepted (art. 1 § 3 G 10).

may be denied judicial recourse against a measure of surveillance until he has been informed of the measure in question. In order to reach this conclusion, the Court departed from the idea that if a measure of surveillance is to be fruitful its victims ought not to be informed thereof. Allowing for judicial recourse, argued the Court, would amount to allowing case-by-case investigations and further discussions on the existence and legality of a measure of surveillance, all of which would bring the secret character of this to an end, with the subsequent impairment of its purpose. In the context of the G 10, this purpose is the protection of national security and the democratic order. Denying recourse to the judiciary was thus regarded by the Court as a precondition for the very protection of national security and the democratic order, values the protection of which were accorded absolute preference over any other, even over the protection of fundamental rights[29].

The above reasoning of the German Constitutional Court can be criticised on various grounds. To begin with, the idea that the protection of the democratic order must be given preference even over the protection of fundamental rights does not hold. For it disregards the fact that the protection of fundamental rights as well as the principle of separation of powers are themselves pillars of a democratic system and that, as the separate opinion to the majority decision put it, "it is a contradiction in itself that in order to protect the Constitution inalienable principles of the Constitution be sacrificed"[30]. Even the Court's reasoning in terms of the protection of national security is not convincing. In this context the Court is opposing the protection of fundamental rights against the protection of the public interest and establishing an automatic subordination of the former one to the latter. By doing so, the Court seems to forget that it belongs to the essence of fundamental rights that they be protected precisely against the interests of public power and that only in exceptional circumstances may the public interest justify restrictions on their exercise. It is therefore wrong to assume as the Court did that fundamental rights must automatically yield to the protection of the public interest, regardless of whether this was justified by exceptional circumstances. This result can only eventually be reached after striking a balance between the protection of the public interest and the protection of the right in question. No such balance was struck by the German Constitutional Court in the case at issue.

Moreover, if a balance had been struck between the protection of the public interest and the protection of the right to judicial recourse, it could only have led to one solution: denying recourse to the judiciary to victims of a measure of surveillance

[29]BVerfGE 30, 1 at 18-19.
[30]BVerfGE 30, 1 at 46 (my translation).

before they have been informed of its existence imposes an unnecessary restriction upon the fundamental right to judicial recourse. In fact, means could have been devised to keep the secret character of telecommunication surveillance while allowing for judicial recourse against it. In particular, the German legislation allows that a judicial investigation and even a judicial decision be to some extent kept secret from the parties to a case where the protection of national security is at stake[31]. This implies that whenever a judicial claim is raised that an unlawful measure of surveillance might be taking place, courts can only inform the claimant of the existence of such a measure if this is judged unlawful or otherwise provided that notification would not impair the success of the surveillance. In any other case, the claimant would only be informed of the fact that there has been no infringement upon his rights, not of whether this is so because there has been no interception or because this has been carried out in a perfectly lawful way[32]. This solution could have and, on the basis of the principle of reasonableness, it ought to have been applied to the case at stake. In fact, it appears as an alternative and equally effective means to attain the pursued aim, a means which would not have entailed an encroachment upon fundamental rights. The suppression of judicial recourse must therefore be regarded an unnecessarily burdensome, hence unconstitutional restriction of the art. 19.4 right. Nor can the importance of suppressing judicial recourse be undermined by noting that recourse to the Constitutional Court can always be had. Constitutional recourse should not be taken as a substitute but as a complement of judicial recourse. Rather, the fact that constitutional recourse is not precluded only confirms the idea that also courts can guarantee the secrecy necessary for the success of measures of surveillance.

Finally, criticism can be laid not only on the fact that the Court did not strike a balance before it restricted the protected scope of the right to judicial recourse. Equally open to criticism is the reason *why* no such balance was struck, that is on which grounds the Court did not confront the interest in the protection of this right with the public interest which in its view justified the restriction of the protected scope of the right. The reason for this is that the law amending the Basic Law -that is the law that aimed at restricting the protected scope of the right to judicial recourse- was not examined by the Court as a law, but as if it already were part of the Basic Law itself. As a consequence, the Court did not study whether the restriction of the right to judicial recourse was constitutional; rather, it reasoned on the basis of the principle of

[31]For the possibility of secrecy both during the judicial investigation of a case and in the judicial decision, see Kleinknecht/Meyer, *Kommentare zum Strafprozeßordnung*, Einleitung, Par. 60, p. 14; § 35, Par. 8, p. 132. See also Num. 213.1 of the *Richtlinien für das Strafverfahren und das Bußgeldverfahren*.

[32]This idea was also suggested by the Government of Hesse in its pleadings before the Constitutional Court (see BVerfGE 30, 1 at 10).

constitutional unity and tried to reconcile what it regarded as two existing constitutional provisions, i.e. the right to judicial recourse and the restriction that the protection of national security and of the democratic order imposed upon this right. Being considered part of the Constitution, the restriction as such could not be questioned.

In spite of the above criticism, the system of telecommunication surveillance allowed by art. 10.2.2 of the Basic Law and regulated by the G 10 was considered constitutional by the German Constitutional Court and even by the European Court of Human Rights[33]. Let us now look at the claims against violations of the right to the secrecy of telecommunications that this system provides.

2.1.3 The G 10 System

The control of measures of surveillance adopted on the basis of the G 10 is entrusted to two different organs, a Board and a Commission. The Board consists of five members of the Federal Parliament; the Commission consists of three members, one of whom, the President, must have the qualification required to be a judge. The three members of the Commission are elected for a legislative period by the Board after the Government has been heard on this point. They need not be members of the Parliament; yet care is taken that, within the Commission as well as within the Board, the different political parties in Parliament are equally represented (Art. 1 § 9 (4)).

Every six months the Board must be informed by the responsible Minister of the measures of surveillance adopted by his Ministry during the six month period (Art. 1 § 9 (1)). Also the Commission must be informed of such measures: every month the responsible Minister must submit to the Commission a report including all the measures of surveillance he has ordered during the previous month. Acting with complete independence (Art. 1 § 9 (4)), the Commission must decide on the legality and necessity of those measures and order that the Minister in question immediately terminates measures considered illegal or unnecessary (Art. 1 § 9 (2)). Also once a month, the responsible Minister must report to the Commission on the cases in which the person affected by an interception has been informed thereof, as well as on the possible reasons for non notification in all other cases. If the Commission considers that in some case information is required, this must be immediately arranged by the responsible Minister (Art. 1 § 9 (3)).

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[33] *Klass and others v. Germany* judgement (Series A, vol. 28), where the European Court considered that the decision of the German Constitutional Court was in accordance with the Convention.

Recall that, once the person affected by a measure of surveillance has been informed thereof, he can have recourse to the judiciary against this measure. To be more precise, this person can open an administrative judicial procedure so that courts can decide whether the decision of the G 10 Commission that the measure of surveillance in question may be carried out was lawful. In such cases, courts must judge not only the formal legality and constitutionality of a measure of surveillance, but also the very opportunity of this measure over and above the opinion expressed by the G 10 Commission in this respect. In other words, courts must pronounce their own independent opinion on whether the requirements were fulfilled upon which telecommunication surveillance may be ordered on the basis of the G 10, i.e. whether there was "factual evidence for suspecting that a person ... plan[ned] to commit, [was] committing or [had] committed" one of the crimes listed in Art. 1 § 2.1 of the G 10[34]. This means that the G 10 Commission does not enjoy a margin to freely appreciate whether or not the above-mentioned requirements have been fulfilled; rather, the Commission's appreciation in this respect can eventually be subject to judicial control which goes beyond a control of arbitrariness and judges its very opportunity[35]

The above description of the G 10 might leave one with the impression that ultimately telecommunication surveillance is better controlled by an independent board rather than by the judiciary because possibly more protective of the right to the secrecy of telecommunications. Indeed, the control exercised over measures of surveillance exercised by the G 10 Board and Commission seems much more serious and strict than the judicial control of these measures -generally speaking judges simply trust the good sense of the law enforcing agents and authorise most petitions for telecommunication surveillance without further consideration. That this is the way judicial control often works is highly regrettable. Yet it would be wrong to judge a system by its misfunctioning, but by the principles which sustain its adequate functioning as well as by its potential for functioning more adequately. The judiciary is conceived as being impartial *inter partes* in the solution of conflicts and this makes it the branch of State best able to guarantee the protection of rights; this is particularly the case in the context of fundamental rights. Where a first branch of the State (the executive) is accused of violating a fundamental right on the basis of means made available by another branch of the State (legislative), then cases ought to be solved by a third branch, i.e. by the

[34]Art. 1 § 2 Abs. 1 of the G 10, translation taken from the case of Klass and others, judgement of the European Court of Human Rights, p. 15.
[35]BVerwGE 87, 23 at 26-27.

judiciary[36]. The independence of courts even makes them suitable for the resolution of cases where a different court is accused of the violation of a fundamental right. In any case, the essential independence of the judiciary ought to be preferred to the accidental independence of an ad hoc body elected by Parliament when the restrictions imposed upon rights have to be controlled. A body similar to the G 10 Commission might be important to the end of avoiding judicial misfunctioning, yet it should stand as part of the judiciary or at least work in close connection with it.

Moreover, one of the most striking features of the G 10 system is the absolute secrecy in which the activities of the G 10 Board and Commission are carried out. These two bodies are not required to account to anyone for what they do, either by publicising their decisions or otherwise. This is open to strong criticism. Even if in principle confidentiality is justified in the context of telecommunication surveillance, particularly in the context of the measures of suveillance authorised by the G 10, to put one's faith in the absolute secrecy that characterises the functioning of the G 10 system seem too far-fetched; it deprives the system of any transparency, something which does not withstand the test of reasonableness studied in the last chapter. The G 10 system only allows for two controls. One is ordinary judicial control, yet this becomes possible only when the G 10 Commission itself decides that the person affected by a measure of surveillance must be informed thereof; the other is the control of the constitutionality of G 10 measures of surveillance by the Constitutional Court. I will now say a few words about the possibility of recourse to the Constitutional Court as a mechanism for the protection of the right to the secrecy of telecommunications. Special attention will be paid to how this mechanism applies in the context of the G 10 system of telecommunication surveillance.

2.2 Recourse to the Constitutional Court

The content of the right to the secrecy of telecommunications is also defined by the possibility of recourse to the Constitutional Courts against measures of surveillance. This possibility is contemplated in art. 93.1 of the Basic Law, which reads as follows.

[36]Admittedly, in as far as the judiciary is yet another branch of the State it cannot be said to be completely independent (the view that judicial independence cannot in truth be said to exist is convincingly sustained by Martin Shapiro in *Courts. A Comparative and Political Analysis*, The University of Chicago Press, Chicago and London, 1981). Yet it at least has the credit of being the most independent or the least dependent branch of the State to decide cases of violations of fundamental rights.

Art. 93.1
"The Federal Constitutional Court shall rule:
4a. on constitutional complaints which may be filed by anybody claiming that one of their basic rights or one of their rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103, or 104 has been violated by public authority"

The Federal Constitutional Court is the organ which guarantees that the Basic Law, this including fundamental rights[37], is respected by all public authorities. This function is more closely regulated in the Law of the Constitutional Court (*Bundesverfassungs-gerichtgesetz* -BVerfGG). Claims may be brought before the Constitutional Court by victims of a violation of one of the constitutional provisions mentioned in art. 93.1.4a. by public authority. Previously, however, all judicial procedures available must be exhausted (§ 90 (2) 1); only exceptionally may claims be directly raised to and decided by the Court, namely if they involve questions of general importance or if any delay could entail irreparable harm for the claimant (§ 90 (2) 2). Claims addressed against judiciary or administrative decisions must be raised within one month of the definite decision on the issue being publicised or notified to the claimant (§ 93 (1)); those addressed against laws or other acts of sovereignty which cannot be judicially challenged must be raised within one year of their enactment (§ 93 (2)).

It is worthy of note that in the context of art. 10.2.2, that is in the context of the scope of non-protection of art. 19.4, the first two rules mentioned above do not always find grounds for application; in particular, they cannot apply where the person affected by a measure of surveillance is not informed thereof. First, the rule that available judicial procedures be exhausted cannot apply where the claimant does not have recourse to the judiciary at all. Moreover, the Constitutional Court has stated that in such cases recourse to the G 10 Commission cannot be considered 'judicial' according to § 90 (2) 1, hence that it is not a necessary step before a claim may be brought before the Constitutional Court[38]. As a result, potential victims of violations of the right to the secrecy of telecommunications can bring their claims directly before the Constitutional Court. Second, the deadline of one month does not apply where notice as to the infringement upon a right is simply excluded. In such cases, potential victims of an art. 10 wrong can bring their -direct- claims before the Constitutional Court any time, provided these claims are supported by sound suspicion of an infringement upon the claimant's right[39].

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[37]BVerfGG in der Fassung der Bekanntmachung v. 12. Dezember 1985 (BGBl. I S. 2229), in particular in its §§ 90 et seq..
[38]BVerfGE 67, 157 at 170-171; see also BVerfGE 30, 1 at 23.
[39]BVerfGE 67, 157 at 169-170.

Conclusions

The above analysis shows that the mechanisms of complaint against violations of the secrecy of telecommunications available in the ECHR, Germany and the United States are essentially similar: these three systems recognise a right to have recourse to an independent body, which must decide whether or not a violation actually occurred and eventually must provide redress. However, it also shows that there are some important differences among these three systems.

A first difference concerns the concept of victims of a violation of the right to the secrecy of telecommunications. In particular, note that this concept is subject to narrower interpretation in the context of the United States than in the context of Germany and of the ECHR. For one thing, the Supreme Court of the United States has not yet had a chance to decide on the existence of potential victims of the fourth amendment, in spite of the importance that recognising potential victims of the right to the secrecy of telecommunications has for the protection of this right. For another thing, the interpretation of the concept of victims is strongly conditioned by the way the coverage of the fourth amendment is presently defined. Interpreted as a provision for the protection of privacy, the fourth amendment only recognises a right against searches and seizures which infringe upon privacy interests that society considers reasonable. As a result, the concept of a victim of fourth amendment wrongs is subject to the ebbs and flows of the dominant social opinion as to the reasonableness of an expectation of privacy. On this basis, victims of telecommunication surveillance are defined as those placed under a measure of surveillance with an expectation of privacy in the act of telecommunication in question, an expectation that society is willing to consider reasonable. As was explained in chapter 4, the expression 'reasonable expectation of privacy' has so far been interpreted in objective terms by the Supreme Court, so that for the time being, the constitutional right to the secrecy of telecommunications (hence the concept of victims of this right) is not as ill-defined as it could become.

Second, the German system has an advantage over the other two ones. In Germany victims of a measure of surveillance have a right to be informed thereof as soon as this does not endanger the investigation that justified the surveillance, so that if they think that their right to the secrecy of telecommunications has been violated they can actually make use of the mechanisms of protection of this right. Such a right to be informed is not imposed by the ECHR; nor does it exist in the United States. Here victims of a measure of surveillance only have a chance to object to it where the

surveillance has led to information which law-enforcing authorities want to introduce as evidence at trial, unless a claim is raised on the basis of mere suspicion. The result is that the right to the secrecy of telecommunications is too often confused with the right to the suppression of evidence illegally seized.

Finally, note that the United States stands as the only system of the three ones under consideration where victims (although it rests to be seen whether this covers potential victims) of a violation of the right to the secrecy of telecommunications are always assured recourse to the judiciary. The ECHR merely requires that the Contracting Parties provide victims of a Convention wrong with some kind of recourse in front of an arbitration body which must certainly offer certain guarantees such as independence, but which need not be part of the judiciary. The possibility of not providing judicial recourse has been developed in Germany. Here those who believe they have been victims of a violation of this right may not always confirm their suspicions by having recourse to the judiciary; instead, in the context of certain measures of surveillance they have to rely on the control exercised by a body created ad hoc by Federal Parliament or, eventually, have recourse before the Constitutional Court. This ad hoc body carries out its work of control in the greatest secrecy; indeed, it was introduced as a way to make sure that the secret character of certain particularly important measures of surveillance would be preserved even during the control of their constitutionality. Secrecy is clearly a condition for the success of such measures, the problem is that secrecy could also have been attained within the context of the judicial recourse. This alternative system of control thus imposes an unnecessary restriction upon the right to have recourse to the judiciary, hence a restriction that goes beyond the limits permitted by the constitutional principle of reasonableness. The restriction must therefore be considered unconstitutional.

Section 2: Substantive remedies

Introduction

Violations of the secrecy of telecommunications are completed wrongs, in the sense that the right to the secrecy of telecommunications is definitely and irreversibly violated with each single infringement upon that secrecy. This means that remedies against them cannot consist of bringing the violation in question to an end, as in the case of on-going wrongs. The only possible remedy is granting compensation to the victims of the wrong in question, compensation which is generally of a pecuniary character.

However, saying that a wrong is already complete and can therefore not be stopped, does not imply that the *consequences* of this wrong must also be complete, that is, that they have necessarily been exhausted. A good example of this is the case of violations of the right to the secrecy of telecommunications which end up in the seizure of information. Such violations are completed wrongs, yet their consequences are not exhausted so long as some use of the information seized is still being made. It thus appears that, although violations of the right to the secrecy of telecommunications cannot be stopped, yet the consequences of such violations in some cases can be prevented from occurring.

The three systems under consideration provide some compensation against violations of the right to the secrecy of telecommunications. Parallelly, the United States and Germany have considered the problem of stopping the consequences of violations of this right and have devised a legal instrument to this end. This is the so-called 'exclusionary rule', according to which information seized through unlawful measures of surveillance may not be used as evidence at trial. This rule has acquired such importance that it can be regarded as the most characteristic element of the right to the secrecy of telecommunications in both these systems. The greatest part of the present section will be dedicated to studying this rule. Before, we will have a brief look at other compensations against violations of the right to the secrecy of telecommunications provided in the ECHR, Germany and the United States.

1. Compensation Against Telecommunication Surveillance

1.1 The European Convention on Human Rights

As was seen in the previous section, the ECHR requires that victims of a Convention wrong be in a position to raise a claim against the wrong before a national authority. It also stresses that such recourse must be effective, which implies that they must be apt for the granting of a fair remedy if this be required. Yet the ECHR does not give many indications as to the particular remedies that must be provided against wrongs under the Convention. This question is fundamentally left to the discretion of the Contracting Parties, whilst the organs of the Convention are called upon to make sure that the remedies provided by the Contracting Parties meet certain standards.

This distribution of roles between the Contracting Parties and the Convention organs underlies both the present text of the Convention (arts. 32.2, 32.3, 50) and the new text introduced by Protocol No. 11 (art. 41 and 46). The most relevant provisions are art. 50 and its future substitute art. 41, both of which have a very similar wording[40]. Art. 50 reads as follows:

> Article 50:
> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party".

According to art. 50 (and to its future substitute art. 41), the Court shall afford just satisfaction to victims of Convention wrongs who have only obtained partial reparation from the national authorities in question. Thereby, the Convention does not place the Contracting Parties under any obligation to grant a particular degree of reparation for Convention wrongs, it does not even place it under the obligation to grant any reparation at all. Rather, art. 50 simply makes it clear that the reparation granted to victims of Convention wrongs can always be examined by the Court, which can always decide whether it would be advisable to afford some extra satisfaction.

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[40]Future art. 41 reads as follows: "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the decision of the Court shall, if necessary, afford just satisfaction to the injured party".

Art. 50 seems to be assuming that total reparation for Convention wrongs can eventually be (indeed that it ought to be) granted. However, as was reasoned in the introduction to this chapter, total reparation for the violation of rights is simply unfeasible, which means that any reference to total reparation cannot be taken seriously. The impossibility of total reparation has often been acknowledged by the Court and taken into account in the interpretation of art. 50. The Court admits that art. 50 had in view cases where total reparation *is* possible but is precluded by internal law, yet it has stated that "common sense suggests [that art. 50 should] also cover the case where the impossibility of restitutio in integrum follows from the very nature of the injury"[41]. The result is that the Court is entitled to provide just satisfaction in every case of violation of a Convention right that it decides. In this context, the Court does not regard claims under this provision as new petitions but as an 'annex' to the original claim that a Convention right was violated. Accordingly petitions under art. 50 need not be the object of a second, independent judgment, but can be examined within the judgment dealing with the merits, provided that the issue is ready for decision[42].

In order that just satisfaction can be granted, the victim of a Convention wrong must have suffered certain damage as a result of the wrong. To this end, it does not suffice that the person concerned has been considered a 'victim' by the Court. The Court has ruled that this circumstance does not deserve just satisfaction or, to be precise, it has ruled that the mere declaration that a Convention wrong has been committed is enough of a satisfaction for having been the victim of this wrong[43]. In order that additional pecuniary satisfaction can be granted, the party seeking satisfaction must show that the Convention wrong caused some additional damage and that there is a direct causal link between wrong in question and the damage[44].

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[41] *De Wilde, Ooms and Versyp v. Belgium* ("Vagrancy" Cases), judgment of 23 July 1968, Series A, vol. 6, Par. 14-16, p. 7-10.

[42] M.E. Mas, "Right to Compensation Under Article 50", *The European System for the Protection of Human Rights*, Martinus Nijhoff Publishers, Dordrecht-Boston-London, 1993, p. 775 at 779. This implies that exhausting domestic remedies is not an 'admissibility condition' for claims under art. 50 (see the "Vagrancy" cases, Series A, vol. 6, Par. 14, pp. 1-8; see also M.E. Mas, "Right to Compensation ..." at 780-781).

[43] See *Golder v. U.K.*, judgment of 21 Feb. 1975, Series A, vol. 18, Par. 46, pp. 22-23; *Silver and others v. U.K.*, judgment on art 50, Series A, vol. 67, Par. 10, pp. 6-7; *Schönenberger and Durmaz v. Switzerland*, judgment of 20 June 1988, Series A, vol. 137, Par. 36, p. 15; *Kruslin v. France*, judgment of 24 April 1990, Series A, vol. 176, Par. 39, p. 25; *McCallum v. U.K.*, judgment of 30th Aug. 1990, Series A, vol. 183, Par. 37, p. 17; *Campbell v. U.K.*, judgment of 25 March 1992, Series A, vol. 233, Par. 70, p. 23; *Modinos v. Cyprus*, judgment of 22 April 1993, Series A, vol. 259, Par. 30, p. 12.

[44] See *Campbell and Fell v. U.K.*, judgment of 28 June 1984, Series A, vol. 80, Par. 134-136, p. 54; *McCallum v. U.K.*, judgment of 30th Aug. 1990, Series A, vol. 183, Par. 36, p. 17; *Margareta and Roger Andersson v. Sweden*, judgment of 25 Feb. 1992, Series A, vol. 226, Par. 107, p. 32; *Pfeifer and Plankl v. Austria*, judgment of 25 Feb. 1992, Series A, vol. 227, Par. 50-51, p. 19.

'Damages' can be both of a pecuniary and of a non-pecuniary character. The former kind embraces any possible material loss suffered by the victims of a Convention wrong; the latter embraces, e.g., stress, loss of reputation, moral suffering or physical pain. Pecuniary damage is clearly easier to evaluate and to compensate for than the non-pecuniary damage. In the context of the right to respect for correspondence, non-pecuniary damage (when it has been regarded as the direct consequence of the violation of this right) has hardly ever been considered relevant enough to deserve compensation beyond the mere decision of the Court that there has been a violation of this right; to be more precise, pecuniary compensation has only been granted on two occasions, of which only one was concerned with the right to the *secrecy* of telecommunications[45].

1.2 Germany

The German system recognises a right to redress to all those who have been subject to unconstitutional measures of telecommunication surveillance. As has been explained in the previous section, all those who *know* that they have been victims of a measure of surveillance and who believe this was unconstitutional can challenge it before the ordinary courts. On the other hand, those who only *suspect* that they are or have been victims of surveillance have recourse to courts only if this has been carried out in the context of ordinary law enforcement. In the context of the protection of national security or the democratic order it is for the G 10 Commission to control the lawfulness of every measure of surveillance. If the G 10 considers that a measure of surveillance has been unduly adopted, it must order the immediate termination of this measure (art. 1 § 9 (2) G 10).

In the context of ordinary law-enforcement, courts, in particular the OLG, must order the termination of unlawful measures of surveillance which have not yet been completely carried out (§ 28.1 of the EGGVG[46]). If surveillance has already been

[45] *Herczegfalvy v. Austria*, judgment of 24 Sep. 1992, Series A, vol. 244, Par. 100, p. 29; the other case, dealing with the freedom to engage in telecommunications, is *Margareta and Roger Andersson v. Sweden*, judgment of 25 Feb. 1992, Series A, vol. 226, Par. 107, p. 32.

[46] §§ 23 et seq. of the EGGVG complete the right to a remedy recognised in art. 19.4 of the Basic Law in the context of measures or decisions adopted by judicial authorities. The term 'judicial authorities' (*Justizbehörden*) embraces not only courts, in as far as they do not act with judicial independence, but also the Public Prosecutor and the police in as far as they act as law-enforcing officers (see Kleinknecht/Meyer, *Kommentare zum Strafprozeßordnung*, § 23 at 2). §§ 23 et seq. therefore apply in the context of decisions concerning the surveillance of telecommunications in ordinary law-enforcement, since as explained in chapter 5 this can be ordered by courts and, exceptionally, by the Public Prosecutor under closely regulated conditions and following closely regulated indications (in this sense, see Kleinknecht/Meyer, *Kommentare zum Strafprozeßordnung* § 23 at 6, 10).

carried out, the OLG must order that things be brought back to the state they were in before the right to the secrecy of telecommunications was violated; should this not prove possible, upon the request of the person affected, the OLG must compensate for the violation with a statement that the measure in question was unlawful (§ 28.1 EGGVG). The OLG also decides whether those who are or have been subject to a measure of surveillance should be informed thereof (§ 28.2 EGGVG). If the Constitutional Court considers that a decision, whether judiciary or administrative, violates art. 10 it must declare it void and, if judicial remedies are available, send the issue back to a court competent by the matter (§ 95 (2) BVerfGG); if art. 10 is violated by a law, it must be declared void (§ 95 (3) BVerfGG).

1.3 The United States

In the previous section we saw that victims of violations of the right to the secrecy of telecommunications have recourse to different claims before the judiciary as ways to seek redress against such violations. If the competent court reaches the conclusion that a violation actually took place, then redress must be granted. This normally consists of pecuniary compensation. This is the case in the context of civil actions for damages against either state or federal officials[47] or even against municipal corporations[48] directly under the fourth amendment or in the context of a civil suit for trespass under state law; on the other hand, criminal prosecution[49] cannot be used as a basis for civil action for damages, yet the fact that the violator is found guilty sometimes appears to the victim of the violation as a more important moral compensation. However, the most characteristic remedy against fourth amendment wrongs is doubtless the so-called exclusionary rule. Studying this rule will be the purpose of the rest of this section.

[47]See 42 U.S.C. § 1983 and the Court's judgement in *Bivens v. Six Unknown Named Agents of the F.B. of Narcotics*, 403 US 388 (1971) respectively. On this latter, see W.E. Dellinger, "Of Rights and Remedies: The Constitution as a Sword", 85 *Harv. L. Rev.* 1532 (1972).
[48]See *Monell v. New York City Dept. of Social Services*, 436 US 658 (1978); *Leatherman v. Tarrant City Narcotics Unit*, 122 L. Ed. 2d 517 (1993) (pending publication).
[49]18 U.S.C. § 242.

2. The so-called Exclusionary Rule

2.1 The United States

Indeed, the most characteristic remedy against fourth amendment wrongs is the so-called exclusionary rule. In the following pages I will first of all examine how the rule started to be applied in the context of the fourth amendment; I will then comment on the different doctrinal positions adopted with respect to the rule and will suggest an alternative approach to it; finally, I will look at the way the rule has been and is presently interpreted by the Supreme Court. Note that all these comments also apply to the right to the secrecy of telecommunications from the moment when it started to be considered as covered and protected under the fourth amendment.

2.1.1 The Origins of the Exclusionary Rule

The exclusionary rule dates back to the case of *Boyd v. U.S.*, that is to the very origins of the doctrine of the Supreme Court on the fourth amendment. In this case, the Court suppressed some personal papers of the accused that the government had unreasonably seized and sought to introduce as evidence at trial against him. Personal papers unreasonably seized, the Court reasoned, cannot be introduced as evidence at trial against their lawful owner, for this would amount to forcing this latter to confess against himself; in other words, the introduction at trial of personal papers unlawfully seized would amount to a new constitutional wrong, namely to a violation of the fifth amendment right against self-incrimination.

The reasoning of the Court in *Boyd* might appear more or less justified because it concerned the introduction of private papers as evidence at trial. Indeed, reading certain personal papers at court might be tantamount to having the person in question incriminate himself; this is notably the case with diaries, letters, etc. However, the Court immediately enlarged its reasoning to all kinds of private property, so that the introduction of any object lawfully possessed was thought to amount to making the lawful possessor incriminate himself. The importance thereby accorded to private property is apparent and is in accordance with the general spirit of the times. Private property was conceived as a prolongation of individual personality, to the extent that what it tells others about its lawful holder was considered as good as a declaration made by the holder himself and, eventually, as a confession.

The exclusionary rule was thus devised in the context of searches and seizures against property lawfully seized and resulted from a combined interpretation of the fourth and fifth amendments[50]. Yet, always within the context of searches and seizures of property lawfully held (i.e. in the context of searches and seizures *materially* unlawful) the exclusionary rule could easily have been deduced from the fourth amendment taken by itself. In particular, the rule can be seen as arising from two considerations: first, seizures of property lawfully held are on-going wrongs; second, bringing such on-going wrongs to an end is part of the courts's duty to enforce the Constitution. Seizures of property lawfully held are on-going wrongs in the sense that they do not come to completion the moment property is seized but, on the contrary, expand during the time in which property is unlawfully being kept from its lawful holder. Wrongs of this kind do not amount to definite violations of rights, given that as soon as they are brought to an end the violated right will be automatically enforced. Hence the courts's duty actually to bring such wrongs to an end. In the context of the fourth amendment this means that whenever a seizure encroaches upon legitimate possessory interests courts must order that the property in question be returned to its lawful holder, with the immediate result that this property can no longer be used as evidence at trial.

In spite of the origins of the exclusionary rule, the Supreme Court also seems to have reasoned along the above lines. Already in its early case law there are examples of cases where the Court simply relied on the fourth amendment to rule that "papers wrongfully seized should be turned over to the accused"[51], to which end it imposed the condition that "the accused" make a timely application in this respect[52]. Soon the

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[50]Examples of this double constitutional ground of the exclusionary rule can be found in *Hale v. Henkel*, 201 US 43 (1906); *Wilson v. US*, 221 US 361 (1911); *Gouled v. US*, 255 US 298 (1921); *Agnello et al. v. US*, 269 US 20 (1925); *Marron v. US*, 275 US 192 (1927); and even sporadically in later cases (see P. Stewart, "The Road to *Mapp. v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases" 83 *Col. L. Rev.* 1365, 1377 (1983)).

[51]*Weeks v. US* 232 US 383 at 398 (1914) (see the cases cited therein in support of this position); *Silverthorne Lumber Co. v. US*, 251 US 385 (1920). In this latter case, the application of the exclusionary rule had to rely on the fourth amendment, since companies do not enjoy the fifth amendment right against self-incrimination.

[52]Rule 41 (e) of the Federal Rules of Criminal Procedure. Under the common law, a collateral issue may not be brought up to inquire about the means by which evidence was obtained. Evidence presented at trial can only be questioned on its pertinence; the manner in which it was obtained must be the object of independent proceedings (*Adam v. NY*, 192 US 585 at 596 (1904); see references to common-law cases at 594 et seq.). Hence the requirement that the victim of a fourth amendment violation make a timely application for its return, so that this question is already decided when the item of evidence is used at trial (see *Weeks v. US*, 232 US 383, esp. 393 et seq. (1914)). This requirement, however, has not been interpreted in strict terms. In the Court's words, it embodies "an important social policy and not a narrow, finicky procedural requirement. [This] ... precludes application of the Rule so as to compel ... injustice" (*Jones v. US*, 362 US 257 at 264 (1960)). In this line, e.g., the Court has admitted unseasonable applications for return provided they were made as soon as the defendant knew of the seizure of his papers (*Gouled v. US* (255 US 298 (1921)); moreover, the requirement has been altogether dispensed with where uncontroversial facts show that the evidence at stake was obtained in

exclusionary rule would be exclusively justified on the basis of the fourth amendment[53]. This shift in justification brought along a significant change in the understanding of the exclusionary rule. Under a combined fourth-fifth amendment rationale, the rule was conceived as part of the object of the constitutional right against self-incrimination, that is it had the status of a constitutional right. Under a fourth amendment rationale, on the other hand, the rule is not a constitutional right and does not even have direct constitutional status: it is just a consequence of applying a remedy against the violation of a constitutional right.

So far the exclusionary rule has been exclusively related to wrongs which encroach upon the possessory interests protected by the fourth amendment. Soon however the Court started also to apply the rule in cases where no such possessory interests were at stake, that is, in cases of searches and seizures that are not materially but *formally* unreasonable. The grounds for this position were settled in the case of *Silverthorne Lumber Co. v. US*[54]. Here the Court stated that the rule required not only that, if seized, property lawfully held be returned but also that it be not used or taken any notice of at all[55]. Property thus seized could therefore not be used as evidence even after having been returned to its lawful holder -it could not, e.g., be referred to at trial. In sum, courts were required to act as if the unlawful seizure had never occurred. This doctrine implied an important enlargement of the framework of application of the exclusionary rule. In its new dimension the rule was no longer attached to the mere protection of lawful property but, rather, to the protection of the *privacy interests inherent in lawful property*. It is not property itself but the privacy interests inherent in property that require, first, that property lawfully held be not searched, second, that if such property is searched despite this the result of the search be not disclosed and, third, that if it is disclosed despite this the result be not used at all. The Court included these requirements within the scope of the exclusionary rule and introduced the theory that any use of evidence unlawfully obtained is "the fruit of a poisonous tree"[56] and is thus to be rejected altogether.

In spite of the above enlargement of its scope of application, the exclusionary rule continued to be justified on the same basis as before: the Court continued to perceive the exclusionary rule as the consequence of a certain remedy against a fourth

violation of the fourth amendment (see *Agnello et al. v. U.S.*, 269 US 20 (1925)), or where its application would amount to compelling a defendant to declare against himself. (*Jones v. US*).

[53]See, see P. Stewart, "The Road to *Mapp v. Ohio* ..." at 1377.

[54]*Silverthorne Lumber Co. v. US*, 251 US 385 (1920).

[55]Ibid., at 392.

[56]The "fruit-of-a-poisonous-tree" metaphor was introduced in *Nardone v. US*, 308 US 338 at 341 (1939).

amendment wrong, i.e. as a consequence of giving property unlawfully seized back to its lawful holder. As a matter of fact, the enlargement of the rule resulted from the idea that if the devolution of property is to make any sense at all it must preclude not only every *direct* use but also every *indirect* use of this property. The Court's prime concern was to avoid the position in which a fourth amendment possessory wrong could serve as a basis for a future lawful encroachment upon the privacy interests inherent in the property seized, in such a way that compliance with the fourth amendment would ultimately be justified through its previous violation[57]. In fact, if the fourth amendment were to allow the indirect use of property as evidence it would be offering a clue as to how to avoid compliance with the fourth amendment itself; for it would be very easy to return the property unlawfully seized to its lawful holder, i.e. to avoid any direct use of it, and then use the information obtained through the unlawful seizure. The Court's prime concern was thus to avoid the fourth amendment becoming reduced to a mere "form of words"[58].

We have thus far seen how the *Silverthorne* decision detached the exclusionary rule from the exclusive protection of property and attached it to the protection of the privacy interests inherent therein. Yet the *Silverthorne* decision went a step further and set the basis for the application of the exclusionary rule in all *independent privacy wrongs*: "[t]he essence of a provision forbidding the acquisition of evidence *in a certain way* is that not merely evidence *so acquired* shall not be used before the court but that it shall not be used at all"[59]. With these words the Court was suggesting that the "fruit-of-a-poisonous-tree" theory ought to apply to searches and seizures which are unlawful on a purely formal basis. In other words, it was suggesting that the exclusionary rule ought to apply in all fourth amendment violations[60].

Conceived as an instrument for the protection of independent privacy interests, the exclusionary rule presents the problem of its own justification. It certainly cannot be justified on the basis of the courts' duty to bring on-going wrongs to an end, for violations of privacy are "fully accomplished" wrongs[61]. That is they are wrongs

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[57]An interesting analysis of the issue of compliance through violation in the above sense has been made by W.C. Heffernan, "On Justifying Fourth Amendment Exclusion" (1989) *Wis. L.Rev.* 1193 at 1206 et seq. and 1229 et seq.

[58]*Silverthorne Lumber Co. v. US*, at 392. This argument had already been used in Weeks: "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offence, the protection of the Fourth Amendment ... is of no value" (*Weeks v. US*, at 393).

[59]*Silverthorne Lumber Co. v. US*, at 392 (1920) (emphasis added); *Wong Sun v. US*, 371 US 471 at 485 (1963).

[60]In its new conceptual framework, the exclusionary rule has also justified the refusal to testify on questions based on information obtained in violation of the fourth amendment (see *Lanza v. NY*, 370 US 139 (1962); *Gelbard v. US*, 408 US 41 (1972)).

[61]*US v. Leon*, 468 US 897 at 906 (1984).

which both start and finish the very moment privacy is infringed upon, so that by the time some evidence is used at trial the violation of privacy can no longer be brought to an end[62]. Nor can the rule be justified on the basis of the Court's reasoning in *Silverthorne*: the danger that a fourth amendment violation might be upheld because of a previous compliance with this provision does not exist in the context of independent privacy wrongs. The Supreme Court seems to have resented these difficulties, for as yet it has not provided any clear justification for the application of the rule in the context of privacy interests, as it had done in previous phases of its evolution. Studying what the grounds for the exclusionary rule can be in this context will be the objective of the following paragraphs.

2.1.2 Present Doctrinal Positions

The justification of the exclusionary rule is today one of the most controversial issues in the context of the fourth amendment. All the different positions adopted in this context seem to have a common point of departure: the exclusionary rule is a way to prevent future constitutional wrongs from occurring. Based on this assertion, justifications of the exclusionary rule have gone in two directions. The rule has been justified either as a remedy against fourth amendment violations or in purely preventive terms.

[A] The Rule as a Remedy

The exclusionary rule has been defended on the grounds that it is a remedy against fourth amendment privacy violations, in the sense that its application leads to the enforcement of this provision. The grounds on which this assertion lies are somewhat unorthodox. In particular, it claims that the rule enforces the fourth amendment because it can prevent future fourth amendment violations. The preventive force of the rule, it is argued, lies in the fact that it discourages infringements of fourth

[62]W.C. Heffernan has suggested that, in a less strict sense, fourth amendment privacy wrongs could be considered on-going. Even if there is not a continuous infringement of privacy interests, he claims, there is a continuous *pattern* of fourth amendment infringements, that is, "a pattern of arrests, searches and so on, in which each wrong is characterized by a similar violation of interests protected by the fourth amendment" ("On Justifying ..." at 1201). Yet, the author himself admits that using the concept "on-going wrong" in this latter sense can be confusing and problematic. He then justifies the exclusionary rule on the following basis: every fourth amendment privacy wrong constitutes a pattern of wrongs which are not on-going, but independent from one another, yet such wrongs are connected in such a way that if a wrong is committed the next one appears as a threatened wrong and must, therefore, be prevented. Hence the obligatoriness of the exclusionary rule (ibid. at 1201-1202).

amendment rights by making them unprofitable, that is by systematically barring the use at trial of any evidence obtained in violation of the fourth amendment. In other words, the exclusionary rule is considered a remedy because it achieves a *prospective enforcement* of the fourth amendment.

The premises of the above position are highly questionable. It is, in fact, highly questionable whether measures of 'prospective enforcement' can be regarded as remedies. Remedies are ways of reacting against violations that have already occurred. Their aim is to restore rights to the position they were before being violated or, should this not be possible, to offer a compensation of some kind. It is far from clear how a measure can be defined as a remedy on the basis of its potential to prevent future violations. Even if, as a hypothesis, the exclusionary rule could be qualified as a remedy in the terms described above, this might justify that it be occasionally applied but not that it be applied in every single case. Indeed, it can be considered a constitutional requirement that remedies against fourth amendment wrongs exist and are duly applied so that this provision can be enforced, yet the Constitution offers no grounds why a particular remedy should be preferred to any other. This is why claims that the exclusionary rule is a remedy are usually complemented by the claim that it is not just a remedy, but *the only effective* remedy against fourth amendment violations actually available, a reason why its application is regarded as a constitutional command.

The existing remedies against violations of the fourth amendment, so this argument goes, cannot be relied on as alternatives to the exclusionary rule. To begin with, such formal remedies have a very limited framework of application: fourth amendment victims can certainly undertake a criminal prosecution of the violators[63]; yet they must prove that the violation complained of was willful[64]. They can also seek an injunction against a fourth amendment violation by a law enforcing agency; yet they must prove that this agency has a policy that results in widespread fourth amendment violations or, moreover, that they themselves might be injured in the future by such a policy[65]. As was explained above, they can bring an action for damages against either state or federal officials directly under the fourth amendment, or a civil suit for trespass under state law; yet officers can oppose the defence of qualified immunity, which shields public officials from actions for damages unless their conduct was unreasonable in light of clearly established law[66]; moreover, many officers do not have the resources

[63]18 U.S.C. § 242 (1976).
[64]See *Screws v. US*, 325 US 91 (1945).
[65]See *Rizzo v. Goode*, 423 US 362 (1976) and *City of Los Angeles v. Lyons*, 461 US 95 (1983), respectively.
[66]See *Davis v. Scherer*, 468 US 183; *Elder v. Holloway et al.* 127 L. Ed. 2d 344 (1994) (pending publication).

to comply with a money judgement and compensate the victim of a fourth amendment violation. Furthermore, even within their limited framework, the above formal remedies are claimed to be totally ineffective in practice, since they do not actually give rise to any material remedy at all. The reason offered is that prosecutors, judges and juries are sympathetic to law enforcement officials and not to the usual victims of illegal searches and seizures. This gives the above remedies very little chance of success; not surprisingly, they are hardly ever used at all[67].

The argument that there is no alternative remedy to the exclusionary rule is thus relied on to defend its application as a constitutional requirement. The rule is considered, first of all, a constitutional requirement under the fourth amendment, but also under the due-process clause of the fourteenth amendment. The due-process clause of the fourteenth amendment imposes certain standards of criminal procedure which are considered implicit in the concept of ordered liberty[68]. The concept of ordered liberty implies the respect and protection of rights which are basic for a free society. Amongst these the Supreme Court has included the fourth amendment right against unlawful searches and seizures[69]. Therefore, insofar as the exclusionary rule is considered the only effective remedy against fourth amendment violations, its application is also a constitutional requirement under the fourteenth[70].

[B] The Rule as a Preventive Measure

Several prevention arguments have been raised to justify the exclusionary rule. The one most often claimed is that the rule helps to deter future fourth amendment violations by the police. In this instance, however, deterrence is not regarded as *the only effective remedy* against -future- fourth amendment violations. The pursuance of deterrence through the exclusionary rule is thus not considered a constitutional

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[67]On all the above questions, see C. Foote, "Tort Remedies for Police Violations of Individual Rights" 39 *Minn. L. Rev.* 493 (1955); Barrett, "Exclusion of Evidence Obtained by Illegal Searches - A Comment on *People v. Cahan*, 43 *Cal. L. Rev.*" 565 (1955); Monrad G. Paulsen, "Safeguards in the Law of Search and Seizure" 52 *Nw U. L. Rev.* 65 (1957); J. Kaplan, "Search and Seizure: A No-Man's Land in the Criminal Law" 49 *Cal. L. Rev.* 474 at 486 et seq. (1961); B.C. Canon,"Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion" 62 *Ky L. J.* 681 (1974); Y. Kamisar, "The Exclusionary Rule in Historical Perspective: the Struggle to Make the Fourth Amendment more than an 'Empty Blessing'", 62 *Judicature* 337 (1979); P. Stewart, "The Road to *Mapp. v. Ohio* ..." 1383 (1983); Sam J. Ervin, Jr., "The exclusionary rule: An Essential Ingredient of the Fourth Amendment", (1983) *The Supreme Court Review* 283 at 296. See also the dissenting opinion of the Justices Murphy and Rutledge to *Wolf v. US*, at 41 et seq.

[68]These standards were primarily addressed to the states. On the development of the due-process clause, see Kamisar, "Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts" 43 *Minn. L. Rev.* 1083 (1959).

[69]*Wolf v. Colorado*, 338 US 25 (1949).

[70]*Mapp v. Ohio*, 367 US 643 (1961).

requirement; instead, it is regarded just as one possible policy within the framework of constitutional rights. In the case of evidence unlawfully seized, courts are confronted with a choice between deterring fourth amendment violations, on the one hand, and seeking effective law enforcement, on the other. The deterrence argument shows a general preference for the former option, yet it does not assume that the exclusionary rule must be applied in any event. Rather, it assumes that the particular circumstances of each case must be analysed, so as to measure the extent to which the interest in law enforcement is presently outweighed by the interest in deterring constitutional wrongs.

The support this argument offers to the exclusionary rule is very limited. It does not justify that evidence be always excluded, but only in as far as this might help to deter law enforcement agents from violating the fourth amendment in the future and, even then, only to the extent that the interest in such deterrence outweighs the interest in law enforcement. In fact, the deterrence argument has been more often used by the critics of the exclusionary rule than by its defenders. Justifying the rule on a deterrence-policy basis, they argue, can only lead to its suppression. In this context, it is claimed that the rule does not actually deter at all and that, even if it did, the social price it imposes is too high for it to be considered reasonable in policy terms[71]; after all, they conclude, the exclusionary rule is not a remedy against fourth amendment violations, hence it is not a means to enforce the fourth amendment, but is merely the result of a particular and costly policy[72].

A second prevention argument focuses on the need to preserve judicial integrity. This argument claims that the admission at trial of evidence unlawfully seized amounts to the judicial legitimation of a wrong, thus to the participation of the judiciary in its commission[73]. The exclusionary rule is regarded as the only way to prevent the judiciary from getting involved in such "dirty business". As was the case of the

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[71]On this issue, see the study made by D.H. Oaks, "Studying the Exclusionary Rule in Searches and Seizures" 37 *U. Chi. L. Rev.* 665 (1970). See also W.R. La Fave, "Improving Police Performance through the Exclusionary Rule. Part I: Current Police and Local Court Practice; Part. II: Defining the Norms and Training the Police", 30 *Miss. L. Rev.* 391 and 566 resp. (1965), where, without arguing for the uselessness of the exclusionary rule, the author points out its problems and deficiencies as a deterrence device. A more elaborated version of this argument has been developed by T.S. Schrock & R..C. Welsh, "Up from Calandra: the Exclusionary Rule as a Constitutional Requirement", 59 *Minn. L. Rev.* 251 (1974). The authors claim that courts may not admit at trial evidence unlawfully seized because this would perpetuate the wrong that was committed through the unlawful seizure. Thus, courts must not apply the exclusionary rule because they are under the duty to prevent or to avoid the commission of future wrongs; they must apply it because they are under a duty to put a remedy to wrongs committed in the past. According to these authors, therefore the fourth amendment includes a right to the exclusionary rule. Compare this with the position held by W.C. Heffernan, "On Justifying ...".

[72]See R.A. Posner,"Rethinking the fourth Amendment", (1981) *The Supreme Court Review* 49.

[73]This argument was first raised by Justice Holmes in his dissenting opinion to the case of *Olmstead v. US* (277 US 438 at 470 (1928)).

previous prevention argument, the judicial-integrity argument does not justify that evidence be excluded whenever obtained in violation of fourth amendment rights, but only that it be excluded in cases where judicial integrity is at stake -for example, the exclusionary rule is not justified if an unlawful search and seizure was carried out in good faith, for judicial integrity is not endangered by the confirmation of an involuntary wrong. Within those limits, however, the judicial-integrity argument does impose exclusion as a rule. Admittedly, the need to preserve judicial integrity is not a constitutional requirement but is, as in the case of deterrence, the result of a policy choice. In cases where relevant evidence has been unlawfully seized, a choice has to be made between the interest in preserving judicial integrity, on the one hand, and the interest in encouraging effective law enforcement, on the other. This choice can be made on a case-by-case basis, after due balancing of the particular circumstances involved. Yet those who defend the judicial-integrity argument have adopted a general and abstract position with respect to this balance. In their view, "it is [i.e. it is *always*] less evil that some criminals should escape than that the Government should play an ignoble part"[74].

Still a third prevention argument has sometimes been raised: evidence unlawfully seized must be excluded insofar as its use would amount to the commission of a constitutional wrong by the judiciary. The wrong referred to is a due-process wrong. The possibility that the exclusionary rule be a constitutional requirement under the fourteenth amendment due-process clause has already been discussed above. Independently of those considerations, however, some commentators have noted that the due-process clause forbids the use of evidence gathered in a manner which is not simply unlawful but, additionally, so brutal or unconscionable that it "shocks the conscience"[75], that is that the admission at trial of evidence so gathered would amount to a due-process wrong[76]. This argument thus presents the exclusionary rule as the only way to prevent an imminent constitutional violation and, to the extent that this is so, as a rule which must be systematically applied. For one thing, courts' duty to enforce constitutional rights implies that they must take measures to prevent threatened constitutional wrongs from occurring[77]. Thus, as far as evidence obtained in a

[74]Ibid. at 470.

[75]*Rochin v. California*, 342 US 165 at 172 (1952).

[76]T.S. Schrock & R..C. Welsh, "Up from Calandra ..." at 335 et seq.; W.C. Heffernan, "On Justifying ...", at 1202. As the author here shows, the Court seems to reject the idea that the use at trial of evidence unlawfully obtained can be a new fourth amendment wrong.

[77]The role of courts in face of threatened wrongs has been studied by W.C. Heffernan, "On Justifying ..." at 1196 et seq. Of particular interest is Heffernan's remark that the Supreme Court actually follows the above-suggested doctrinal line in the context of threatened fifth and sixth amendment wrongs in trial settings, that is, that the Court requires the judiciary to prevent such wrongs from occurring.

"shocking" manner is concerned, the application of the exclusionary rule appears as a constitutional requirement.

The three arguments described above approach the exclusionary rule as a means of preventing future constitutional violations. There is, however, a fundamental difference between the three arguments. The first one regards the exclusionary rule as the result of a policy option the application of which requires case-by-case policy considerations; the second one still regards the rule as a policy option, yet in this case the option has been made in very general, abstract terms, so that there is a whole spectrum of cases in which the exclusionary rule must be automatically applied without further consideration as to the particular circumstances; the third argument considers that in certain cases the exclusionary rule is a constitutional requirement.

2.1.3 An Alternative Approach to the Exclusionary Rule

I would now like to put forward a third approach to the exclusionary rule, as an alternative to both the 'prospective-remedy' and the 'preventive-policy' explanations of the rule which, to my knowledge, has not yet been adopted by American commentators. What this approach proposes is that the exclusionary rule be regarded, first, as a remedy in the ordinary sense of the word, that is, that it be regarded as a measure aimed at repairing past wrongs; second, it proposes that the rule be regarded as a remedy which must always be applied in fourth amendment violations independently of any policy considerations. I will now try to develop these two points.

First, the exclusionary rule must be regarded as a remedy because it helps to bring things back to the state they were in before the fourth amendment wrong occurred. This is true in the context of both property and privacy wrongs. In both these instances, the rule helps to enforce the fourth amendment by way of erasing the consequences of the fourth amendment wrong as far as this proves possible. In the context of property wrongs, this is done by way of bringing the on-going property wrong to an end; in the context of privacy wrongs, this is done by way of minimising the consequences of the wrong, that is by way of preventing the information gained in violation of a privacy interest from being publicised any further.

Second, the exclusionary rule must be applied in every case of violation of the fourth amendment. This is not because the rule is a remedy (some alternative remedies could always be applied), nor is it because it is the only effective remedy available against fourth amendment violations (the obligatoriness of the exclusionary rule would

then be purely coincidental). The obligatory application of the rule results from the very nature of the remedy it provides, which consists of erasing the consequences of the violation of the fourth amendment right. For one thing, erasing the consequences of violations of constitutional rights is part of the court's duty to enforce these rights. Enforcing constitutional rights implies that means must be provided so that rights can be exercised free from unlawful interferences; it thus implies that if rights should be interfered with in their protected scope they must be restored to the position they were in before the interference in question occurred. Hence the obligatoriness of the exclusionary rule[78].

2.1.4 The Position of the Supreme Court

Originally, the Supreme Court regarded the exclusionary rule as a constitutional right enshrined within the fifth amendment. Also when the rule started to be justified on the basis of the fourth amendment, the Court continued to regard it, somewhat irreflectively, as a constitutional right[79]. This position only changed in the case of *Wolf v. US*[80]. Here the exclusionary rule was explicitly referred to as a remedy, to be more precise as a 'prospective remedy', yet it was not considered *the only actual remedy* against fourth amendment violations, that is, it was not regarded as a constitutional must. The doctrine introduced in *Wolf* was not immediately confirmed by the Court in subsequent cases. Rather, the Court struggled to reach the opposite aim, i.e. to minimise the effects of the *Wolf* ruling and make the exclusion of evidence appear again as a constitutional requirement[81]. To this end, the judicial-integrity, the matter-of-due-process and the single-actual-remedy arguments were all put forward. The struggle did not prove very fruitful, however. Already in the 1960s[82], the Court started clearly to defend the view that the exclusionary rule was a deterrence policy measure the application of which had to be decided on a case-by-case basis. The exclusionary rule cannot be a remedy, argued the Court, because it does not "cure the invasion of the defendant's rights which he has already suffered", since fourth amendment wrongs are

[78]Compare this approach to the exclusionary rule with the position defended by Heffernan, which was explained in footnote 62 above.
[79]See, e.g., *Harris v. US*, 331 US 145 (1947); *McDonald et al. v. US* 335 US 451 (1948).
[80]338 US 25 at 28 (1949).
[81]For the most significant examples, see *Elkins v. US*, 364 US 206 (1960); *Mapp v. Ohio*, 367 US 643 (1961); *Abel v. US*, 362 US 217 (1960); *Wong Sun v. US*, 371 US 471 (1963); *Ker v. California*, 374 US 23 (1963); *Beck v. Ohio*, 379 US 89 (1964); *Linkletter v. Walker*, 381 US 618 (1965); *Terry v. Ohio*, 392 US 1 (1968).
[82]*Terry v. Ohio*, 392 US 1 (1968); *Alderman v. US*, 394 US 165 (1969).

"fully accomplished by the unlawful search or seizure itself"[83]. Moreover, the Court called neither the judicial-integrity argument nor the 'matter-of-due-process' argument to play any significant part in the conception of the rule. This position has been sustained by the Court for many years. In some recent cases, the Court seemed to look at the exclusionary rule again as the only effective 'remedy' against fourth amendment violations, hence as a constitutional command[84]. For the time being, however, hopes that the Court's approach to the exclusionary rule might change have been dispelled by one the Court's latest statements on the issue: "the exclusionary rule is a *judicially created* remedy designed to safeguard against future violations of Fourth Amendment rights through its deterrent effect ... *The Amendment does not expressly preclude the use of evidence obtained in violation of its commands*, and exclusion is appropriate *only* where the rule's remedial objectives are thought *most* efficaciously served"[85].

It thus appears that, as the exclusionary rule started to apply as a means to protect the privacy interests guaranteed by the fourth amendment, the Court has tended to regard the rule either as a 'prospective remedy' or, preferably, as a policy measure, hence as a measure whose application has to be decided on balance. How can this misconception of the role of the exclusionary rule under the privacy interpretation of the amendment be explained? The most immediate answer is that the Court has never found any solid grounds to justify the application of the exclusionary rule under a privacy rationale, such as the grounds offered by the alternative interpretation of the rule suggested above. Indeed, under a privacy rationale the Court simply has not thought of the exclusionary rule as a means to bring things back to the state they were in before the fourth amendment wrong occurred. This is most probably due to the fact that, unlike violations of property interests, violations of privacy are not on-going wrongs but complete ones. The Court has never thought that courts have a duty to stop not only on-going wrongs, but also the on-going consequences of completed wrongs.

The above answer is not fully satisfactory, however. One might still wonder what ever stopped the Supreme Court from thinking of the exclusionary rule as a real remedy. This, of course, is just a matter for speculation. Yet one thing is clear: regarding the application of the exclusionary rule as a matter of policy is in tune with the more general attitude of the Court towards the right to privacy, that is, it is in tune with its attitude of minimising the importance of protecting the right. As has been argued on previous occasions, the attitude of the Supreme Court towards the right to

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[83] *U.S. v. Leon*, 468 US 847 (1984); see also *US v. Calandra*, 414 US 338 (1974); *Stone v. Powell*, 428 US 465 (1976).
[84] See *James v. Illinois*, 493 US 307 (1990); *NY v. Harris*, 495 US 14 (1990).
[85] *Arizona v. Evans*, 1995 U.S. LEXIS 1806 (pending publication) (emphasis added).

privacy seems to rely on the following grounds: the right to privacy is selfishly held by individuals for the sole purpose of developing their own personality and is exercised even at the cost of depriving society and the State from information necessary for the promotion of the well-being and preservation of those individuals. This perception of the right to privacy as purely individualistic and opposed to the common good becomes particularly acute when its protection clashes with the interests of law enforcement. It is consistent with this that, when law enforcement is at stake, the Court avoids regarding the protection of privacy through the exclusionary rule as a matter of principle. Instead, it prefers to put things differently and strike a balance between the interest in protecting privacy through the potential deterrence of future violations, on the one hand, and the interest in actual law-enforcement, on the other. Needless to say, the result of this balancing will not always be as favourable to the protection of the right to privacy as it should.

Regarded as a policy measure, the decision whether or not the exclusionary rule applies in a particular case is the result of striking a balance between the importance of a piece of evidence and the potential for deterrence inherent in the exclusion of this piece of evidence at trial. The balance which controls the application of the exclusionary rule must be and has always been struck on a case by case basis; yet, as in the case of the definition of the protected scope of the fourth amendment, the Supreme Court has placed the results of this balance into more or less fixed exceptions to the application of the exclusionary rule. Let me mention the exceptions I have been able to single out.

First, the Court has imposed the so-called 'good-faith exception'[86], according to which evidence unlawfully obtained may be admitted at trial if the law-enforcing agent that carried out the search and seizure in question reasonably believed that it was lawful. Indeed, under a deterrence rationale, no benefit derives from applying the exclusionary rule in such cases[87]. A particular consequence of this exception is that the Supreme Court's rulings on the fourth amendment only have prospective effect[88]. A second exception has been drawn from the idea that evidence unlawfully seized may be

[86] *U.S. v. Peltier*, 422 U.S. 531 (1975); *US v. Ceccolini*, 435 US 268 (1978); *Michigan v. DeFillippo*, 443 US 31 (1979); *Rawlings v. Kentucky*, 448 US 948 (1980); *U.S. v. Leon*, 468 US 897 (1984); *Massachussets v. Sheppard*, 468 US 981 (1984). In the context of telecommunication surveillance, see *Scott v. US*, 436 US 128 (1978).

[87] As a result, however, the police is given some control over the application of the exclusionary rule, in clear contradiction with the deterrence rationale of the rule. The good-faith exception has been criticised on these grounds by W.J. Mertens & S. Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law", 70 *The Georgetown L. J.* 365 (1981).

[88] *Linkletter v. Walker*, 381 US 618 (1965); *Fuller v. Alaska*, 393 US 80 (1968); *Desist v. US*, 394 US (1969); *Kaiser v. NY*, 394 US 280; *US v. White*, 401 US 745 (1970); *US v. Peltier*, 422 US 531 (1975).

used at trial if it is obtained again by completely independent, lawful means. By way of stretching this idea to its limits the Court has arrived at the so-called 'inevitable-discovery exception'[89]. This exception applies to instances where the evidence at stake was not *actually* obtained by an independent, lawful source but where it would *ultimately or inevitably* have been thus obtained if their unlawful acquisition had not previously occurred. Third, under certain circumstances the Court has admitted an 'impeachment exception'[90] to the exclusionary rule. Only consideration of very weak deterrence interests, it has argued, actually suggest that evidence aimed at impeaching the credibility of a witness be suppressed on the basis that its search and seizure was unlawful. Finally, the Court has also admitted some miscellaneous exceptions: the rule does not apply, for example, when the piece of evidence at stake is the defendant's own body or identity[91], nor does it apply in civil trials[92], exceptions which have particular importance in cases of deportation of aliens, as will be seen in the next chapter. The civil-trial exception goes hand in hand with the idea, already referred to in the previous chapter, that the fourth amendment is primarily regarded as an aspect of criminal law, although nothing in the wording of this provision indicates that it should not apply in civil cases. The civil-trial exception could also find a plausible justification on the very origins of the exclusionary rule: as has been explained, this rule first arose as a result of interpreting the fourth amendment in combination with the fifth amendment right against self-incrimination, a right which only applies in the context of criminal law[93].

It is difficult to predict whether the above exceptions would continue to apply if the rule were regarded again as a 'prospecitve remedy'. Strictly speaking, regarding the exclusionary rule as a remedy implies that it must apply without exceptions in as far as a piece of evidence derives from a constitutional wrong as the 'fruit of a poisonous tree'. The only 'exceptions' to the rule can be cases which fall outside the 'fruit-of-a-poisonous-tree rule' itself. This is for example the case of evidence unlawfully seized which is contemporaneously or subsequently obtained or re-obtained by completely independent, lawful means. Besides, the 'fruit-of-a-poisonous-tree rule' does not extend ad infinitum. To being with, it does not cover cases where the connection between the illegal search and seizure and the acquisition of the evidence in question is "speculative or indirect"[94]. In addition, the taint of the illegal act can be considered

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[89]*Williams v. Brewer*, 430 US 387 at 407 (1977); *Nix v. Williams*, 467 US 431 (1984).
[90]See *Walder v. US*, 347 US 62 (1954); *US v. Havens*, 446 US 620 (1980). For a thorough analysis of the issue, see Mary Jo White, "The Impeachment Exception to the Constitutional Exclusionary Rules" 73 *Col. L. Rev.* 1476 (1973).
[91]*Gerstein v. Pugh*, 420 US 103 (1974); *INS v. Lopez-Mendoza*, at 1039.
[92]*US v. Janis*, 428 US 433 (1976); *INS v. Lopez-Mendoza*, 468 US 1032 (1984).
[93]Akhil Reed Amar, "Forth Amendment First Principles" 107 *Harv. L. Rev.* 757 at 791 (1994).
[94]*US v. Crews*, 445 US 463 (1980); *Segura v. US*, 468 US 796 (1984); also in this sense, *NY v. Harris*, 495 US 14 (1990).

purged if the illegal act is separated from the acquisition of evidence by a long enough lapse of time[95] or by certain events the significance of which purges the original illegality -typically the voluntary yielding of evidence or the intervention of an independent magistrate[96].

In spite of all that, I think it unlikely that an interpretation of the exclusionary rule as a prospective remedy could overrule all the policy based exceptions to its application. My impression is based upon two considerations: first, these exceptions are deeply rooted in the case-law of the Supreme Court; second, regarding the exclusionary rule as a prospective remedy cannot provide solid theoretical grounds for abandoning such well-established case law. The reason is that most exceptions to the exclusionary rule are justified on the basis of the potential for the exclusionary rule to deter future fourth amendment wrongs, which ultimately is also the aspect of the exclusionary rule that the 'prospective remedy' doctrine stresses. In order that a change in case law could be achieved, the exclusionary rule would have to be regarded as a *real* remedy, that is as a means of bringing the consequences of the past violation of a right to an end, hence as a remedy that must be applied by courts as part of their duty to enforce constitutional rights. Before the Court can ever think of approaching the exclusionary rule as a real remedy against violations of privacy, however, its approach to the right to privacy would have to experience a more fundamental change. The Court would have to stop regarding this right as suspicious and as going against the common good and would have to start regarding it with a more sympathetic eye; it should even start giving this right its due as a basic condition for deliberation, for the free exercise of fundamental rights and for the existence and preservation of the democratic system.

To summarise, the way the Supreme Court has interpreted the exclusionary rule has been subject to fluctuations which reflect the doctrinal debate on the issue: the Court has regarded the rule sometimes as a 'prospective remedy', sometimes as a preventive measure imposed as a matter of policy. This latter position has prevailed since the late 1960s. Since then the Court has decided on the application of the exclusionary rule by way of striking a balance between the interest in the protection of privacy, on the one hand, and the interest in law enforcement, on the other; moreover, the interest in the protection of privacy has not been measured by reference to the violation of privacy that already may have occurred, but by reference to the potential for deterrence inherent in the exclusion at trial of evidence obtained in violation of the fourth amendment. This approach to the exclusionary rule is in perfect tune with the attitude of the Court

[95] *Wong Sun v. US*, 371 US 471 at 485 (1963); *Taylor v. Alabama*, 457 US 687 (1982).
[96] *Wong Sun v. US*, 371 US 471 at 485 (1963); *Johnson v. Louisiana*, 406 US 356 (1972); *Brown v. Illinois*, 422 US 590 (1975); *US v. Ceccolini*, 435 US 268 (1978).

towards the right to privacy, which conceives it as a purely individualistic interest the protection of which ought to be minimised for the sake of the common good. In order that a fundamental change in the conception of the exclusionary rule can occur, the Court would thus have to depart from a doctrine more favourable to the right to privacy and to its protection.

2.1.5 The Exclusionary Rule in the USC

Chapter 119 of Title 18 of the USC explicitly regulates its own exclusionary rule, on the basis of which victims of illegal interception of wire or electronic telecommunications can move to suppress evidence thus illegally obtained in as far as it incriminates them (§§ 2515 and 2518 (10); see also § 2517 (5)). So does Chapter 36 of Title 50 of the USC (§ 1806 (e)-(h)). As opposed to the interpretation of the exclusionary rule attached to the fourth amendment, the statutory exclusionary rule is clearly provided as a remedy whenever evidence is the result of illegal interference with wire or electronic telecommunications[97]. Moreover, it is provided as a remedy in all kinds of trials and hearings, regardless of whether they are criminal or civil. This statutory exclusionary rule is clearly an improvement on the constitutional exclusionary rule. The only question is whether it has any influence over this latter.

The answer is that it does, in the same way as the statutory definition of the coverage and of the protected scope of this right influences the definition of the coverage and of the protected scope of this right at the constitutional level. As a result, there is a high chance that the exclusionary rule will apply with consistency in cases of telecommunication surveillance, since they will tend to be solved on statutory grounds. Nevertheless, as the Supreme Court itself has admitted[98], the constitutional and the statutory exclusionary rules are conceptually different. The relevance of this statutory exclusionary rule is thus more a matter of fact than a matter of theory and must be taken with the same reservations as the importance of the statutory definition of the protected scope of the right to the secrecy of telecommunications. Strictly speaking, therefore violations of the constitutional right to the secrecy of telecommunications are subject to the exclusionary rule in the same terms as other cases of unconstitutional searches and seizures are.

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[97]However, according to the Supreme Court evidence need be suppressed only for a failure to satisfy statutory requirements that directly aim at limiting the use of wire-taping to situations clearly calling for such an extraordinary investigative device (*US v. Donovan*, 429 US 413 (1977)).

[98]*Alderman v. US*, 394 US 165 at 176 (1969). Here the Court drew a distinction between the congressual power to regulate an exclusionary rule and the exclusionary rule "for constitutional purposes". See also *US v. Giordano*, 416 US 505 (1974).

2.2 Germany

The most characteristic remedy against violations of the secrecy of telecommunications is, in Germany as in the United States, the exclusionary rule[99]. This rule has often been deduced from the Basic Law, yet it has a more solid and explicit basis in statutory law, which contemplates it as a remedy in cases where the protected scope of the statutory right to the secrecy of telecommunications is infringed upon. As was explained in the previous chapter, the protected scope of this statutory right defines the protected scope of the constitutional right to the secrecy of telecommunications. One can therefore rely on the statutory exclusionary rule as a remedy which applies when the protected scope of the constitutional right to the secrecy of telecommunications is infringed upon, hence as a constitutional remedy. I will start by looking at the statutory regulation of the exclusionary rule.

First of all, let me recall that the protected scope of the fundamental right to the secrecy of telecommunication is limited, among others, by two sets of norms. These are, on the one hand, §§ 94 et seq. of the StPO, which regulate the lawful interception of telecommunications for the purposes of ordinary law-enforcement and, on the other hand, the so-called G 10, which regulates such lawful interception for the purposes of national security and protection of the democratic order. Although neither of these two sets of norms explicitly regulates an exclusionary rule, both of them seem to impose it implicitly. Both StPO § 100b (5) and G 10 § 7 (3) state that information obtained through measures of surveillance may only be used for the prosecution of certain crimes. These are for the most part the crimes that may authorise a measure of surveillance: they are the crimes listed in § 100a and in G 10 § 2, respectively, together with the crimes listed in § 138 of the StGB in the context of surveillance carried out under the G 10. Explicitly, these two provisions only ban the use of information obtained through telecommunication surveillance for the prosecution of non-listed crimes; yet, they implicitly refer to measures of surveillance carried out in accordance with the prescriptions of, respectively, § 94 et seq. and the G 10. One can therefore assume that both StPO § 100b (5) and G 10 § 7 (3) contain an implicit rule, i.e. they rule that, a fortiori, information gathered in a manner contrary to these provisions should not be admitted as evidence at trial.

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[99]The German exclusionary rule has been studied by W. Pakter, "Exclusionary Rules in France, Germany and Italy", 9 *Hastings Int'l and Comp. L. Rev.* 1, at 38 et seq.(1985).

StPO § 100 b (5) and G 10 § 7 thus impose what we could call an 'explicit material condition' and an 'implicit formal condition' in order that information obtained through surveillance may be used as evidence at trial. The formal condition is that information must have been legally obtained; the material condition is that information may only be used in the prosecution of some particular crimes[100]. Note that the use of information is not limited to the crime which initially justified the measure of surveillance. Information about other crimes accidentally obtained may be used at trial provided that the crime in question be included in the list referred to above. Moreover, if this condition is fulfilled information may be used at trial even against a third person, i.e. a person different from the one originally under investigation[101]. Beyond the limits of these two conditions, information obtained through surveillance may not be used at trial at all, not even indirectly[102]. Yet Germany does not have a well-developed doctrine of the "fruits of the poisonous tree" and at any rate this doctrine has not been taken to its last consequences; far from it, evidence has been admitted at trial when it appeared to be connected to or influenced by a measure of surveillance in too vague or remote a way. The extent to which this is or not the case can only be decided on the basis of the factual circumstances of every particular case[103].

The statutory regulation of the exclusionary rule makes it a well-defined remedy which regularly applies whenever information obtained through surveillance does not fulfil the material and the -implicit- formal requirements imposed by the StPO § 100 b (5) and G 10 § 7 (3) for the use of evidence at trial. It thus regularly acts as an accepted exception to the procedural rule that in the investigation of the truth any piece of evidence, so long as relevant, may be introduced at trial (StPO § 244.2). I would now like to note that in the case of the StPO this statutory regulation is very recent[104], yet even before it was enacted the exclusionary rule had been applied in this context in rather systematic terms[105]. Even more important is that, over and above its statutory

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[100]A second material condition is embodied in the prohibition of intercepting certain privileged communications. This is notably the case with the oral conversations between a defendant and her lawyer (§ 148 StPO, see chapter 5); hence evidence obtained from the interception of such conversations may not be used at trial (see BGHSt 33, 347).

[101]BGHSt 26, 298 at 302; (1979) *NJW*, 1370 at 1371; 29, 23 at 24; 29, 244 at 247; 32, 10 at 15; BVerfGE 67, 157 at 182.

[102]For example, an inadmissible tape recording cannot be replaced by a transcript of its contents or by the testimony of a police officer who listened to it (BGHSt 27, 355 at 357; see also 29, 244 at 249 et seq.).

[103]See, e.g., BGHSt 27, 355 at 358 (a suspect's confession to a non-listed crime was deemed inadmissible because it was the result of having confronted the suspect with an unlawful tape recording); 32, 68 at 71; 35, 32 at 34 (a suspect's declaration was deemed admissible even though it resulted from an unlawful surveillance on the grounds that enough time has elapsed between the unlawful surveillance and the declaration as to detach the latter sufficiently from the former).

[104]§ 100 b (5) was introduced by Art. 3 of the law from 15th July 1992 (BGBl. I S. 1302).

[105]Also the rule that information accidentally obtained can only be used for the prosecution or investigation of one of the listed crimes was most commonly followed (BGHSt 26, 298 at 302; (1979)

regulation, the exclusionary rule has been regarded as a constitutional requirement which must apply in cases of direct violation of art. 10 of the Basic Law, to the extent that the application of the statutory exclusionary rule has been considered a requirement deriving directly from the Basic Law[106].

When studying the exclusionary rule in the United States I suggested a justification for applying this rule as a constitutional requirement in cases of violations of the constitutional right to privacy, in general, and of the constitutional right to the secrecy of telecommunications, in particular. I then defended the idea that the obligatoriness of the exclusionary rule derives from the fact that it helps to restore the constitutional right to privacy or to the secrecy of telecommunications to the position it was in before it was ever violated. In particular, the exclusionary rule prevents the consequences of the violation privacy (the divulgence information obtained through a privacy wrong) from expanding any further, thereby helping to bring things back to their original state of secrecy, or at least as close to this state of secrecy as possible[107]. This justification can very well apply to the German case. It even has the support of the Constitutional Court, which has affirmed that the use at trial of evidence obtained in violation of the right to privacy constitutes another step in the violation of this right[108]. Also in the context of the right to the secrecy of telecommunication, the Court has affirmed that "[t]he encroachment upon the fundamental right of art. 10.1 of the Basic Law continues through the use as evidence at trial of the information protected by the secrecy of telecommunication"[109]. The obligatoriness of the exclusionary rule thus lies in the courts' duty to enforce the Constitution[110].

NJW, 1370 at 1371; 29, 23 at 24). There are however exceptions: see, e.g. BGHSt 28, 129 ((1979) *NJW*, 990 at 992), where information obtained through wire-tapping was admitted against a third person in the prosecution of a non-listed crime upon the mere assumption of a connection between this non-listed crime and a listed one; see also the decision adopted by the 3rd. Camera of he Second Senat of the Constitutional Court on the 18th August 1987, according to which information accidentally obtained as a result of a lawful interference can be used for the prosecution of *any* crime ((1988) *NJW*, 1075).

[106]BGHSt 19, 273 (the court assumes the constitutional character of the exclusionary rule); 23, 329 at 331 (the question whether the rule is constitutionally imposed is left open); 29, 244 at 249. See also BVerfGE 85, 386 at 402.

[107]In Germany, this approach is also argued by T. Weigend, "Using the Result of Audio-Surveillance as Penal Evidence in the Federal Republic of Germany" 24 *Stanford J. Int'l L.*, 21 at 30 (1987).

[108]BVerfGE 34, 238 at 250. See also Kaiser, "Verwertbarkeit von Äußerungen Dritter während überwachter Telefongespräche (§ 100a StPO)" (1974) *NJW*, pp. 349-350.

[109]BVerfGE 85, 386 at 399 (my translation).

[110]This duty is explicitly imposed by art. 1.3 of the Basic Law; also § 28 EGGVG reminds us of the duty of courts to bring things back to the state they were in the context of the violation of a fundamental right by judicial authorities.

Conclusions

The three systems under consideration recognise material remedies against the violation of the right to the secrecy of telecommunications. Undoubtedly, the most significant of these remedies is the so-called exclusionary rule. The exclusionary rule is applied both in the United States and in Germany, whilst it is not contemplated in the ECHR. In fact, the Convention does not provide for measures to repair the violation of rights recognised therein; it only rules that, in the absence of total reparation, just satisfaction must be granted by the Court. As was argued above, only partial reparation for interferences with the secrecy of telecommunications is feasible; hence, according to the standards set by the Convention, just satisfaction always ought to be provided in cases where such interferences occur. However, the Convention organs are reluctant to accord just satisfaction unless some moral or other damage is actually shown which adds to the temporary deprivation of a Convention right in cases where no particular damage is shown, the Convention organs regard the favourable decision of the Court as a just satisfaction.

The ECHR therefore sets relatively low standards for the protection of the right to the secrecy of telecommunications. Both Germany and the United States provide more effectively for the protection of the right to the secrecy of telecommunications than the ECHR. In these two systems, courts have a duty to enforce fundamental rights, hence they must try to prevent their violation or, at least, they must offer reparation as far as this proves possible. As already pointed out, the most significant remedy for violations of the right to the secrecy of telecommunications is the exclusionary rule. I have argued that the role of this rule is to stop the on-going consequences of a violation of this right, by way of preventing the secrecy of an act of telecommunication unlawfully intercepted from being broken any further. This is what makes the rule part of the duty of courts to enforce fundamental rights recognised in the Constitutions.

Unfortunately, the exclusionary rule is not always thus understood by courts and commentators. In fact, if we compare the exclusionary rule attached to violations of the fundamental right to the secrecy of telecommunications in Germany with that in the United States, then we can see that the rule is systematically and uncontroversially applied as part of the right to the secrecy of telecommunications only within the former system. In the United States, the Supreme Court has rather regarded the exclusionary rule as a policy measure or, eventually, as a remedy for which it cannot find any convincing grounds. This conception of the exclusionary rule has run parallel to the idea that the rule applies in order to protect the privacy interests guaranteed in the fourth amendment. As a matter of fact, this conception of the exclusionary rule is connected

with the Supreme Court's vision of privacy as an individualistic interest the protection of which ought to be minimised. A consistent application of the exclusionary rule in the United States thus requires that the right to privacy be regarded in a more positive light than it is at present; ideally, the right to privacy ought to be regarded as a condition for participation, as it is in Germany.

Now, it is true that both in Germany and in the United States a exclusionary rule is regulated by statute in cases of telecommunication surveillance and that the statutory regulation of the rule prescribes that it apply systematically. The difference between Germany and the United States is that in the former system the systematic application of the exclusionary rule is also regarded as a constitutional requirement, which is not the case in the latter. In the United States, evidence obtained through unlawful telecommunication surveillance is excluded at trial only in as far as cases are solved on a statutory basis or, if they are solved on constitutional grounds, only in as far as the Supreme Court takes the statutory regulation as a pattern to be followed. The fact that the constitutional exclusionary rule depends upon its statutory equivalent is regrettable, for it is the constitutional regulation of a right that must grant this right the widest possible protection, so that it can be unconditionally guaranteed over and above inevitable fluctuations in statutes. Constitutional standards should be above and lead statutory standards; they should not be below and led by them.

CHAPTER 7: THE SUBJECTS OF THE RIGHT TO THE SECRECY OF TELECOMMUNICATIONS

Introduction

As a closing point of my study of the right to the secrecy of telecommunications, I will now discuss who are the subjects of this right. This last chapter will embrace two main areas. In section 1, I will discuss who are the addressees of the right to the secrecy of telecommunications (who can commit a violation of this right?); in section 2, I will look at its holders (who is recognised as a possessor of this right?). In both these sections I will deal with issues that concern the subjects of fundamental rights generally speaking, and not only the right to the secrecy of telecommunications. Yet if I have decided to dedicate this last chapter to the subjects of the right to the secrecy of telecommunications it is not only with a view to making as complete a study of this right as possible; it is also because some of the issues concerning the subjects of fundamental rights affect the right to the secrecy of telecommunications in some particular way. Moreover, one of these issues is crucial for understanding the right and the way it can keep pace with recent social and technological developments, something I have defined as the final aim of this thesis. I am thinking in particular of the question of whether the right to the secrecy of telecommunications can be exercised with third-party effects or 'Drittwirkung', i.e. whether this right can apply in private relationships. This question will occupy the major part of this chapter.

Studies of fundamental rights often start with an analysis of their subjects. I however have preferred to address this issue only at the end, once the object and the content of the right to the secrecy of telecommunications have already been discussed. This, I believe, will allow a better understanding of who the subjects of this right are, for we will be able to appreciate the extent to which the terms in which this right is recognised or protected may vary according to the holder of it or even to its addressee.

Section 1: The Addressees of the Right to the Secrecy of Telecommunications

It has been mentioned previously in this thesis that fundamental rights were conceived as instruments of defence against the State. Fundamental rights came to offer special guarantees against the State to certain areas of civil society regarded as particularly important, thereby strengthening the line which the movement of thought known as 'modernity' had drawn between the State and civil society. The natural addressee of fundamental rights is therefore the various holders of public power. However, this century has led to the question being posed of whether fundamental rights should not also apply to private relationships. This is the first issue I will address in this section. Following it, I will discuss which public authorities are the addressees of fundamental rights in the federal systems of Germany and the United States; to be precise, I will discuss whether the German *Länder* and the American States are regarded as the addressees of fundamental rights recognised, respectively, in the federal Basic Law and the federal Constitution of the United States. Each of these two issues will initially be dealt with in general terms and subsequently within the context of the right to the secrecy of telecommunications.

1. Public Power and the 'Drittwirkung'

Introduction

Fundamental rights are subjective rights of defence against the State. They are granted to the individual as 'public' rights, i.e. they are addressed against the public power and thus contrasted with the 'private' rights that individuals enjoy vis-à-vis other members of society. Public and private rights thus differ in their respective addressees. Often, they also differ in their respective object, that is, they also differ in the respective activity or area of reality they crystalise as a right: this is for example the case with the right to due-process, the right to access to court or with political rights, which can only be conceived as public rights against the State. This, however, need not be the case and there are areas of human reality which can be the object of both a public and a private right. The right to the secrecy of telecommunications is a good example of this: the secrecy of telecommunications is often recognised both as a fundamental right against State interference and as a private right against the interference of other individuals.

The above scenario is at the origin of the recognition of fundamental rights. Generally speaking, this scenario is presently still valid: the line between society and the State continues to exist and continues to be in need of protection against the tendency of the State to trespass on it; also fundamental rights continue to stand for certain areas of society which are particularly important and which therefore deserve particular protection against the State. Nevertheless, something has changed since the time fundamental rights were first recognised. The line between society and the State may continue to exist, yet it is now significantly blurred; for nowadays the State carries out functions which in principle should correspond to civil society, and vice versa. In particular, I would like to stress that individuals often are in a position from which they can exert so much legal or de facto power over other individuals that they can threaten a right as much as the State can. The decision whether such individuals have private or public duties vis-à-vis other individuals, hence whether they are the addressees of private rights or of public rights (fundamental rights) is by no means easy. In fact, such situations may pose the question of whether fundamental rights ought to be applied among private individuals, that is, whether fundamental rights ought to apply with a 'horizontal' or third party effect (*'Dritwirkung'*).

There are borderline cases in which fundamental rights can to some extent still be conceived of as elements of the relationship between society and the State, the only problem being the definition of the term 'State'. To the extent that this is so, the question of whether or not fundamental rights have third party effect can be avoided. The core of this question lies in the application of fundamental rights in relationships which are solely and purely private. The application of fundamental rights in this context cannot be justified on the basis of a re-definition of the scope of the terms 'public' or 'State'; rather, it requires that the very expression 'fundamental rights' be re-defined, so that the rights in question appear to be something wider than, and qualitatively different from, elements of the relationship between the State and society.

Grounds for the 'Drittwirkung' of fundamental rights are offered by the idea that these are not merely subjective rights of the individual, but also objective values or institutional guarantees, i.e. objective components of the legal system. The point of departure for defenders of the 'Drittwirkung' is that, in as far as fundamental rights stand for objective values of the legal order, they should be respected by individuals as well as by public power. This does not amount to disregarding the dimension of fundamental rights as subjective rights of the individual against the State, not even the fact that this is the primary dimension of fundamental rights. Disregarding this would distort the concept of fundamental rights as public rights and would imply the end of the dividing line between the public and the private, something which might bring about

more disadvantages than advantages: as one author has put it, "in 'privatising human rights' we may end up with a 'publicisation of the private' and renewed demands to be defended *from* the State"[1]. Defenders of the 'Drittwirkung' do not go as far as that. They do not claim that fundamental rights are or ought to be imposed on individuals in the same way as they are imposed on public powers; all they claim is that the objective dimension of fundamental rights influences private relationships, to the extent that it is the source of certain aspects of such relationships[2].

The influence of fundamental rights upon private relationships can be regarded as either direct or indirect. Most authors and courts hold that this influence can only be indirect: fundamental rights can only apply to private relationships in as far as these relationships are affected by the fact that the State has disregarded its obligations vis-à-vis fundamental rights, whether these obligations are of a negative or of a positive character. First, private relationships can be influenced by the State's disregard of its obligation not to infringe the exercise of fundamental rights (a State's negative obligations); this is the case with private infringements upon a fundamental right which are confirmed by a judicial decision. Secondly, private relationships can also be influenced by the State's disregard of its obligation to provide for the actual protection of fundamental rights, this including the duty to provide for an adequate legal framework so that fundamental rights can be exercised by inter alia private individuals (a State's positive obligations). The State's positive obligations obviously offer the broadest grounds for the 'Drittwirkung' of fundamental rights: on its basis, every private violation of a fundamental right can be said to stem from the State's inaction in protecting this right.

Thus the question of the 'Drittwirkung' of a fundamental right is triggered whenever laws do not offer sufficient protection to the exercise of fundamental rights against their violation by private individuals. A most significant example is the right to equality: most western States have officially abolished discrimination on the grounds of gender or race, yet they have not succeeded in stopping discrimination carried out by private individuals, discrimination which continues to take place at an alarming rate. Another example is the fundamental right to privacy, which civil society now starts to threaten in ways somewhat similar to those posed by public power: let us think, for example, of private investigators, private security bodies or the surveillance of employees by employers at the working place. Private investigators, employers and

[1]Andrew Clapham, 'The 'Drittwirkung' of the Convention", *The European System for the Protection of Human Rights*, Martinus Nijhoff Publishers, Dordrecht-Boston-London, 1993, p. 186 (emphasis in original, footnotes omitted).
[2]Robert Alexy, *Theorie der Grundrechte*, Nomos Verlagsgesellschaft, Baden-Baden, 1985, p. 489-490.

even private telecommunication services also threaten the right to the secrecy of telecommunications, hence the problem of the 'Drittwirkung' also arises in the context of this right. It is true that the secrecy of telecommunications is generally protected by statute against private interference. The question of the 'Drittwirkung' mostly arises in as far as coverage, scope of protection and content are more restricted in the case of the secrecy of telecommunications as a statutory right.

In the following pages I will analyse the extent to which the right to the secrecy of telecommunication is recognised with third-party effects in the ECHR, Germany and the United States. Within the context of each of these systems, I will first of all look at the way the question of the 'Drittwirkung' of fundamental rights has been addressed. This analysis will show that none of the systems under consideration includes private individuals among the direct addressees of fundamental rights, but each prefers to address the issue in an indirect way. Then I will apply the respective approaches of those systems to the 'Drittwirkung' in the context of the right to the secrecy of telecommunications. Finally, in Germany and the United States I will look at the extent to which this right is recognised as a private right by statute, with a view to seeing how this recognition affects the issue of the 'Drittwirkung'.

1.1 The European Convention on Human Rights

The first point of departure for the question of the 'Drittwirkung' is art. 1 of the ECHR, according to which "[t]he *High Contracting Parties* shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I ..." (emphasis added). Art. 1 clearly defines the Contracting Parties as the only addressees of Convention rights. This is confirmed in art. 19, which speaks of "the engagements undertaken by *the High Contracting Parties* in the present Convention" (emphasis added), and in art. 25, which states that "the Commission may receive petitions ... from any person ... claiming to be the victim of a violation *by one of the High Contracting Parties*" (emphasis added). Also the new art. 34, which will replace art. 25 of the Convention once Protocol No. 11 enters into force, is phrased in the same terms as this latter provision, save that the new art. 34 refers to the Court instead of to the Commission as the recipient of complaints.

All the above provisions indicate clearly enough that Convention rights cannot be directly applied against private individuals[3]. In spite of this, the question of the 'Drittwirkung' has arisen in the context of the Convention. Some authors have suggested that certain Convention provisions recognise rights in such general terms that they are clearly meant to apply to relations among individuals. Art. 8 is included among such provisions, for the first paragraph of this article is phrased in terms so "general and absolute" that it "constitutes an absolute imperative for the individual"[4]; moreover, since paragraph 2 only exceptionally allows interferences by public authorities, the conclusion is drawn that private interferences must be regarded as unconditionally forbidden[5]. This position is only defended by a minority, however, and in any event is not the position of the Convention organs. These apply the Convention to individuals only indirectly and at least in two different ways. Let us have a look at these two ways[6].

[A] Inadmissibility of Private Complaints which imply the Violation of a Convention Right

The Commission has rejected some applications that have been made to it on the grounds that they were seeking confirmation of the violation of some Convention right. To this end, the Commission relied on art. 17, which reads as follows:

> Article 17
> "Nothing in this Convention may be interpreted as implying for any State, group or persons any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention"

This provision has been interpreted as offering grounds for the inadmissibility of applications which seek the protection of a Convention right the exercise of which is focused on the violation of some other Convention rights. Let me give the two most significant examples. The first example concerns the decision of the German Constitutional Court to outlaw the German Communist Party. The Communist Party

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[3]On the other hand, the wording of art. 13 also allows for the opposite reading. It states that victims of a Convention wrong "shall have an effective remedy before a national authority *notwithstanding that* the wrong in question has been committed by *persons acting in their official capacity*" (emphasis added).

[4]Jan de Meyer, "The Right to Respect for Private and Family Life, Home and Communications in Relations between Individuals, and the Resulting Obligations for State Parties to the Convention" *Privacy and Human Rights* -Reports and Communications on the third colloquy about the European Convention on Human Rights-, Chapter 4, p. 255 at 262-263.

[5]Ibid.

[6]Much of what will be said here relies on A. Clapham, "The 'Drittwirkung' of the Convention ...".

presented an application before the Commission alleging the violation of its freedom of thought (art. 9), freedom of expression (art. 10) and freedom of association (art. 11). The Commission rejected the application on the grounds that the Communist Party aimed at imposing the dictatorship of the proletariat, which would imply the destruction of a number of rights recognised in the Convention[7]. The second example concerns the prosecution and imprisonment of the Chairman and Vice-Chairman of a Dutch political party for incitement to racial hatred. The Chairman and the Vice-Chairman complained before the Commission that their right to freedom of expression (art. 10) had been violated, yet the application was rejected on the grounds that it went against the right not to be discriminated against on grounds of race (art. 3 and 14)[8]. In both these cases, the Commission denied the protection of a Convention right to individuals who were using or intending to use this very right in order to violate the rights of others recognised in the Convention. One could also read these decisions of admissibility to mean that, although the Commission granted that national authorities may have indeed interfered with a Convention right, yet it considered the interference as one that did not encroach upon the protected scope of the right in question because it was justified under art. 17 of the Convention.

[B] The Boundaries of the Responsibility of the Contracting Parties

Above it was said that the question of the 'Drittwirkung' of fundamental rights has been brought to the fore by the fact that the line between the State and civil society is becoming more a more blurred. A most immediate way to make the Convention rights applicable in private relationships would therefore be to enlarge the scope of the term 'State' for the purpose of the application of the Convention, so that cases in which the line between the State and society is not clear would fall into the former category. The Convention organs have not followed this line, however. The Commission prefers to reject applications against bodies whose nature is on the borderline between the public and the private[9] or, rather, it prefers to leave the question unanswered[10].

On the other hand, the responsibility of the Contracting Parties has been thought to cover the decisions of courts in private-law cases. This means that the Contracting Parties are responsible for the private violation of a Convention right if this is

[7]Ap. No. 250/57, Dec. Adm. Com. of 20 July 1957, 1 *YB*, p. 223.
[8]Ap. No. 8348/78 and 8406/78, Dec. Adm. Com. of 11 Oct. 1979, 18 *D&R*, p. 187.
[9]See A. Clapham, "The 'Drittwirkung' of the Convention ..." at 166-167.
[10]Ap. No. 4515/70, Dec. Adm. Com. of 12 July 1971, 38 *Coll. Dec.*, p. 86; *Young, James and Webster v. U.K.*, judgement of 25 Nov. 1980, Series A, vol 44, Par. 49, p. 20.

confirmed by a national court[11]. Although perfectly accepted[12], this indirect way of applying the Convention in private relations has not been used very often, probably because not many applications have ultimately been concerned with a private violation of the Convention.

Undoubtedly, the most relevant mechanism for the application of the Convention rights in private relationships is the doctrine of the positive obligations of the Contracting Parties[13]. As was discussed in chapter 4, it is settled doctrine of the Convention organs that the Convention imposes upon the Contracting Parties the obligation not only to refrain from every interference with Convention rights but also to take positive measures to ensure that these rights be actually exercised. The existence and scope of the positive obligations of the Contracting Parties in the context of art. 8 of the Convention were studied in detail in chapter 4. There we saw that the Contracting Parties are positively obliged to remove obstacles to the exercise of the rights recognised in art. 8 for which they can be held responsible, this including the obligation to provide for an adequate legal framework for the exercise of these rights; we also saw that the Convention organs define the scope of the positive obligations of the Contracting Parties not only on the basis of the criterion of responsibility but also on the basis of the balancing criteria which define the protected scope of the negative dimension of art. 8 rights, i.e. restrictions of these rights may be imposed if they are "necessary in a democratic society" for the pursuance of one of the aims specified in art. 8.2. I would now like to add that the positive obligations of the Contracting Parties oblige them to remove obstacles and to provide for an adequate legal framework for the exercise of rights not only with respect to the public power but "even in the sphere of the relations of individuals between themselves"[14]. The positive obligations of the Contracting Parties is thus one of the indirect mechanisms through which the Convention is applied in private relations.

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[11]Ap. No. 10153/82, Dec. Adm. Com. of 13 Oct. 1986, 49 *D&R* p. 67; Ap. No. 11002/84, Dec. Adm. Com. of 8 March 1985, 41 *D&R*, p. 264; Ap. No. 11366/85, Dec. Adm. Com. of 16 Oct. 1986, 50 *D&R* p. 173; *Markt Intern Verlag and Klaus Beermann v. Germany*, judgment of 20 November 1989, Series A, Vol. 165, Par. 27, p. 17.

[12]See K. J. Partsch, written communication in *Privacy and Human Rights*, answering to J. de Meyer, "The Right to Respect for Private and Family Life ...", Chapter 4, p. 275 at 279. The author speaks in the context of applications claiming the right to guardianship of, or to visit, a child (respect for family life) and stresses that these applications are not addressed to the person who has the guardianship but against the public authority which has taken a decision about the guardianship or the visiting regime. However, Jan de Meyer prefers to see these cases as examples of direct 'Drittwirkung' (see J. de Meyer, "The Right to Respect for Private and Family Life...". at 267-268).

[13]This point is also stressed by P.J. Duffy, "The Protection of Privacy, Family Life and other Rights under Article 8 of the European Convention on Human Rights" (1982) *Yearbook of European Law*, pp. 199-200.

[14] *X and Y v. The Netherlands*, judgment of 26 March 1985, Series A, vol. 91, Par. 23, p. 11.

Let me now give some examples of indirect 'Drittwirkung' through the doctrine of the positive obligations of the Contracting Parties. All these examples have been taken from the context of art. 8, for the simple reason that this is the provision I am most familiar with. A first example is the case of *Airey v. Ireland*[15]. In this case Mrs. Airey made Ireland responsible for the violation of her right to private life: she claimed that she had to suffer ill-treatment from her husband (who had been convicted and fined for this reason) because the excessive cost of legal representation prevented her from obtaining a legal separation and no legal aid was available for such proceedings. The Court found the Irish State responsible for the violation of Mrs. Airey's right to respect for private life, even if this right was actually impaired by Mr. Airey, a private person. Second, in the case of *X and Y v. The Netherlands*, the father of a mentally handicapped girl who had been sexually assaulted raised a complaint against The Netherlands for the violation of both his daughter's and his right to respect for private and family life. He claimed that these rights were violated because under Dutch law neither the girl (she was mentally handicapped) nor her father (he was not the victim of the assault) could prosecute the assaulter. The Court found a violation of the positive obligations of the State to enable the exercise of rights, even if in this case the right in question was exercised against a private person. In a third case, *Power and Raynor v. U.K.*[16], the Court had to decide whether the noise created by Heathrow airport violated the private life of the people living in the neighbourhood. Although the airport is privately owned, the Court reasoned in terms of the positive obligations of the State to ensure the exercise of the rights recognised in art. 8, even if upon the facts it finally did not find that the Government of the United Kingdom had committed any Convention wrong.

The above paragraphs summarise the way the Convention organs approach the issue of the application of the Convention rights in private relationships. This issue has not yet been dealt with in the context of the right to the secrecy of telecommunications, yet one can easily apply the above-mentioned rationales to this particular framework. This means that the Convention organs might be reluctant to find some public action in private violations of the right to the secrecy of telecommunications if these involve no clear responsibility of the Contracting Party accused of the violation; on the other hand, it also means that the right to the secrecy of telecommunications must be enforced by national courts even when the right is violated by private parties and that the Contracting Parties are obliged to adopt positive measures to enable the exercise of this right stretching to the private sphere, including adequate legislative protection of the

[15] *Airey v. Ireland*, judgment of 9 Oct. 1979, Series A, Vol. 32, Par. 33, p. 17.
[16] *Power and Raynor v. U.K.*, judgement of 21 Feb. 1990, Series A, Vol. 172, Par. 39, p. 18.

right. The extent to which individuals will have to found a Convention wrong upon the private violation of their right to the secrecy of telecommunications depends on the extent to which the right is sufficiently protected as a 'private' right within a national system. In the following pages I will address this question in the context of Germany.

1.2 Germany

1.3.1 The Application of Fundamental Rights in Private Relationships: the Case of the Secrecy of Telecommunications

The idea that fundamental rights are primarily rights of defence against the State is widely accepted in Germany[17]. It is also widely accepted that fundamental rights also have an objective dimension, i.e. that they stand as objective values of the legal system imposed by the Constitution; even the idea that fundamental rights influence private relationships can be considered to be uncontroversial. The question that remains controversial is the way in which fundamental rights influence private relationships.

The most common view is that fundamental rights apply in private relationships only in an indirect way. This is precisely the position adopted by the Constitutional Court[18]. The case-law of the Court portrays the idea developed above that fundamental rights apply in private relationships in as far as these are influenced by the State's violation of its obligations vis-à-vis fundamental rights. Indeed, the Court holds that the State must both respect and actively provide for the exercise of fundamental rights, even in the context of private relationships. According to the Court, the State violates its negative obligation of respect when a judge upholds a situation in which an individual interfered with the exercise of a fundamental right. Originally, there may have been a purely private violation, yet this acquires public character as soon as it is confirmed by a judicial decision, since with this decision the judiciary (hence the State) is actively contributing to an interference with the exercise of a right[19]. Further, according to the Court, the State's positive obligation actively to provide for the exercise of fundamental rights can also be violated by the judiciary; this is the case when courts tolerate a private infringement of a fundamental right, that is, when courts do not explicitly uphold such an infringement, yet disregard the fact that it has taken place, and thereby they implicitly

[17]See, e.g., Badura, *Kommentar zum Bonner Grundgesetz*, Art. 10, Par. 20, p.14; Maunz-Dürig-Herzog, *GGKommentar*, Art. 10, p. 18; Pappermann, Art. 10, *GGKommentar* ed. by Ingo von Münch, Par. 6, p. 435.
[18]See BVerfGE 7, 198 at 207; 25, 256; 34, 269 at 280; 39, 1 at 41 et seq.; 42, 64 at 73-74; 42, 143 at 147 et seq.; 50, 290 at 337; 52, 131 at 166; 84, 192 at 195; 89, 214 at 232.
[19]BVerfGE 7, 198 at 203.

allow it[20]. In principle, this positive obligation could also be violated by the law-maker and the executive, namely when they do not provide an adequate normative framework for the protection of the exercise of fundamental rights even against interferences carried out by private persons. Yet, the Constitutional Court has not yet decided this point.

The main stream position in Germany, supported by the Constitutional Court, therefore, is that fundamental rights have an indirect third party effect or 'Drittwirkung'. Defenders of a direct 'Drittwirkung' are in a minority[21]. Note, however, that the results of an indirect and of a direct 'Drittwirkung' basically coincide[22]. Under both these theories, fundamental rights ultimately apply in relationships among individuals and under both of them are ultimately called on to do so by the judiciary. Thus the indirect 'Drittwirkung' merely helps to justify that fundamental rights apply in the context of private relationships; once this much has been accomplished, the application of fundamental rights in this context takes place in rather direct, straightforward terms.

All the above considerations apply in the context of the right to the secrecy of telecommunications as recognised in art. 10 of the Basic Law. The question of the third party effect of this particular right has not yet been addressed by the Constitutional Court, yet it has been addressed by both the Federal Court of Appeals (*Bundesgerichtshof*) and the Federal Labour Court (*Bundesarbeitsgericht*)[23]. Both these courts have reasoned in the terms explained above: the right to the secrecy of telecommunications is primarily a subjective right of the individual against the State, yet it is also an objective value of the legal order imposed by the Constitution and as such influences private relationships. After having stated this, however, both the Federal Court of Appeals and the Federal Labour Court have proceeded to apply the right to the secrecy of telecommunications against private individuals in what would seem to be a very direct manner. One could nevertheless argue that both courts rely upon the implicit assumption that it is their duty both to respect and to provide for fundamental rights in private relationships.

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[20]BVerfGE 25, 256.

[21]Hans Carl Nipperdey is regarded as the founder of the direct 'Drittwirkung' and the First Senate of the Federal Labour Court (*Bundesarbeitsgericht*) as the main defender of this theory (see Alexy, *Theorie der Grundrechte*, at 428; Christian Starck, "Constitutional Definitions and Protection of Rights and Freedoms" in *Rights, Institutions and Impact of International Law according to the German Basic Law* (Ch. Starck ed.) pp. 47-48, Nomos Verlagsgesellschaft, Baden-Baden 1987).

[22]See Alexy, *Theorie der Grundrechte*, at 481 et seq.

[23]See, e.g., BAGE 1 March 1973 ((1973) *NJW*, p. 1247); BAGE 27 May 1986 ((1987) *NJW*, p. 674 et seq.); BGHE(ZR) 20 Feb. 1990 ((1991) *JR*, p. 67 et seq.).

Recognising third party effects on the right to the secrecy of telecommunications has particular importance in at least two fields. The first field is the surveillance by employers of telecommunications engaged in by employees at the working place. Courts usually regard these situations as covered by art. 10 of the Basic Law on the basis of an indirect 'Drittwirkung'. However, they usually think that these situations fall outside the protected scope of this provision[24]: on balance, courts argue, it is justified for employers to have a right to survey the telecommunications carried out by their employees during working hours, in order to control the efficiency of work and the use that is being made of the working premises. In other words, courts argue that it is reasonable that employers have a right to survey their employees' telecommunications and that this right can be considered implicit in every labour relationship.

That the right to the secrecy of telecommunication is accorded such low importance in the context of labour relationships is regrettable, particularly if we compare this with the importance that the Constitutional Court accords to the right to privacy when exercised vis-à-vis public authorities. In the public sphere, the right to privacy appears as a condition for the existence of a constitutional democratic system, for which its protection is enhanced. In the context of labour relationships, on the other hand, the right to privacy is not thought to play such a role. Drawing such a sharp distinction between the public and the private sphere when assessing the importance of privacy is wrong, however. Generally speaking, free participation requires an area of seclusion and secrecy not only from the State but also from society, so that providing the necessary means for the adequate protection of privacy against society ought to be regarded as a priority positive obligation of the State (whether or not it is subjective) deriving from the right to privacy[25]. In addition to this, employers are in a position from which they can infringe the privacy of their employees much more systematically and with much greater consequences than other members of civil society. Employers can gain information about their employees more easily than other people can, but above all they can use this information very powerfully, notably as a condition for employment. As a result, employers can endanger the free participation of employees in public life to a greater extent than other members of civil society. This is why attaching such low importance to the right to privacy in labour relationships is wrong. It is wrong particularly since it implies subordinating this right to interests of such limited importance as the general well-being of the work place or the efficiency of the productive system. The automatic subordination of the right to the secrecy of

[24]BAGE 1 March 1973 ((1973) *NJW*, p. 1247); BAGE 27 May 1986 ((1987) *NJW*, p. 674 et seq.); see also OVGE Bremen 18 Dic. 1979, (1980) *JZ*, p. 405 et seq.
[25]This idea is confirmed in BVerfGE 84, 192 at 194 et seq.

telecommunications to such interests is thus out of proportion, hence unconstitutional. This is not to deny that certain limits to the exercise of the right to the secrecy of telecommunications at the work place might be necessary for the sake of efficiency and productivity. Yet in order that these limits can be held constitutional they must be imposed on the basis of the principle of reasonableness (see chapter 5), in particular after having struck a due balance between the different interests at stake and after having acknowledged the importance that the interest in the protection of privacy also has in labour relationships.

In addition to being unreasonable, restrictions of the right to the secrecy of telecommunications at the work place must be considered unconstitutional also on different grounds. If the exercise of this right is covered by art. 10 of the Basic Law, something we take as a point of departure, then limitations to its protected scope are constitutional only if they are authorised by law (arts. 10.2 and 19.1 of the Basic Law), which is not the case with the limitations at issue. Courts have surmounted this difficulty on the basis of at least two different arguments. A first argument[26] is that employees implicitly renounce their right to the secrecy of their telecommunications at the working place when they sign a labour contract, since they know that surveillance of employees' telecommunications is a general practice. A second argument[27] is that surveillance of employees' telecommunications is a 'structural limitation' of the protected scope of this right of the same kind as the limitations of this right imposed by the post and telecommunication services as part of their normal functioning; moreover, in order to avoid the requirement that they be authorised by law, this 'structural limitation' is also regarded as an 'inherent limitation' to the coverage of the art. 10 right.

Both these arguments lie open to criticism. The argument that employees implicitly renounce their right to the secrecy of telecommunications when they sign a labour contract raises the question of whether consent to surveillance allegedly implicit in a labour contract is freely granted or whether it is formed by the necessity of finding a job. As for the argument that surveillance of telecommunications at the work place is an inherent structural limitation to the right to the secrecy of telecommunications, it is not at all clear how telecommunication surveillance can be inherent in the functioning of a company. Moreover, over and above these difficulties, this argument must be rejected as an aspect of the doctrine of 'inherent limitations', a doctrine that was criticised at length in chapter 3.

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[26]See BAGE 1 March 1973 ((1973) *NJW*, p. 1247); OVGE Bremen, 18 Dic. 1979, (1980) *JZ*, p. 405 et seq.
[27]See BAG decision of 27 May 1986 ((1987) *NJW*, p. 674 at 676).

In sum, courts think that art. 10 of the Basic Law, applied with indirect 'Drittwirkung', covers a right to the secrecy of telecommunications vis-à-vis the employer, yet they generally think that, on balance, the right ought not to be considered protected under art. 10. I believe that this limitation to the protected scope of art. 10 is unconstitutional, both because it is not authorised by law and because, in my view, it is clearly out of proportion.

A second field in which the third party effect of the right to the secrecy of telecommunications is particularly relevant is the field of the privatisation of telecommunications services[28]. § 1 (4) of the *Gesetz über Fernmeldeanlagen* (*FAG*) saw some liberalisation of telecommunication services by means of restricting the traditional monopoly of the State to the classical telephone service. Moreover, this last sector will also be liberalised in the very near future[29]. This circumstance poses the question of the third party effects of the right to the secrecy of telecommunications in as far as this right must also be protected vis-à-vis the telecommunication service, since this is no longer run by the State. Yet this question has thus far been avoided by the FAG, which has introduced a statutory right to the secrecy of telecommunications against private persons who run a telecommunication service (§ 10 FAG). The FAG thus supports the idea developed above that the question of the 'Drittwirkung' of fundamental rights mostly arises in as far as a particular right is not sufficiently protected against private parties by statute. I would now like to continue to look at the extent to which German laws protect the secrecy of telecommunications against violations by private individuals.

1.2.2 The Secrecy of Telecommunication against Private Individuals as a Statutory Right

The secrecy of telecommunications is protected against private individuals in several statutory provisions. § 202 of the German Criminal Code (*Strafgesetzbuch* -StGB) makes it a crime to violate the secrecy of an act of written telecommunication.

[28]The privatisation of telecommunication services is surrounded by a heated doctrinal debate as to its compatibility with art. 87.1, which grants the federation the administration of the federal post. According to some commentators, this provision forbids the private administration of the post, whereas according to others it only is one element in the distribution of competences between the federation and the Länder. The terms and the background of this debate have been summarised by Bernhard Großfeld & Helmut Janssen, "Zur Organisation der Deutschen Bundespost" 46 *DÖV* 424 (1993).

[29]For some notes on the context and on the implications of the liberalisation of telecommunication services, see T. Blanke & D. Sterzel, "Ab die Post? Die Auseinandersetzung um die Privatisierung der Deutschen Bundespost" 26 *Kritische Justiz* 278 (1993).

This provision contemplates a penalty of up to three years imprisonment or a fine for any person who, without authorisation, opens a closed piece of written telecommunication which is not addressed to her, or finds out about the content of such a piece of telecommunication by any other means. The same penalty is provided for any person who, without authorisation, gets to know the content of a closed item of written telecommunication ("of an item telecommunication the content of which is especially protected") which is not addressed to her, even if this piece of telecommunication has previously been opened by a different person.

For its part, § 201 of the StGB protects the secrecy of oral telecommunications. It punishes with a penalty of up to three years imprisonment or with a fine, any person who, without authorisation, records somebody's "not privately spoken words", uses words thus recorded or publicly reports them or their main content; the same penalty is provided for any unauthorised person who, with a listener device, listens into words privately spoken and which were not addressed to her, as well as who publicly reports the words thus obtained. However, publicly informing of words illegally listened into or recorded is not a crime if it is done in order to protect public interests of overriding importance.

The penalty of up to three years imprisonment, which can be raised to up to five years imprisonment, or a fine if the above-mentioned crimes against the secrecy of written and oral telecommunications are committed by a civil servant or by an employee in a public service with a violation of their special duty to respect the confidentiality of the spoken word (§§ 201 (3) and 354 (2) 1). Such employees are also punished with five years imprisonment or with a fine if they pass onto a third person information they have obtained as part of the normal development of their job. The addressees of this right, it is true, are public employees; yet the same penalty is provided for persons entrusted by the postal system to carry out postal activities or for private individuals who carry out a telecommunication service for the public. Finally, I would like to note that even a private person is only allowed to inform a third person about details concerning an act of telecommunication upon authorisation, even if these details have been obtained through lawful means and outside the framework of a telecommunication service; absent authorisation, any such information is punished with up to two years imprisonment (§ 354 (4)). These penalties protect not only the secrecy of the content of an act of telecommunication but also the secrecy of its surrounding circumstances (§ 354 (5)).

The above statutory provisions seem to offer the secrecy of telecommunications adequate protection against private persons. The coverage of these provisions is similar

to the coverage of art. 10 of the Basic Law. As in art. 10, the StGB protects the secrecy of telecommunications in as far as this is inherent in the act of telecommunication in question: § 201 only protects the secrecy of "not publicly spoken words"; similarly § 202 only protects the secrecy of letters with respect to their content and provided that they are duly closed. In addition, the StGB protects the secrecy of both the content and the circumstances surrounding an act of telecommunication in as far as they do not lie in open view. On this issue, note that employees of a telecommunication service or any other person who has lawfully come to know about the details of such surrounding circumstance are not allowed to reveal them to third persons to whom they remain unknown. Finally, as in art. 10, the StGB recognises for each party to an act of telecommunication a right to the secrecy of this even vis-à-vis the other party (right to the confidentiality of one's words), so that neither may record a conversation nor agree to a third person's surveillance without the consent of the other party to the conversation. There is however one point in which the coverage of the statutory right to the secrecy of telecommunications is narrower than its constitutional equivalent: the StGB contains no provision against the interference with the secrecy of *electronic* telecommunications, such as E-mail, whereas the secrecy of such modalities of telecommunications is implicit in the art. 10 general recognition of a right to the secrecy of telecommunications.

Victims of a violation of the statutory right to the secrecy of telecommunications have a criminal and a civil action for recovery against the persons who have committed the violation in question. Yet it is not clear whether they can also move to suppress incriminating evidence eventually obtained by private persons through illegal telecommunication surveillance. Rather, within the context of the secrecy of oral telecommunications § 201 seems to suggest the opposite, for it allows divulgence of words illegally listened into or recorded if its purpose is to protect public interests of overriding importance. At least in the context of certain particularly serious crimes, this provision excludes the application of the exclusionary rule.

This circumstance constitutes a reason why it might be advantageous for individuals to have art. 10 of the Basic Law applied in the context of private relationships. Over and above such particular cases, however, the application of art. 10 with third party effects has a clear advantage for individuals, namely it has the advantage of recognising individuals a *constitutional* right, with all the advantages of broad recognition and stability that this implies over purely statutory rights and, in addition, with the possibility of bringing cases of violations of this right before the Constitutional Court.

1.3 The United States

1.3.1 The Application of Fundamental Rights in Private Relationships: the Case of the Secrecy of Telecommunication

In the United States, the question of whether fundamental rights apply in private relationships has been raised within the context of the right to the equal protection of laws recognised in the fourteenth amendment. According to Section 1 of this provision "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws". This sentence of the fourteenth amendment was enacted with the purpose of banning racial discrimination, a pervasive practice in the United States. Although explicitly addressed only against the states, it has often been argued that the fourteenth amendment aimed at banning racial discrimination also in private relationships[30]. Whether or not this was the intention of the amendment, the truth is that courts have actually tried to attain this aim while respecting the literal wording of the fourteenth amendment. To this end, it would have been easy to rely on the idea that the provision imposes upon the states not only negative obligations but also the positive obligation to enhance the equal protection of laws, an idea discussed in chapter 3. However, courts have tended to disregard the positive obligation doctrine in this context and have preferred to ban private discrimination on the basis of a direct application of the negative obligations imposed by this amendment.

The means used to this end has been the so-called 'state action' doctrine: courts have not been willing to apply the fourteenth amendment in every private relationship, but only in as far as discriminatory conduct is "fairly attributable to the states"[31], i.e. in as far as some kind of 'state action' is involved in an act of discrimination. It is difficult to draw a general picture of the terms in which courts have defined the expression 'state action', since decisions have tended to be orientated to the solution of each particular case; yet some commentators[32] have tried to systematise the courts' approach to this issue. I will adopt a classification of 'state action' situations into two groups[33] . The

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[30]This point is developed by John Silard, "A Constitutional Forecast: Demise of the 'State Action' Limit on the Equal Protection Guarantee", 66 *Col. L. Rev.* 855 (1966).
[31]*Lugar v. Edmondson Oil Co.*, 457 US 922 at 937 (1982).
[32]Silard, "A Constitutional Forecast ..."; Thomas P. Lewis, "The Meaning of State Action", 60 *Col. L. Rev.* 1083 (1960); Charles L. Black, "The Supreme Court 1966 Term. Foreword: 'State Action', Equal Protection and California's Proposition", 81 *Harv. L. Rev.* 69 (1967); Samuel Estreicher, "Federal Power to Regulate Private Discrimination: the Revival of the Enforcement Clauses of the Reconstruction Era Amendments" 74 *Col. L. Rev.* 449 (1974); David S. Elkind, "State Action: Theories for Applying Constitutional Restrictions to Private Activity", 74 *Col. L. Rev.* 656 (1974).
[33]Elkind, "State Action: Theories for Applying ..."

first group embraces cases in which there has been a private assumption of government powers and functions; the second group embraces cases in which the government is involved in a private activity. Let me draw the general traits of these two groups.

Let us first look at the private assumption of government powers and functions. There is private assumption of government powers and functions when a private person possesses power or performs a function that "traditionally [has been] the exclusive prerogative of the State"[34]. This is the case, e.g., with a company-owned town[35], with a city park which is privately run[36] or with a shopping complex so large that the Court regards it as the "functional equivalent" of a town business block[37]. In all these cases, the Supreme Court has seemed to regard the relevant constitutional amendments as limitations not merely upon government, but upon governmental powers generally. Of course, the extent to which governmental power is exercised (i.e. the extent to which 'state action' exists) depends upon the extent to which there is private monopoly control over a resource which is essential for the exercise of a fundamental right.

The second group contains cases in which government is involved in a private activity. This can take place in various ways. First of all, government is involved in a private activity if it grants power to private persons so as to *enable* or, at least, enhance the efficacy of an activity; in other words, there is 'state action' when private persons have power which derives solely from government, whether this power is granted directly or indirectly[38]. Second, government is also involved in private activity when it merely *aids* or supports private parties in the exercise of an activity which they would carry out without the aid; aid might consist of money, tax exemptions or deductions, awards of contracts, etc., and must be so significant that it is justified for constitutional standards to be imposed upon the whole activity[39]. Third, there is 'state action' when

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[34]*Burton v. Wilmington Parking Auth.*, 365 US 715 at 722 (1961).

[35] *Marsch v. Alabama*, 326 US 501 (1946). The Court ruled that, on the basis of the first amendment, this town could not prevent a Jehovah's Witness from distributing religious literature (as will be explained below, the Supreme Court has ruled that fundamental rights are incorporated in the fourteenth amendment).

[36]*Evans v. Newton*, 382 US 296 (1966). Even if privately run, a city park cannot be operated as a segregated facility.

[37]*Amalgamated Food Employees v. Logan Valley Plaza*, 381 US 308 (1968). The Court ruled that the shopping centre in question could not prohibit picketing against a store on the premises, on the basis that no equivalent alternative existed, since effective picketing outside the wall was impractical.

[38]There is a direct grant of power, e.g., when private bodies are granted power to determine government policy: in *Smith v. Allwright* (321 US 649 (1944)) the Court found that liability to run in a general election upon success in primaries amounted to party control of the elective process, hence to 'state action'. There is indirect grant of power, e.g., when an existing activity is offered government protected status: in *Reitman v. Mulkey* (387 US 369 (1967)) the Court found 'state action' in discrimination by landlords, since this was supported by an amendment to the California Constitution which protected the absolute freedom of property owners to refuse to sell or rent their property to anyone.

[39]A typical case of aid is the public funding of private schools: see, e.g., *Milonas v. Williams*, 691 F.2d. 931 at 940 (10th Cir. 1982), cert. denied, 460 US 1069 (1983).

the government uses private persons to carry out its own activities or to achieve its own purposes, even if it does not provide these persons with special power or support and does not even regulate the activity in question. Such situations are known as 'agency' situations and are regarded as cases of 'state action' on the grounds that the government cannot free itself from constitutional duties and limitations by delegating responsibility to the private sector. A good example is the case of airport searches and seizures carried out by private airline employees or even the case of prisons privately run[40]. Finally, the Supreme Court has stated that, at least in some instances, there is 'state action' in the judicial enforcement of private rights, although it has not specified what these instances are exactly[41].

Note that all the above modalities of 'state action' could be read as examples of the states' positive obligations under the fourteenth amendment: they can all be interpreted to mean that, if a state allows private individuals to exercise governmental power, or if it gets involved in a private activity, then the state in question has the duty to make sure that the activity in question respects the equal-protection clause. Yet, courts have preferred to reason on the basis of the fourteenth amendment as a source of negative obligations for the public power of the states and then adopt a flexible interpretation of the expression 'public power'. Be that as it may, the result is that courts have been applying the fourteenth amendment to certain private relationships; this is also true for the rights 'incorporated' in the amendment, an issue which will be dealt with below. Amongst the 'incorporated' rights there is the right to the secrecy of telecommunications recognised in the fourth amendment. This right can therefore apply in private relationships via the 'state action' doctrine.

Some of the above-mentioned modalities of 'state action' could apply in the context of the fourth amendment right to the secrecy of telecommunications. This is the case with the judicial enforcement of private rights, with 'agency' situations such as the development of private telecommunication services or the authorisation of private prisons, as well as with the private assumption of government powers by, for example, private investigators, at least when they pursue evidence for criminal prosecution[42]. However, some instances of interception of telecommunications by private parties

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[40]The development of private prisons in the United States as well as the issue of the protection of fundamental rights within these prisons is studied in Note "Inmates' Rights and the Privatisation of Prisons", 86 *Col. L. Rev.* 1475(1986).

[41]The most famous case is *Shelley v. Kraemer* (344 US 1 (1948)), where the Court ruled that restrictive private covenants do not violate the fourteenth amendment if they are voluntarily adhered to; yet they cannot be judicially enforced, since then there would be 'state action'.

[42]For the more general issue of the application of the fourth amendment right in cases of searches and seizures carried out by private security personnel, see Steven Euller, "Private Security and the Exclusionary Rule", 15 *Harv. Civil Rights-Civil Liberties L. Rev.* 649 (1980).

remain outside the scope of state action, such as interceptions carried out by employers within their companies, by private investigators within the context of a civil case, for example in a case of divorce, or even interspousal telecommunication surveillance. Moreover, even in cases where 'state action' could be involved, the Supreme Court has not applied this doctrine to private interceptions of telecommunications. This circumstance is certainly influenced by the fact that the secrecy of telecommunications is protected against private interceptions at the statutory level. Indeed, to the extent that the secrecy of telecommunications against private parties is protected by statute as widely and as effectively as it is protected by the fourth amendment, the need to have recourse to this latter is not felt so urgent. Let us now have a look at the statutory protection of the secrecy of telecommunications in private relationships.

1.3.2 The Secrecy of Telecommunication against Private Individuals as a Statutory Right[43]

Section 3623(d) of Title 39 of the U.S.C., recognises a statutory right to the secrecy of written telecommunications. Both the coverage and the protected scope of this statutory right essentially overlap with the coverage and the protected scope of its equivalent constitutional right. As the fourth amendment, § 3623(d) only guarantees the secrecy of first class mail, i.e. of mail sealed against postal inspection (see chapter 4). Similarly, as the fourth amendment, § 3623(d) imposes a warrant requirement upon the opening of first class mail, yet, § 3623(d) only admits an 'ordinary administrative divulgence' exception and a 'consent' exception (see chapter 5) to the warrant requirement; moreover, consent may only be given by the addressee. This means that the protected scope of the secrecy of written telecommunications it recognises is wider than that of the equivalent constitutional right. In addition, the remedies provided against violations of the constitutional and the statutory right to the secrecy of written telecommunications are identical, since both the criminal action of Title 18 § 242 of the U.S.C. and the civil action of Title 42 § 1983 of the U.S.C. can be brought against the violation of "any rights ... secured by the *Constitution or laws*" (emphasis added). In sum, the secrecy of written telecommunications seems to enjoy wider protection as a statutory than as a constitutional right, since § 3623(d) admits fewer exceptions to the warrant requirement than the Supreme Court in the context of the fourth amendment.

[43]I will now analyse the provisions of the U.S.C. presently in force; I would however like to note that U.S. Congress is drafting a Bill which aims, among other things, at preventing abuse of electronic monitoring in the workplace (Privacy for Consumers and Workers Act of 1993); moreover, a second Bill is being drafted which authorises electronic monitoring by employers under certain circumstances (Telephone Privacy Act of 1993). It is to be expected that these Bills will regulate telecommunications surveillance in the workplace.

The U.S.C. also recognises a statutory right to the secrecy of wire and electronic communications. Chapter 119 of Title 18 (§§ 2510-2520) protects the secrecy of telecommunications vis-à-vis any third person, whereas Chapter 36 of Title 50 (§§ 1801-1811) protects the secrecy of telecommunications against violations carried out under colour of law. Let me now refer to these two chapters in turn.

[A] Chapter 119 of Title 18

Chapter 119 of Title 18 applies to interstate and foreign, wire and electronic telecommunications, as well as to wire and electronic telecommunications which affect interstate or foreign commerce (§ 2510). § 2511 punishes with not more than five years imprisonment or a fine or both the willful interception of the above-mentioned types of telecommunication[44], the willful use of intercepting devices already installed and the willful disclosure or use of the content of intercepted communication by any person knowing or having reason to know that the information in question has been thus obtained, each of which amounts to an independent offence. If one of the above offences is not committed for a tortious or illegal purpose or for the purpose of commercial gain and if it affects a radio communication that is not scrambled or encrypted, then punishment is less severe: it consists of a fine of not more than $ 500 if the communication is the radio portion of a cellular telephone communication, a public land mobile radio service or a paging service communication, and of a fine, or not more than one year imprisonment, or both, if the communication is not one of these. The above prohibition to intercept also applies to persons or entities providing a wire or electronic communication service to the public: these persons or entities may not intentionally divulge the contents of any communication to any person or entity other than an addressee or intended recipient of such communication or an agent of such an addressee or intended recipient (§ 2511 (3)(a)). In addition, § 2512 punishes with a fine of not more than $ 10,000 or not more than five years imprisonment or both the intentional manufacture, distribution, possession and advertising or devices which are primarily useful for the surreptitious interception of wire and electronic telecommunications. Note that neither the expression 'wire communication' nor the expression 'electronic communication' covers "the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit" (§ 2510).

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[44]This Chapter also recognises a right to the secrecy of 'oral communications', i.e. of "communications uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectations" (§ 2510 (2)). Yet, these person-to-person communications will not be mentioned here, since the right to their secrecy remains outside the scope of the right to the secrecy of telecommunications, which is the concern of this thesis.

Chapter 119 follows the doctrine developed by the Supreme Court according to which the right to the secrecy of telecommunication only covers 'secrecy' in as far as this is inherent in the act of telecommunication in question. To begin with, § 2511 (2) (c) and (d) allow the interception of telecommunications carried out by, or with the consent of, one of the parties to it[45]. In addition, § 2511 (2)(g)(i) does not ban the interception of or access to "an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public"; "readily accessible to the general public" means that a communication is not scrambled or encrypted, transmitted through particular radio frequencies not accessible to all or otherwise withdrawn from the general public (§ 2510 (16)), i.e. a communication "readily accessible to the general public" is what in this thesis I call an 'open-channel' communication. Chapter 119 is however not very rigourous in that it seems to classify the above provisions as exceptions to the protected scope of the statutory right against telecommunication surveillance, whereas they must rather be regarded as exceptions to the coverage of this right (it states, "it shall not be unlawful under this chapter", instead of, 'it shall not be an interception under this chapter'). Finally, Chapter 119 only condemns the surveillance of the 'content' of telecommunications, i.e. the surveillance of "any information concerning the substance, purport, or meaning of that communication", but not the surveillance of the circumstances surrounding an act of telecommunication. The use of a 'pen register', i.e. a mechanical device which records only the numbers dialed on a telephone line, is thus not unlawful under this Chapter[46].

Victims of an illegal measure of surveillance have both a civil and a criminal cause against the person who has carried it out (§§ 2511 (4)(a) and 2520). They can recover appropriate relief, this including equitable or declaratory relief, damages, punitive damages in appropriate cases and a reasonable attorney's fee and other litigation costs reasonably incurred. Damages are less high if the interception is of a radio communication transmitted on frequencies not readily available to the general public but which is not scrambled or encrypted, provided that the conduct is not for a tortious or illegal purpose or for commercial advantage or gain. Note, however, that

[45]Recall, however, that, as noted in chapter 5, Congress is presently working on a Bill (Telephone Privacy Act of 1993) to amend section 2511 so that surveillance of an act of oral, wire or electronic communication made by a person not acting under the colour of law can only be lawfully consented to by all parties to the act of communication.

[46]This provision was introduced by the Privacy Act of 1986; even before the Supreme Court had ruled that the use of a pen register was allowed under 18 USC. See *US v. NY Telephone Co.*, 434 US 159 (1977). This view was even supported by the Senate Report on Title III of the Omnibus Act, according to which "the proposed legislation is not designed to prevent the tracing of phone calls. The use of a 'pen register', for example, would be permissible" (ibid. at 167-168).

good faith reliance on the lawfulness of the interception stands as a complete defence against civil and criminal actions.

In addition, according to §§ 2515 and 2518 (10) victims of illegal interception of wire or electronic telecommunications can move to suppress evidence so obtained in as far as it incriminates them; that is, these sections regulate an exclusionary rule. This circumstance was commented on in chapter 6, where I stressed that this statutory exclusionary rule is regulated in unconditional terms, so that it applies whenever evidence has been obtained in violation of Chapter 119, even at civil trials. I would now like to add that Chapter 119 makes no distinction as to who has committed the illegality in order that an item of evidence can be suppressed; it therefore seems that the exclusionary rule also applies in the context of evidence illegally obtained by private individuals.

[B] Chapter 36 of Title 50

Whilst Chapter 119 of Title 18 penalises any illegal surveillance of wire and electronic telecommunications, Chapter 36 of Title 50 specifically penalises illegal surveillance made under colour of law. In particular, this Chapter (§ 1809) makes it an offence (punishable with a fine of not more than $ 10,000 or imprisonment for not more than five years or both) to engage in electronic surveillance under colour of law, except as authorised by statute, as well as to disclose information obtained under colour of law by electronic surveillance, knowing or having reason to know that the information was thus obtained, except if disclosure is authorised by statute. This provision overlaps with the provisions of Chapter 119 commented on above, which condemns every measure of illegal surveillance of telecommunications without distinction; this means that the prohibition of telecommunication surveillance regulated in § 1809 is relevant only in as far as either the coverage of this provision or the remedies it provides against violations of the secrecy of telecommunications, is wider than the coverage or the content of the corresponding provisions of Chapter 119.

Let me start with the content. Chapter 36 provides the same remedies against violations of the secrecy of telecommunications as Chapter 119: victims of illegal telecommunication surveillance have both a civil and criminal cause against the person who has carried it out; they are also entitled to recover damages, punitive damages, a reasonable attorney's fee and other investigation and litigation costs reasonably incurred (§ 1810). Note that Chapter 36 does not admit good faith as a defence against these actions. In addition, Chapter 36 (§ 1806 (e)-(h)) regulates an exclusionary rule in very similar terms to Chapter 119.

As for the coverage of § 1809, this provision is in some sense narrower, in some sense wider, than the corresponding provisions of Chapter 119 of Title 18. The right recognised in Chapter 36 is narrower in as far as it only covers the secrecy of *wire telecommunications*. Enacted in 1978, this Chapter has not been updated to cover the secrecy of non-wire electronic telecommunication, which means that this is only protected under the general provisions of Chapter 119. On the other hand, the right recognised in Chapter 36 is wider in as far as it covers not only the secrecy of the content of telecommunications, but also the secrecy of "any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication"; in other words, Chapter 36 covers the secrecy of the circumstances surrounding an act of telecommunication. Only in this latter respect does Chapter 36 add something new to the provisions of Chapter 119.

[C] Conclusions

The conclusion one can draw from the above summary of the relevant provisions of the U.S.C. is that the statutory and the constitutional right to the secrecy of wire and electronic telecommunications are extremely similar and, if at all, this right is more broadly defined at the statutory level -e.g., the secrecy of the circumstances surrounding an act of telecommunication is occasionally covered as a statutory right. Only in one respect is the coverage of the fourth amendment wider: as will be explained below, this latter applies both to interstate and to intrastate telecommunications, whereas the U.S.C. only applies to intrastate telecommunications if some interstate or foreign interest is at stake. However, as will also be explained below, the question of whether the exclusionary rule attached to the fourth amendment applies in intrastate cases has been and is far from uncontroversial.

For its part, the actual protection accorded to the right to the secrecy of telecommunications is defined in much clearer terms at the statutory level. This is primarily true of the exclusionary rule. The utmost merit of the statutory exclusionary rule is that it is explicitly conceived as a remedy, that is as a rule which undisputably applies whenever the victim of illegal wire or electronic surveillance is incriminated by the evidence thus obtained, provided that he duly moves to suppress this evidence. This means that it applies independently of whether the illegality has been committed by private persons or by the public power. Moreover, the exclusionary rule is not reserved for criminal cases but applies at every trial, hearing or other proceeding before a court, including civil ones.

The above considerations seem to indicate that statutes protect the secrecy of telecommunications better than the fourth amendment. There seems to be no compelling reason, therefore, to make the fourth amendment apply in private relationships in the context of wire and electronic telecommunications. Nonetheless, one ought not to forget the advantages of having a right recognised at the constitutional level: constitutional rights entail certain guarantees of broad and stable recognition that a statutory right does not possess, hence the importance of recognising a right at the constitutional level, even if it operates over and above the statutory recognition and protection of this right.

Conclusions

Fundamental rights are primarily regarded as subjective rights of the individual in the ECHR, Germany and the United States. Yet these three systems have also faced the problem that these rights are sometimes under particular threat from private individuals and have devised different ways of giving them third party effect. The Convention organs rely upon the idea that the Convention imposes upon the Contracting Parties the positive obligation to provide for an adequate legal framework for the protection of rights in private relationships, hence that in cases of private violations of rights they can be made responsible if they have not performed their positive duties adequately. In Germany, the Constitutional Court also relies upon the State's duties, both negative and positive, vis-à-vis fundamental rights in order to apply these rights with third party effect. Finally, the Supreme Court of the United States prefers to apply fundamental rights in private relationships on the basis of the so-called 'state action' doctrine, according to which a state is responsible for the private violation of a right if this violation is 'fairly attributable to the state', that is, if there is a sufficient nexus between this violation and the activities of the state. All these positions accord a sufficient basis for the application of the right to the secrecy of telecommunications against private persons, yet some of them have more potential for this than others. The potential of the 'state action' doctrine to apply fundamental rights with third party effect is much more limited than that of the doctrine of the State's negative and positive obligations (it for example does not necessarily justify the exercise of the constitutional right to the secrecy of telecommunications vis-à-vis the employer) and, of these two, the doctrine of the State's positive obligations offers the broader grounds to the third party effect of fundamental rights. Indeed, this latter doctrine has potential for boundless application of fundamental rights in private relationships.

I would also like to note that when applied in private relationships the right to the secrecy of telecommunications and more generally the right to privacy deserve the same attention as in the context of the relationship between an individual and the State. In both these contexts privacy appears as a condition for free debate and participation, hence its protection is imposed as a requirement for the existence of a constitutional democratic State. This is particularly true in labour relationships, where the position of the employer accords her a great deal of power to hinder the employee's free participation in public life. Here more than in any other private relationship the interest in the protection of privacy, hence the interest in the protection of the secrecy of telecommunications, should enjoy a position of favour when balanced against any other interests, such as the well-being or efficient functioning of the work place.

2. Federalism

Introduction

In the preceding pages I have argued that public power is the only *direct* addressee of the fundamental right to the secrecy of telecommunications and of fundamental rights in general. In the context of federal countries, a further question concerning the addressees of fundamental rights must still be answered: do fundamental rights recognised at the federal level only apply vis-à-vis federal authorities, or do they also apply vis-à-vis the authorities of the states which integrate the federation? This question arises both in Germany and in the United States. Moreover, it arises irrespective of the fact that the German *Länder* and the American states have their own Constitutions and that some of these Constitutions recognise their own right to the secrecy of telecommunications. In other words, the point at issue is to what extent the right to the secrecy of telecommunications as recognised in the German Basic Law and in the Federal Constitution of the United States (i.e. the secrecy of telecommunications as a *federal* constitutional right) applies vis-à-vis the authorities of the German *Länder* and of the American states, respectively. The German Basic Law is very clear in this respect: some of its provisions state that all the rights that the Basic Law recognises as fundamental can be exercised against all public authorities, these including the authorities of the *Länder*[47]. In the United States, state authorities are also to some extent regarded as the addressees of the fourth amendment's right, hence of the right to the secrecy of telecommunications included therein. This however is not stated in the

[47]See arts. 1.3, 23, 28.3 of the Basic Law; see also §§ 94.2 and 94.4 of the Law of the Constitutional Court -Bundesverfassungsgerichtgesetz.

Federal Constitution, but is the result of the way the Supreme Court has interpreted certain constitutional provisions and must therefore be regarded as one of the many contributions that the case-law of the Supreme Court has made to the American constitutional system. The following pages will be dedicated to analysing the interpretative trend of the Supreme Court that has led to the application of the fourth amendment right to the secrecy of telecommunications in the states. I will first look at the extent to which this right applies vis-à-vis state authorities; second, I will consider the extent to which the exclusionary rule which is attached to the fourth amendment applies at state trials.

2.1 The U.S. States as Addressees of the Fourth Amendment

The federal Constitution of the United States does not explicitly affirm that the Bill of Rights embodied in its first eight amendments must apply to the states. Originally, the Supreme Court tended to interpret this silence as a sign that the first eight amendments only limit the power of the Federal Government; this interpretation was even regarded as "one of the settled principles of the Federal Constitution"[48]. Eventually, however, the Court started to develop the doctrine that federal constitutional rights can also apply to the states. To this end, it relied on the due-process clause of the fourteenth amendment, according to which "no state shall ... deprive any person of life, liberty or property, without due process of law"[49]. The Court stated, in particular, that certain rights are of such a nature that they are included in the conception of due process of law, hence they apply to the states[50]. In other words, the due-process clause of the fourteenth amendment was interpreted to mean that it incorporates the application of federal constitutional rights to the states. This doctrine has prevailed over the years. Note however that the Court has never affirmed that the whole of the Bill of Rights is incorporated in the fourteenth amendment[51]; moreover, according to the Court a right need not be explicitly included in the Bill of Rights in order to be considered

[48] *Feldman v. US*, 322 US 487 (1944); see also *Brown v. New Jersey*, 175 US 172 (1899); *Ohio ex rel. Lloyd v. Dollison*, 194 US 445 (1904); *Jack v. Kansas*, 199 US 372 (1905); *U.S. v. Lanza*, 260 US 377 (1922).

[49] On the due process of law, see Annotations 18 L Ed 2d 1388 and 23 L Ed 2d 985.

[50] See, e.g., *Powell v. Alabama*, 287 US 45 (1932); *Palko v. Connecticut*, 302 US 319 (1937).

[51] Although some members of the Supreme Court hold that the fourteenth amendment incorporates the Bill of Rights in its totality (see Annotation 18 L ed 2d 1388 at 1390, note 3), the majority of the Court has never adopted this view: see, e.g., *Bute v. Illinois*, 333 US 640 (1948); *Wolf v. Colorado*, 338 US 25 (1949); *Bartkus v. Illinois*, 359 US 121 (1959); *Mapp v. Ohio*, 367 US 643 (1961); *Malloy v. Hogan*, 378 US 1 (1964).

incorporated[52]. The due-process clause has been interpreted as incorporating rights in as far as they are implicit in the concept of ordered liberty, whether or not they are explicitly mentioned in the Constitution; in other words, the due-process clause has been interpreted to mean that it incorporates 'fundamental rights'[53]. An increasing number of federal rights have been held to be 'fundamental'. Among these, and contrary to what was the original trend of the Court, there is the fourth amendment right against searches and seizures, hence the right to the secrecy of telecommunications. At present, this right is applied against the states via the fourteenth amendment[54].

The fourth amendment right is uncontroversially regarded as part of the concept of ordered liberty, therefore as incorporated in the fourteenth amendment. This, however, does not necessarily imply that the fourth amendment applies vis-à-vis the states in exactly the same terms as it applies vis-à-vis federal authorities. Originally, the Court held that the rights incorporated in the fourteenth amendment needed to apply against the states only to the *degree* necessary to comply with a requirement of fairness. This doctrine, which is sometimes referred to as the doctrine of 'selective incorporation', was later abandoned by the Court for the so-called doctrine of 'direct application', which is the one presently followed[55]. According to this doctrine, the 'incorporated' rights apply vis-à-vis the states to the same extent and under the same standards as they are applicable in federal courts. Yet this theory does not imply that a right need to be incorporated in the fourteenth amendment as a whole; on the contrary, rights can be 'incorporated' *partially*. To be precise, a right is only 'incorporated' in as far as it is deemed to be part of the concept of ordered liberty, i.e. in as far as it is deemed 'fundamental'. Only to this extent does a right apply in the states in the same terms as it applies at the federal level. In the context of the fourth amendment, the Supreme Court has clearly stated that the guarantee against unreasonable searches and seizures (i.e. against unreasonable telecommunication surveillance), together with the standards of reasonableness developed by the Supreme Court, are 'fundamental' and must apply in the states[56]. More controversial is the 'fundamental' character of the so-

[52]A good example of this is the incorporation of the general 'right to privacy' which the Supreme Court saw as implicit in the 'penumbras' and 'emanations' of particular constitutional rights (*Griswold v. Connecticut*, 381 U.S. 479 (1965)).

[53]As explained in the General Introduction, in the United States 'fundamental rights' are most commonly defined, precisely, as those rights "implicit in the concept of ordered liberty".

[54]See, e.g., *Wolf v. Colorado*, 338 US 25 (1949); *Schwartz v. Texas*, 344 US 199 (1952); *Elkins v. US*, 364 US 206 (1960); *Mapp v. Ohio*, 367 US 643 (1961); *Ker v. California*, 374 US 23 (1963); *Aguilar v. Texas*, 378 US 108 (1964); *Stanford v. Texas*, 379 US 476 (1965); *Berger v. N.Y.*, 388 US 41 (1967).

[55]See Annotations 18 L Ed 2d 1388 at 1395 and 23 L Ed 2d 985 at 987.

[56]See *Ker v. California*, 374 US 23 (1963); *Beck v. Ohio*, 379 US 89 (1964).

called 'exclusionary rule' attached to the fourth amendment guarantee. This is an issue which deserves more lengthy comment.

2.2 The U.S. States as Addressees of the Fourth Amendment's 'Exclusionary Rule'

Whether or not the exclusionary rule applies in cases where the fourth amendment has been violated by state authorities has been and is a controversial issue. The Supreme Court has divided this issue into two questions: first, can evidence unlawfully obtained by state agents, without the participation of federal authorities, be used in federal trials? and, second, can evidence unlawfully obtained by state agents be used in state trials? Let me now deal in turn with these two questions.

In spite of its being addressed within the issue of the application of the exclusionary rule, the first question really concerns the addressees of the fourth amendment. For the focus of discussion is not whether the exclusionary rule applies beyond the federal framework; rather, the question is whether, within the framework of federal trials, the exclusionary rule applies in cases in which the fourth amendment has been violated by state authorities; in other words, the question is whether or not a violation of the fourth amendment by state authorities must be taken notice of at federal trials.

Initially, the federal use of evidence unlawfully obtained by the states was accepted by the Supreme Court. The Court only insisted upon one point: such evidence could not be admitted at a federal trial if federal authorities acting under colour of their federal office had taken any part in the unlawful search and seizure in question; it could only be admitted if state authorities had handed it over to federal authorities, as it were, on a "silver platter"[57]. This position went hand in hand with the idea that the fourth amendment is not binding upon the states, hence it was rejected as soon as the fourth amendment was considered 'incorporated' in the fourteenth amendment[58]. The practical consequences of the so-called 'silver platter' doctrine also contributed to its own overruling; for this doctrine allowed federal law-enforcement officials to rely on their state colleagues in order to obtain evidence which could not have been used at trial if they had themselves obtained it. It thus offered federal officials an easy way to get

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[57] *Byars v. US*, 273 US 28 at 33 (1926); *Lustig v. US*, 338 US 74 at 79.
[58] *Elkins v. US*, 364 US 206 at 212-213 (1960); see also *Rios v. US*, 364 US 253 (1960); *Chapman v. US*, 365 US 610 (1961); *Preston v. US*, 376 US 364 (1964).

around the application of the exclusionary rule, thus endangering the deterrence effects of applying the rule at a strictly federal level[59].

As opposed to the previous one, the question of whether evidence unlawfully obtained by state authorities can be used at *state* trials focuses directly on the application of the exclusionary rule against state authorities. The decisive point therefore is whether the exclusionary rule is incorporated within the fourteenth amendment, that is, whether the application of the exclusionary rule is a requirement implicit in the concept of ordered liberty. Furthermore, whether or not this is the case depends on whether or not the exclusionary rule is regarded as essential to the enforcement of rights which are considered part of the concept of ordered liberty, in our case whether it is essential to the fourth amendment right against searches and seizures and the right to the secrecy of telecommunications included therein.

The issue of whether the exclusionary rule is essential to the enforcement of the fourth amendment was studied in chapter 6. There it was explained that during the dominance of the property reading of the fourth amendment the rule was systematically applied by the Supreme Court, which regarded it as an essential ingredient of the fourth and the fifth amendments taken together. The problem is that, at that time, the fourth amendment itself was not considered applicable to the states, hence the question of whether the rule should apply at the state level did not even arise. On the other hand, when in 1949 the Court incorporated the fourth amendment into the fourteenth it also denied that the rule was essential to the amendment, thus that it was applicable to the states[60]. If was necessary to wait ten more years to see this doctrine overruled and the exclusionary rule applied at state trials[61]. The position thus reached was not long lived, however. The position of the Supreme Court as to the applicability of the rule at state trials has fluctuated along with the changes in the doctrine of the Court concerning whether the exclusionary rule is an essential ingredient of the fourth amendment[62], something that was explained in chapter 6. Incidentally, note that by now most states have attached an exclusionary rule to the violation of their own constitutional provision against unlawful searches and seizures, so that the applicability of the federal exclusionary rule to the states does not have the practical consequences that it used to have[63].

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[59]*Elkins v. US*, 364 US 206 at 217-218 (1960).
[60]*Wolf v. Colorado*, 338 US 25 (1949); *Schwartz v. Texas*, 344 US 199 (1952).
[61]*Mapp v. Ohio*, 367 US 643 (1961); *Ker v. California*, 374 US 23 (1963).
[62]For example, in *California v. Greenwood and Van Houten* (486 US 35 (1988)) the Court stated again that the exclusionary rule did not belong to the core of the fourth amendment, hence that it did not apply at state trials via the fourteenth amendment.
[63]See Appendix to the opinion of the Court in *Elkins v. US*, 364 US 206 (1960).

Section 2: The Holders of the Right to the Secrecy of Telecommunications

That fundamental rights were first recognised as rights of defence to the individual against the State is sufficiently well known. I would now like to look at the scope of the term 'individual' as used in this context. This leads to two questions: first, is every individual, i.e. every physical person, the holder of fundamental rights? It is clear that fundamental rights are recognised for citizens who have full legal capacity; the only doubts are whether, and if so to what extent, aliens and minors can also be regarded as holders of rights. The second question is, are physical persons the only holders of fundamental rights? To what extent should legal persons not also be regarded as holders?

All these questions will be addressed in this section. In particular, I will analyse the extent to which aliens, minors and legal persons are the holders of the right to the secrecy of telecommunications in the ECHR, Germany and the United States. Dealing with the case of aliens and minors will prove easier than dealing with the case of legal persons as the holders of rights. As the following pages will show, aliens are uncontroversially regarded as holders of the right to the secrecy of telecommunications within the three systems under consideration, whilst minors might only have some problems in this respect in the United States. On the other hand, the question of whether legal persons are the holders of the right to the secrecy of telecommunications, moreover of what legal persons can be the holders of this rights, presents much more difficult features.

1. Aliens

1.1 Some Notes on the Evolution of the Legal Status of Aliens

Since ancient times, the issue of the legal status of aliens has been the object of the attention of legal systems. Despite this, the recognition and protection of certain fundamental rights for aliens is a rather recent phenomenon. A first step in this direction was taken in the context of natural-law theories, to be precise, in the declarations of

rights enacted at the end of the eighteenth century[64]. References to 'natural rights' or to rights of 'all men' abound in these declarations. In spite of this, the declarations of rights of the late eighteenth century were not conceived as Charters of human rights. As a product of the prevailing liberal theories, declarations of rights were enacted, instead, as part of the 'social contract' which was thought to give rise to the State; in particular, they were enacted as instruments to protect the dividing line between the State and civil society[65]. It should not come as any surprise then that, in this contractual framework, certain rights were only recognised for citizens[66]; moreover, declarations of rights were at times ambiguous as to whether citizenship was a precondition even for the actual protection of natural-law rights, even though these rights admittedly belonged to all individuals[67].

More definite steps in the direction of the recognition and protection of fundamental rights for aliens have been taken in more recent decades. These steps have come hand in hand with the abandonment of contractual theories and the rise of a more participatory conception of the relationship between society and the State. As a result of this evolution, citizenship is no longer considered a definite criterion for the recognition of fundamental rights; rather, attention is now focused on the functional position that a given individual occupies within the State. Indeed, "alien" stands for a relatively well-defined functional position of individuals, yet it is this functional position and not the condition of being alien itself that determines the extent to which aliens are the subject of fundamental rights.

The move from contractualist to functionalist theories in the application of fundamental rights appears particularly clear in the United States. The clarity to be perceived in the American case is at least partly due to the fact that here the change has been carried through piecemeal by the Supreme Court and is thus relatively easy to follow. At the beginning of this evolution, during the nineteenth century and the first

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[64]These were the Declarations of Rights of eight of the twelve original American states (of which the first was the Virginia Declaration of Rights (1776)), the U.S. Federal Bill of Rights (1789) and the Déclaration des Droits de l'Homme et du Citoyen (1789).

[65]In this context, these declarations followed the same line as the documents which preceded them (think of, e.g., the English Magna Charta of 1215, the Petition of Right of 1628 or the Bill of Rights of 1689). All these documents were unmistakably drawn in purely contractual terms -they amounted to a contract between the sovereign and the people-, although in these cases contractualism was not liberal (modern) in character, but responded to a feudalist philosophy.

[66]The title of the French Declaration is very telling in this regard. In addition, articles 6 and 14 of the Declaration recognise political rights only in citizens.

[67]The Virginia Declaration, e.g., in spite of recognising certain rights for "all men", was made "by the Representatives of the good people of Virginia" to declare "which rights do pertain to *them and their posterity, as the basis and foundation of Government*" (emphasis added). The French Declaration also combines the proclamation of natural human rights with provisions as to citizens' right to claim against human rights violations (see in general the preamble and the example of art. 11).

third of the twentieth, most fundamental rights were only accorded to citizens. This situation was the result of the prevailing contractualist approach to the State, but was also conditioned by republicanism, which, together with liberalism, was the most influential trend of thought in the first 150 years of American history[68]. The focal aim of republicanism is the attaining of the common good of the 'nation', which is conceived as the ensemble of *citizens*. In order that the common good be attained, all citizens must participate in the political process, to which end they must stand as autonomous individuals. In this framework, citizens are accorded certain rights and liberties which are essentially liberal in character; yet these rights and liberties are not regarded as goals in themselves: they are mere means to ensure individual autonomy or otherwise to attain the common good, hence the level of protection of these rights and liberties must change according to the circumstantial requirements of the common good. As is easy to infer, this framework did not favour the recognition of fundamental rights for aliens in nineteenth-century and early eighteenth-century America[69]. Aliens were not citizens; this means that they were detached from the nation and from the pursuance of its well-being, hence they could not be granted fundamental rights; furthermore, as a consequence of their detachment from the common good, aliens were regarded as untrustworthy. This circumstance provided American public power with sound grounds to distinguish aliens from citizens[70] and even granted it complete discretion for the exclusion and deportation of aliens. Nevertheless, in some cases the pursuit of the common good seemed favourable to the recognition of certain rights for aliens: this was the case for rights of a procedural character, which appear as objective patterns of behaviour for public power which are morally desirable[71]; similarly, aliens were granted a right to work, since economic liberty is regarded as the key-stone of national common good[72].

The second third of the twentieth century witnessed a shift from a contractual-republican to a functional conception of the State[73]. In this new framework, citizenship is no longer regarded as a definite criterion determining the protection of rights; instead,

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[68]See P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America*, Oxford 1990, pp. 317 et seq.

[69]This issue is carefully studied in "Immigration Policy and the Rights of Aliens" 96 *Harv.L.Rev.* 1286 (1983).

[70]See, e.g., *Patsone v. Pennsylvania*, 232 U.S. 138 (1914). The possibility of excluding aliens from land ownership, on account of the sanctity accorded to citizens' private property, is a case in point: see, e.g., *Terrace v. Thompson*, 263 U.S. 197 (1923); *Webb v. O'Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923).

[71]See e.g. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) and *Wong Wing v. U.S.*, 163 U.S. 228, 238 (1896), in which the Supreme Court extended the scope of, respectively, the fourteenth amendment (at the time understood as a guarantee of 'formal' due process) and the fifth and sixth amendments to all persons within the territorial jurisdiction of the U.S.

[72]See, e.g., *Truax v. Raich*, 239 US 33 (1915).

[73]See "Immigration Policy ..." at 1303 et seq.

account is now taken of the actual participation of a given person in society, that is, account if taken of the functional position that a person has within the State taken as a whole. This functional approach brought about important consequences for the legal status of aliens in the United States. To begin with, public power under this conception enjoys greater discretion to exclude aliens than to deport them[74], since in this latter case aliens have already entered American society and play a certain role therein. Moreover, once aliens are in the United States, whether or not legally[75], they can be holders of constitutional rights. In this respect, attention must be paid to the functional position that aliens occupy within society, to the circumstances in which they claim the recognition of a given right, even to the consequences that recognising a certain fundamental right to an alien might entail for the community. Once a sufficient functional nexus exists, discrimination against aliens in the recognition and even in the protection of fundamental rights is considered "inherently suspect"[76] and can only be justified in as far as the community benefits from it[77]. Moreover, this justification is the object of a strict interpretation by the Supreme Court[78]; it is most typically applied in the context of governmental or representative functions, so that political rights are systematically denied to aliens[79].

Thus far we have dealt with the evolution in the conception of the State and the way it has influenced the evolution of the status of aliens. Along with this evolution, the recognition of rights for aliens has been influenced by a second circumstance, i.e. by the development, particularly after the second World War, of international instruments for the protection of human rights. The human rights thus recognised

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[74]The power to exclude aliens is still considered "inherent in sovereignty ..., a power to be exercised exclusively by the political branches of the government" (*Kleindienst v. Mandel*, 408 US 753, 765 (1972), unless the entering alien has previously lived in the United States -cases which must be solved in similar terms to deportation cases (see *Landon v. Plasencia*, 459 US 21 (1982)). In deportation cases, on the other hand, the alien's functional position in American society must be taken into account and balanced against the interest involved in her deportation (see, e.g., *Bridges v. Wixon*, 326 US 135, 154 (1945), where a deportation order was reversed on the basis of the aliens' deep roots in America).

[75]*Plyler v. Doe*, 457 U.S. 202 (1982) is a very telling example. The Supreme Court held that undocumented children are protected by the fourteenth amendment equal protection clause in their right to public education, on the basis that undocumented aliens have real social and economic participation in society.

[76]*Graham v. Richardson*, 403 U.S. 365, 372 (1971).

[77]It has been noted that federal discrimination has more often been upheld than discrimination contained in state legislation (Note, "A Dual Standard for State Discrimination against Aliens" 92 *Harv. L. Rev.* 1516 (1979)). The possible involvement of national interests, together with the political character of the decisions made by Congress or the President on immigration and naturalization (decisions thus precluded to judicial review) are cited as reasons for the lesser protection of aliens at the federal level.

[78]For example, aliens can be elected for the state civil service (*Sugarman v. Dougall*, 413 U.S. 634 (1973)) and for public education (*Nyquist v. Mauchlet*, 432 U.S. 1 (1977)); they can also be admitted to the bar (*In re Grifiths*, 413 U.S. 717 (1973)).

[79]See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Mathews v. Diaz*, 426 US 67 (1976); *Foley v. Connelie*, 435 U.S. 68 (1978); *Ambach v. Norwick*, 441 U.S. 68 (1979); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982).

coincide, substantially, with the fundamental rights protected by national constitutions, hence the great influence that the former have had upon the latter. This influence has been felt at two different levels. At the purely theoretical level, international conventions have reinforced the idea that certain rights do not only belong to all individuals, but must also be guaranteed to all, independently of citizenship. At the practical level, international conventions enshrine certain mechanisms to ensure that national rights, insofar as they are also proclaimed at the international level, are duly guaranteed to both citizens and aliens by the ratifying countries.

1.2 The Right to the Secrecy of Telecommunications

The above paragraphs should have illustrated the evolution involved in the status of aliens as well as some of the reasons which conditioned this evolution. Let us now look at how this evolution has affected the recognition of the right to the secrecy of telecommunications to aliens. The following paragraphs will focus on aliens as holders of the right to the secrecy of telecommunications in the ECHR, Germany and the United States.

1.2.1 The European Convention on Human Rights

The ECHR is a clear example of the evolution of the legal status of aliens. First of all, the Convention is evidence of the important role that supranational instruments have played in the recognition and protection of fundamental rights within the ratifying nations. Furthermore, the holders of the rights recognised in the ECHR are defined in functional terms and not on a contractual basis. The holders of the Convention rights are defined in art. 1, which reads as follows:

> Article 1:
> "The High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention" (emphasis added)

According to this provision, the High Contracting Parties must guarantee Convention rights to all persons, independently of their nationality or status, provided that they are under their actual authority and responsibility. This applies even to nationals of States which are not parties to the Convention, as well as to stateless persons; moreover, art. 1 applies regardless of whether the person in question is inland or abroad. As pointed out by the Commission, "the obligations undertaken by the High

Contracting Parties in the Convention are essentially of an objective character" and do not aim "to create subjective and reciprocal rights for the High Contracting Parties"[80].

1.2.2 Germany

The German Basic Law recognises the right to the secrecy of telecommunications as a right for every individual. This is also the case for most rights recognised as fundamental in the Basic Law[81]. It therefore seems that, at the time of the making of the Constitution, the idea already prevailed that the universal recognition of fundamental rights ought to be regarded as the rule, whereas the restriction of certain rights to citizens ought to be regarded as the exception. It is also worthy of note that secrecy of telecommunications is one of the few rights that has always been recognised not only to Germans but to all individuals[82].

This circumstance could arguably have been influenced by a historical anecdote: the secrecy of telecommunications was for the first time explicitly proclaimed as a fundamental right, with appeals to the "droit du gens", as a reaction against the opening of letters the addressees of which were aliens. It was first recognised by the French 'Assemblée Nationale' in 1790[83] as a response to the fact that city authorities had opened some letters while they were on their way to their addressee. The opening of letters was certainly no unusual thing at the time. The problem was that these particular letters had official character and, moreover, that they were addressed to foreign political personalities (in particular to two Spanish Ministers), so that their opening could give rise to a diplomatic issue. Thus, the incident which triggered attention towards the importance of protecting the secrecy of telecommunications involved the right to secrecy enjoyed by foreign personalities.

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[80]Ap. 788/60, Dec. Adm. Com of 11 January 1961. *YB* IV 116 (138-140). See also Ap. 6780/74, 6950/75, Dec. Adm. Com. of 26 May 1975, *YB* XVIII p. 82 at 118; Ap. 7289/75, 7349/76, Dec. Adm. Com. of 14 July 1977, *YB* XX p. 372 at 402.

[81]The only exceptions are freedom of assembly (art. 8), freedom of association (art. 9), freedom of movement (art. 11) and the right to choose a trade, occupation or profession (art. 12).

[82]As the Basic Law, preceding constitutions simply stated in generic terms that the secrecy of telecommunications is inviolable. See also Badura, in *Kommentar zum Bonner Grundgesetz*, art. 10, p.16; Maunz-Dürig-Herzog, *GGKommentar*, Art. 10, p. 19; Mangoldt Klein, *Das Bonner GG*, Art. 10, II 5, p. 336; Pappermann, Art. 10, *GGKommentar* by Ingo von Münch, Par. 4, p. 434.

[83]Decree of the French 'Assemblée Nationale' enacted on the 10th of August 1790, *Archives Parlementaires de 1787 à 1860*, Première Série, Tome XVII, Paris, 1984, pp. 695 et seq.

1.2.3 The United States

The Supreme Court of the United States only started to deal with aliens' fourth amendment rights some decades ago, at a time when the functionalist approach to rights already prevailed and the reading of the amendment was already guided by an interest in the protection of privacy. In this context, the Court has had no trouble affirming that the *coverage* of the fourth amendment embraces aliens, even illegal aliens[84], in the same terms as it embraces citizens, for according to the Supreme Court there exists a "sufficiently strong nexus between the Unites States and the targets of such searches"[85].

Nevertheless, the *protected scope* of the right against searches and seizures is narrower in the context of aliens than in the context of nationals. This is notably the case in admission and deportation cases[86]. Border[87] searches and seizures may be carried through[88] without a warrant and even without probable cause[89] provided that there is "reasonable suspicion"[90] that a particular alien is illegally in the country. The same suffices in the stopping of persons on the street conducted by agents of the Immigration and Naturalisation Service (INS) and with the aim of deporting illegal aliens. Moreover, searches for illegal aliens at fixed inland checkpoints do not even require reasonable suspicion[91]. Of course, citizens might also be the occasional victims of all these searches and seizures, so that aliens might not be the only persons affected

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[84] *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

[85] Note, "A Dual Standard..." at 1679.

[86] At the statutory level, admission and deportation searches and seizures are regulated in the Immigration and Nationality Act (8 USCS § 1357(a)(1)). § 287(a)(3) of this Act authorizes agents without a warrant "within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle..." (probable cause is not mentioned). As for the expression "reasonable distance", 25-air-mile distance has been considered too wide to be reasonable (*Almeida-Sanchez v. U.S.* 413 US 266, 272-273 (1973)). Its § 287(a)(1) authorizes any officer or employee of the INS without a warrant "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States".

[87] The Supreme Court found that the term 'border' covers also a border's functional equivalents, such as a station by the border, the confluence of two or more roads that extend from the border or an airport (*Almeida-Sanchez v. U.S.* 413 US 266, 272-273 (1973)).

[88] "The Border Patrol conducts three types of surveillance along inland roadways, ... permanent checkpoints ..., temporary checkpoints ... and ... roving patrols" (*Almeida-Sanchez v. U.S.* 413 US 266, 268 (1973))

[89] *U.S. v. Brignoni-Ponce*, 422 US 873, 880-881 (1975), where this exception to both the warrant and the probable-cause requirements is justified by "the importance of the governmental interest at stake, the minimal intrusion of a brief stop and the absence of practical alternatives for policing the border"; the validity of its execution is dependent on its proportionality with the reasons justifying it.

[90] "Reasonable suspicion", as required by the Supreme Court, must be found according to the characteristics of the area, by information about recent illegal border crossings in the area, by the aspect of the vehicle or by the persons behaviour and appearance. Yet, taken alone, this latter indication does not suffice to justify "reasonable suspicion" (*U.S. v. Brignoni-Ponce*, 422 US 873 at 881 (1975).

[91] *U.S. v. Martinez-Fuerte*, 428 US 5436 (1976).

by the limitation of the protected scope of the fourth amendment that they imply. However, this does not change the fact that these searches and seizures are theoretically addressed only to aliens, i.e. to people who can eventually be deported from the country. This means ideally that, if no error has been committed, nationals would not be subject to the above limitations of the protected scope of the fourth amendment; the fact that they sometimes are must be considered purely accidental.

On the other hand, the *content* of the fourth amendment right is not subject to restrictions specifically aimed at aliens. Yet, aliens are particularly affected by two general exceptions to the use of the exclusionary rule introduced by the Supreme Court: they are affected, first, by the fact that the exclusionary rule does not apply in civil proceedings, since deportation proceedings are civil[92], second, they are also affected by the fact that the rule does not apply when the item of evidence at stake is the defendant's own body or identity[93].

So far we have dealt with the position of aliens in the context of the fourth amendment. Let us now focus on aliens' right to the secrecy of telecommunications as recognised in this provision. In principle, this right is subject to the limitations imposed both on the protected scope and on content of an alien's fourth amendment rights. Note however that some of these limitations hardly find any scope of application in the context of the secrecy of telecommunications. This is notably the case of those which affect the protected scope of an alien's fourth amendment rights. These limitations apply in the context of border searches and seizures, street stops by INS agents or searches at inland checkpoints, that is, they apply in contexts where the possibility of an interception of a piece of telecommunication is hardly imaginable. No additional restriction has been imposed upon the protection and/or the content of an alien's right to the secrecy of telecommunication by the Supreme Court. The Court seems to take the view that the functional position of aliens in the context of interferences with telecommunications does not differ from the position of citizens. No functional reason seems to suggest that either the scope of protection of this right or the remedies available in the case of its violation should be narrower in the case of aliens[94].

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[92]*INS v. Lopez-Mendoza*, 468 US 1032 (1984).

[93]*Gerstein v. Pugh*, 420 US 103 (1974); *INS v. Lopez-Mendoza*, 468 US 1032 at 1039 (1984).

[94]At the statutory level, however, some functional distinction is made in the context of foreign intelligence surveillance, between United States persons (i.e. citizens and permanent resident aliens), on the one hand, and foreigners, on the other. According to § 1802 USC, measures of foreign intelligence surveillance which are highly unlikely to affect a U. S. person need not be authorised by the judiciary.

2. Minors

I will now refer to minors as a second group of doubtful holders of the fundamental right to the secrecy of telecommunications. In principle, age is not a condition on being the holder of a fundamental right -with exceptions such as the case of the right to vote. Nevertheless, the question may arise as to what extent minors have the necessary capacity or maturity actually to be considered the holder of a particular fundamental right. Now, being the holder of the right to the secrecy of telecommunication does not seem to require a particular level of maturity, yet problems start to arise when one turns to the interest which lies behind the recognition of the right to the secrecy of telecommunications, i.e. the interest in the protection of privacy. As was explained in chapter 1, the concept of privacy enshrines an element of volition, so that privacy only exists -hence a right to privacy can only be claimed- in as far as privacy is voluntarily chosen. The problem is that volition requires a certain level of maturity, a level which not all minors might have, even if they are able to hold a telephone conversation or to write a letter. Referring back to privacy therefore implies that the right to the secrecy of telecommunications can only be exercised by persons who have acquired a certain level of maturity.

A turn to the concept of privacy is inevitable in the context of the United States, for here the constitutional right to the secrecy of telecommunications is recognised as part of the fourth amendment since the concept of privacy has controlled the interpretation of this provision. Moreover, the Supreme Court openly defines the coverage of the fourth amendment on the basis of the concept of privacy. As was explained in chapter 4, privacy is conceived in this context as a reasonable expectation of privacy which society is ready to accept as such. This means that the Supreme Court could (and looking at its case-law on the coverage of the fourth amendment, it probably would) deny the right to the secrecy of telecommunications to persons who lack the maturity to expect his telecommunications to be private, i.e. secret; moreover, the Court could deny this right to persons who lack the maturity to have an expectation of secrecy which society is ready to accept as reasonable.

On the other hand, turning to privacy or even to personality is not a necessary step either in Germany or in the ECHR. The reason is that in these two contexts the right to the secrecy of telecommunications is recognised as a right independent of privacy. It is true that privacy remains the background interest for the recognition of this right, yet it is one thing to help in interpreting this right and quite a different thing for it to act as a direct source of the definition for its holders. As an independent right, the right to the secrecy of telecommunication is defined in objective terms, i.e. it is

defined on the basis of the scope of the terms 'secrecy' and 'telecommunications', so that no subjective element such as volition comes to qualify the definition of the right. It can therefore be concluded that the maturity of a person has no influence upon her being the holder of the right to the secrecy of telecommunications and that a person can be the holder of this right from the moment she can be a party to an act of telecommunication[95].

3. Legal Persons

Introduction

Finally, I will deal with the issue of whether legal persons are the holders of the right to the secrecy of telecommunications. The central question is whether and, if so, to what extent, legal persons *can* be the holders of this right; to put it in the words of art. 19.3 of the German Basic Law, the question is to what extent the nature of this right permits it to be exercised by legal persons. For it is obvious that not every right can be exercised by a legal person: let us think, e.g., of the right to life or to human dignity. Is this or is this not the case with the right to the secrecy of telecommunications? This question clearly leads to a more fundamental one, i.e. whether a legal person can be a party to an act of telecommunication. When the legal representative of a legal person takes part in an act of telecommunication, whose right to the secrecy of telecommunication is at stake? Is it this person's right or the right of the legal person she represents?

The answer to this question is clearer in the context of written telecommunications, for the role of the actual natural person who writes and reads what is to be communicated is less relevant than the role of the natural person who speaks in oral telecommunications. Letters, telegrams, even E-mail messages can be addressed to and even sent by a legal person as such, so that the particular natural person who actually receives or sends the message can be irrelevant and sometimes is not even specified. I therefore believe that a legal person can be regarded as a party to an act of written telecommunications. Once this is accepted, saying that legal persons can also take part in oral telecommunications appears as a small step to take; for in the end the idea that it is the legal person who communicates through its legal representative also applies to that case. In my opinion, therefore, legal persons can take part in

[95]Note that in Germany minors are allowed to use the postal service even if the do not have full legal capacity to act (§ 8.1.2 *Postgesetz*).

telecommunications, hence that they have a fundamental right that the secrecy of their telecommunications be respected.

The conclusion that legal persons have a right to the secrecy of the telecommunications in which they take part is shared by some German commentators[96]. Also the Supreme Court of the United States has reached a similar conclusion in the context of the fourth amendment right against searches and seizures[97], in spite of the fact that this provision only refers to "people" and "persons"[98]. This conclusion applies in the context of the right to the secrecy of telecommunications recognised within the fourth amendment; for if legal persons can have a right that their premises be not searched and their property be not seized, they can also have a right that letters or E-mail messages sent by or to them as legal persons be not surveyed.

With the above conclusion, however, the question whether legal persons can have a right to the secrecy of telecommunications is not yet completely solved. It still has to be decided *which* legal persons can be the holders of this right. The recognition of this right for domestic legal persons of private law is uncontroversial. Doubts arise with respect to foreign legal persons, to legal persons under public law and, finally, with respect to organisations without legal personality. In the following paragraphs I will analyse to what extent these three categories of legal persons or, more generally, of organisations, are holders of fundamental rights. Questions on this issue have been posed in the context of the ECHR and Germany, where the relevant provisions are, respectively, art. 25 of the ECHR and art. 19.3 of the German Basic Law. According to art. 25 of the ECHR, complaints before the Commission may be raised by "any person, non-governmental organisation or group of individuals"; according to art. 19.3 of the German Basic Law, "[t]he basic rights shall apply also to domestic legal persons to the extent that the nature of such rights permits". I will now analyse the way these two provisions or, more generally, their respective legal systems, deal with the three categories of legal persons mentioned above, i.e. organisations without legal personality, foreign legal persons and legal persons under public law.

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[96]In this context, see Badura, *Kommentar zum Bonner Grundgesetz*, Par. 25, p. 16; Mangoldt-Klein, *Das Bonner Grundgesetz*, Art. 10, II 6, p. 337; Pappermann, "Art. 10" *GGKommentar* by Münch, Par. 4, p. 434; Maunz-Dürig-Herzog, Art. 10, *GGKommentar*, Art. 10, Par. 22, p. 19.

[97]*Hale v. Henkel*, 201 U.S. 43 (1906); *Wilson v. U.S.*, 221 U.S. 361 (1911); *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385 (1920).

[98]See the concurring opinion of Justice Harlan to *Hale v. Henkel* (cit. at 78) and the joint dissenting opinion of Justice Brewer and the Chief Justice (at 85)

3.1 Organisations without Legal Personality

Art. 25 of the ECHR does not exclusively mention legal persons as holders of the Convention rights; rather, it more generally refers to *organisations* or *groups of individuals*, which implies that legal personality is not a requirement for being the holders of the Convention rights. That this is the case has been confirmed by the Commission[99].

On the other hand, art. 19.3 of the German Basic Law explicitly refers to "legal persons", whereby it seems to be discarding entities without legal personality as holders of fundamental rights. However, one commentator[100] has argued that the fact that only legal persons are mentioned does not imply that entities without legal personality are not holders of fundamental rights; on the contrary, it is argued, the fact that legal persons are mentioned implies "a fortiori" that entities without legal personality must also be holders of fundamental rights. For one thing, such entities are essentially closer to natural persons, i.e. to the natural holders of fundamental rights, than legal persons are. This position seems supported by the doctrine of the Constitutional Court on the holders of fundamental rights. According to the Court, "fundamental rights are above all rights of the individual ... [hence] regarding juristic persons as holders of fundamental rights is only licit when the creation and activity of these persons is expression of the free development of private natural persons"[101]. This rationale seems to be open to the recognition of fundamental rights to organisations without legal personality. This point of view has the advantage of harmonising the recognition of rights under the German Basic Law and under the ECHR. Nevertheless, the Constitutional Court has so far preferred to leave this question unanswered[102].

3.2 Foreign Legal Persons

Art. 25 of the ECHR refers to *any* persons, non-governmental organisations and groups of individuals as holders of the Convention rights. This definition must be qualified on the basis of art. 1 of the ECHR, however. As was observed when studying the rights of aliens above, art. 1 does not go as far as to rule that holders of the Convention rights must only be the nationals of the Contracting Parties, yet it does

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[99]Ap. No. 6538/74, Dec. Adm. Com. of 21 March 1975, 2 *D&R*, p. 90 at 95-96; Ap. 7565/76, Dec. Adm. Com. of 7 March 1977, 9 *D&R*, p. 117 at 118; Ap. No. 8652/79, Dec. Adm. Com. of 15 Oct. 1981, 26 *D&R*, p. 89.
[100]Hendrichs, "Art. 19" in *GGKommentar*, ed. by Ingo von Münch, p. 701.
[101]BVerfGE 21, 362 at 369; 61, 82 at 101, 68 193 at 205-206; 75, 192 at 195-196 (my translation).
[102]BVerfGE 3, 19 at 22.

rule that the holders of the Convention rights are only those *under the jurisdiction of one of the Contracting Parties*. A look at art. 1 in conjunction with art. 25 suggests that holders of the Convention rights are not just any non-governmental organisations and groups of individuals, but only non-governmental organisations and groups of individuals in as far as they act subject to the legal rules of a Contracting Party, even if they do not have their headquarters in the confines of a Contracting Party (i.e. even if they are not nationals of a Contracting Party).

If the wording of art. 25 of the ECHR appears to be overly permissive with respect to the nationality of the legal persons which can be the holders of the Convention rights, the wording of art. 19.3 of the German Basic Law, on the other hand, is too narrow for it exclusively refers to 'domestic' legal persons. In private international law, the expression 'domestic legal persons' refers to legal persons which have their headquarters in Germany. This definition is most commonly accepted within the context of art. 19.3[103], yet some commentators have raised their voice against it on the grounds that it is too narrow. In particular, it has been suggested that a legal person should be regarded as 'domestic' (i.e. as the holder of fundamental rights) if it is so recognised as a legal person in Germany, i.e. if it is granted legal capacity to act as a legal person in Germany and is therefore 'under German jurisdiction'[104]. This interpretation is attractive because it results from a functionalist approach to the recognition of fundamental rights: it makes the term 'domestic' embrace legal persons as far as they are actually subjected to German law. In addition, it helps to harmonise the recognition of rights under the German Basic Law and under the ECHR. The Constitutional Court has taken some steps towards the acceptance of this interpretation of art. 19.3. The Court has ruled[105] that legal persons with their headquarters outside Germany are also holders of the so-called 'procedural' fundamental rights (although the Court has referred to arts. 101 et seq. this conclusion also applies to arts. 17, 19.4), that is they can have access to German courts if they act under German jurisdiction. This is, however, as far as the Constitutional Court has been prepared to go; it has not more generally recognised fundamental rights for foreign legal persons[106].

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[103]K. M. Meeseen, "Ausländische juristische Personen als Träger von Grundrechten" (1970) *JZ* 602 at 604. Commentators generally accept that this definition would change if the law-maker decided to re-define the expression in the context of international private law (ibid.).

[104]This interpretation is supported by Hendrichs, "Art. 19" in *GGKommentar*, Par. 32, p. 701.

[105]BVerfGE 12, 1 at 8; 18, 441 at 447; 21, 326 at 373.

[106]See, e.g., BVerfGE 18, 441 at 447 (the Court left the question unsolved of whether a foreign legal person could be the holder of the rights recognised in arts. 2.1, 3.1 and 14); 23, 229 at 236 (the Court denied that a French "Association culturelle" could claim the violation of fundamental rights).

The question now is, can the right to the secrecy of telecommunications be listed as a procedural right to this effect? I believe that this question ought to be answered in the affirmative. For it seems absurd to me that public authorities are required to behave differently vis-à-vis a firm's telecommunications depending on whether the office in German soil of those whose telecommunications are being intercepted is either the headquarters of this firm or just one of its branches. In other words, it seems absurd to me that only the interception of the former's telecommunication is subject to certain procedural requirements, whilst the latter's can be freely intercepted. Every legal person under German jurisdiction ought to have a right to the secrecy of its telecommunications, so that these can only be intercepted where there is prior compliance with certain requirements which are specified by law, most of which of a procedural nature.

3.3 Legal Persons of Public Law

Art. 25 of the ECHR exclusively refers to "*non-governmental*" organisations, hence it excludes from among the holders of the Convention rights legal persons "which exercise public functions on behalf of the State"[107]. This exclusion can be interpreted in absolute terms, so that legal persons of public law may never be holders of the Convention rights; yet it can also be interpreted in functional terms, which would imply that public legal persons cannot be the holders of Convention rights only *in as far as* they exercise public functions on behalf of the State or that their public character affects the way they act in private legal relations. This second reading seems coherent with the functionalist approach adopted by the Convention organs in other fields, such as in the recognition of rights to aliens. The Convention organs have not yet adopted a clear position on this issue, however. They have for example recognised the Convention rights to religious organisations even if they are public-law corporations, for they do not exercise public power; on the other hand, they have left the question open of whether public enterprises can be the holders of these rights[108].

As opposed to the Convention organs, the German Constitutional Court has long since addressed the question whether legal persons of public law can be the holders of fundamental rights. The point of departure is art. 19.3, which contains a hint

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[107]Ap. 5767/72, 5922/72, 5929-31/72, 5953-57/72, 5984-88/73 and 6011/73, Dec. Adm. Com. of 31 May 1974, *YB* XVII p. 338 (352); 46 *Coll. Dec.* p. 118 (125-126).

[108]On this issue, see H.C. Krüger & C.A. Norgaard, "The Right of Application", ***The European System for the Protection of Human Rights***, Martinus Nijhoff Publishers, Dordrecht-Boston-London, p. 657 at 666.

at the functionalist approach suggested above: art. 19.3 recognises fundamental rights to legal persons "to the extent that the nature of such rights permits". On the basis of this expression, the Constitutional Court has reasoned that it is in the nature of fundamental rights that they be recognised for individuals, so that legal persons are only holders of these rights in as far as they give expression to the free development of private natural persons. From here, the Court continues to say that "these conditions are fulfilled by legal persons of private law" but not by legal persons of public law "in as far as they carry out a public duty"[109]. To the extent that this is so, public legal persons cannot be regarded as holders of fundamental rights; for one thing, to the extent that they carry out a public duty public legal persons belong to the public sphere, hence they are not the holders but the addressees of fundamental rights[110].

There are cases, however, in which public legal persons relate to the public sphere from outside the public sphere itself and are, therefore, in the same position of subordination to and independence from the public sphere as a private individual is[111]. In such cases, public legal persons can be the holders of fundamental rights. Subordination and independence from the public sphere typically characterise the exercise of the so-called 'procedural fundamental rights'. In fact, these rights can be regarded as objective rules of behaviour that the Constitution imposes upon certain branches of the State and the Constitutional Court has had no problem in ruling that legal persons of public law are holders of these rights[112]. This position of subordination and independence is more difficult to find in the context of other fundamental rights -what we could call 'substantial' fundamental rights. The reason is that public legal persons usually relate to these fundamental rights from the standpoint of the particular status they have vis-à-vis the public sphere, that is, they do not relate to these fundamental rights from the same position as a private individual does. The Court has only recognised 'substantial' fundamental rights to public legal persons when these carry out an activity which typically belongs to the exercise of a particular fundamental right. This is the case with Universities in the context of the freedom of "art and science, research and teaching" (art. 5.3); of public media in the context of the freedom of the press (art. 5.1.2); of the Church in the context of the "freedom of faith, of conscience, of creed, religious" and of the freedom to the "undisturbed practice of

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[109]BVerfGE 21, 362 at 369; 45, 63 at 78; 61, 82 at 101, 68 193 at 206; 75, 192 at 196 (my translation).

[110]BVerfGE 21, 362; 61, 82 at 100-101; 68, 193 at 205; 75, 192, 195 et seq; 78, 101 at 102.

[111]'Subordination' must be complemented with 'independence', for otherwise we might simply be facing the relation among different bodies of the public power on the basis of 'competence' (see BVerfGE 21, 362 at 368 et seq; 45, 63 at 79; 61, 82 at 103; 68, 193 at 205 et seq; 75, 192 at 196; see also Erichsen, *Staatsrecht und Verfassungsgerichtbarkeit* I, München 1976, p. 173).

[112]See BVerfGE 3, at 363; 6, 45; 13, 132; 21, 362 at 373; 61, 82 at 104.

religion" (art. 4); or of professional associations of public law in as far as they represent and defend the professional interests of their members[113].

In sum, the Constitutional Court does not give a definite answer to the question of whether legal persons of public law are included under art. 19.3. Rather, the Court approaches this question in functional terms: whether or not legal persons of public law are the holders of fundamental rights "depends on the role that a public legal person plays when it is affected by an act of the public power" which might amount to the violation of a fundamental right[114]. How does this conclusion apply to the right to the secrecy of telecommunications? What is the role of public legal persons vis-à-vis the public power in the context of this right? These questions have not been raised before the Constitutional Court, yet it would most probably simply avoid giving a definite answer. What the Court would most probably do -what indeed ought to be done- is to look at the position that a legal person has with respect to the public sphere in the context of the right to the secrecy of telecommunications, i.e. whether a legal person is in the same position of subordination and independence from the public sphere which carries out an interference as is a private individual.

Let me now summarise the above notes on legal persons as holders of the right to the secrecy of telecommunications. In principle, legal persons can be holders of the right to the secrecy of telecommunications in the ECHR, Germany and in the United States. The question is *which* legal persons can be holders of this right and concerns, in particular, foreign and public legal persons and organisations without legal personality. Neither in the context of the ECHR nor in Germany has this question been fully addressed, yet the tendency seems to be to address it in functionalist terms and look at the particular position of a particular legal person vis-à-vis the public sphere. These issues have not yet been dealt with by the Supreme Court of the United States, although it is highly likely that the Court would approach this issue in the same functionalist terms as it approaches others, such as the status of aliens; thus, before deciding whether foreign and public legal persons and organisations without legal personality are

[113]See BVerfGE 15, 256 at 262; 18, 385 at 386; 31, 314 at 322; 59, 231 at 254; 68, 193 at 207; 70, 1 at 20-21. The position of the Constitutional Court with respect to public legal persons as holders of rights is analysed by Otto Seidl, "Grundrechtsschutz juristischer Personen des öffentlichen Rechts in der Rechtsprechung des Bundesverfassungsgerichts" *Festschrift für W. Zeidler*, Band 2, Walter de Gryter, Berlin - New York, p. 1459.

[114]BVerfGE 68, 193 at 208 (my translation). This position is shared, e.g., by Hendrichs, "Art. 19" in *GGKommentar*, p. 706-707; Erichsen, *Staatsrecht und Verfassungsgerichtbarkeit* I, pp. 167 et seq. Some commentators have argued against this functional interpretation on the grounds of the 'unity of the public power'; yet this unitarian view of the public sphere seems to me to be too simplistic to account for the present structure of the public sphere (for this issue, see Erichsen, *Staatsrecht und Verfassungsgerichtbarkeit* I, p. 174).

the holders of a fundamental right, the Court is likely to look at the actual role that each particular organisation or legal person plays in society and vis-à-vis the public sphere.

Conclusion

I started this thesis with a concrete claim. I claimed that the right to the secrecy of telecommunications is best guaranteed in systems where three basic ideas are respected. These ideas were presented as follows: [1] the right to the secrecy of telecommunications ought to be regarded as essentially liberal in character, hence as a negative right of defence against the State; yet this right should also be supplemented by a positive subjective dimension; [2] the protection of the right to the secrecy of telecommunications ought to be regarded as a condition for the free participation of individuals in public life; [3] the conceptual boundaries of the right to the secrecy of telecommunications ought to be well defined on the basis of a clear unifying rationale. Having these three ideas in mind, I then proceeded to compare the way the right to the secrecy of telecommunications is recognised and protected in the ECHR, in the German Basic Law and in the Federal Constitution of the United States, in order to test the extent to which my initial claim was correct. I hope to have argued convincingly that it is. By way of conclusion, I would now like to summarise the most pertinent points of this comparison.

The practical advantages of approaching the right to the secrecy of telecommunications as essentially liberal in character should be clear from the study of its structure. To be more precise, the advantages should have become clear upon comparing the consequences of conceiving fundamental rights as two-level structures according to liberal patterns, with the consequence of conceiving them as single-level structures according to an institutional or a social approach to these rights. This was the purpose of chapter 3. Here we saw that the three systems under consideration recognise the right to the secrecy of telecommunications basically as a negative right with a two-level structure, yet this structure is consistently respected only in the context of the ECHR. This implies that the coverage of the negative right to the secrecy of telecommunications is defined on purely conceptual grounds only in the context of the ECHR, while in Germany and the United States it is also defined on the basis of non-conceptual considerations (the so-called 'inherent limitations') introduced by courts. In other words, in Germany and in the United States certain limitations on the negative right to the secrecy of telecommunications are not regarded as restrictions on its protected scope, but as part of its very definition. As a result, these limitations need not comply with the requirements imposed upon restrictions of the protected scope of this right (they for example need not be the result of a balance or be subject to strict

interpretation), but apply in the same unconditional manner as do the conceptual boundaries of a right.

Chapter 3 thus illustrated the advantages of respecting the basically liberal character of the right to the secrecy of telecommunications and the two-level structure attached to it. Only where this structure is respected is the coverage of this right defined as widely as possible on conceptual grounds, while its limitations are consistently made to comply with certain requirements and are subject to strict interpretation and application. This does not mean that the right to the secrecy of telecommunications ought not to have a positive dimension, since this has a single-level structure. It was part of my initial claim that a positive dimension, even a positive subjective dimension, is perfectly compatible with a liberal approach to this right as long as it complements and does not replace its basic negative one. Indeed, so long as this is the case, the right to the secrecy of telecommunications *ought* to have a positive subjective dimension, because this implies more efficient protection of this right.

The case of the ECHR should have confirmed the idea that recognising a positive right to the secrecy of telecommunications is compatible with the basic negative dimension of this right and that it favours its more efficient protection. Indeed, we saw in chapter 4 that both these dimensions coexist in perfect harmony in the ECHR. According to the organs of the Convention, the Contracting Parties have not only the negative obligation to refrain from interfering with the secrecy of telecommunications; in addition, they have the positive obligation to provide for an adequate legal and institutional framework to ensure that telecommunications can actually be held in secrecy. Moreover, the holders of this right have a subjective claim that these positive obligations be fulfilled. This clearly places holders of the right to the secrecy of telecommunications in a much more favourable position vis-à-vis the exercise of this right than they are in the German context and that of the United States, where this right has not been recognised as containing a positive subjective dimension.

One of the advantages of the positive subjective dimension of the right to the secrecy of telecommunications is that it offers a strong basis for the application of this right with indirect third party effect. In the context of the ECHR, a Contracting Party can be made responsible for a private violation of the right to the secrecy of telecommunication whenever this can be attributed to the fact that the Contracting Party in question has not complied with its positive obligations vis-à-vis the right. Admittedly, the State's positive subjective obligations are not the only grounds for the application of fundamental rights in private relationships. The German Constitutional Court, for example, relies both upon the State's positive and negative duties toward

fundamental rights (in particular, it relies upon the duties of the judicial branch of the State), whereas the Supreme Court of the United States relies exclusively upon a state's negative duties and applies fundamental rights in private relationships on the basis of the so-called 'state action' doctrine. As we saw in chapter 7, all these positions permit the application of the right to the secrecy of telecommunications with third party effect. Yet we also saw that the doctrine of the positive obligations developed by the organs of the Convention allows the widest application of this right in private relationships; in principle, it allows the application of this right in virtually any kind of private relationship. At the other extreme lies the American 'state action' doctrine, on the basis of which a right applies with respect to private persons only in as far as the conduct of the persons in question is "fairly attributable to the states", either because there has been a private assumption of government powers and functions or because the government is involved in a private activity. This covers, for example, the application of the right to the secrecy of telecommunications vis-à-vis private telecommunication services or private prison staff, but not necessarily vis-à-vis employers. The potential that the judiciary branch offers for applying this right with third party effect in Germany lies somewhere in between these two extremes.

So much for the first of the three leading ideas of my study. Throughout this thesis I have also tried to illustrate the disadvantages that an individualistic conception of privacy has for the protection of the right to privacy, in general, and of the right to the secrecy of telecommunications, in particular. I have taken the case of the United States as an example of such a conception. In the United States the right to privacy seems regarded as suspect. In particular, the right to privacy seems geared up to protecting individual preferences for secrecy and seclusion at the expense of the common good, which requires higher levels of publicity. This can be felt in every detail of the Supreme Court's approach to the right to privacy guaranteed in the fourth amendment. To begin with, the definition of the *coverage* of the fourth amendment right is left in the hands of society, that is it is left in the hands of the major enemy of privacy. According to the Supreme Court, the fourth amendment guarantees an interest in privacy only in as far as an expectation of privacy is at stake which society is ready to accept as 'reasonable'. Moreover, according to the Court society cannot accept as 'reasonable' an expectation of privacy in a situation where privacy does not exist de facto, whereby the right to privacy is deprived of its prescriptive role. The Court thus seems to be trying to compensate for the antisocial tendencies of privacy; the result is that it is imposing serious restrictions upon the scope of privacy that is accorded constitutional attention.

Also the *protected scope* of the fourth amendment right is defined in restrictive terms. The Supreme Court subordinates the right to privacy guaranteed by this provision to any interest in law enforcement. According to the Court, privacy can be infringed for the prosecution of any crime at all, independently of any consideration as to the reasonableness of the infringement; in other words, whether there is a less intrusive way to prosecute the crime in question and whether the intrusion is proportionate to its aim is irrelevant. All that is required is that an interest in law enforcement is at stake and that the intrusion upon privacy interests is adequate to pursue this interest. In principle, both these circumstances must be checked by an independent magistrate, yet there are cases where the interest in law enforcement is considered so much stronger than the privacy interests at stake that it even justifies that this step be avoided, thus depriving privacy of its only formal guarantee.

Finally, the suspect character of privacy can be felt in the approach of the Supreme Court to the *exclusionary rule*, that is to the rule according to which evidence seized in violation of the right to privacy may not be used at trial. The Court does not regard the exclusionary rule as a means of bringing the on-going consequences of a privacy wrong to an end. Rather, the rule is regarded as a measure aimed at preventing *future* privacy wrongs. Looked at as a means of deterrence of future wrongs, the application of the exclusionary rule has not always been considered obligatory but, more often than not, has been considered a matter of policy. Whether or not evidence unlawfully seized is excluded at trial is decided after having struck a balance between the potential for deterrence of future wrongs inherent in the exclusion, on the one hand, and the relevance of the evidence in question, on the other. In such a balance, the former hypothetical interest will usually yield to the latter and more concrete one. In sum, the importance the Court accords to violations of privacy is not such that it should justify a serious loss of relevant evidence.

In order to illustrate more clearly the disadvantages of conceiving privacy as an individualistic interest, I have compared this vision of privacy with its complete opposite. To be precise, I have compared it with a vision of privacy as a condition for free individual participation in the public life, hence as a condition for the existence of a constitutional democratic State conceived in discourse-theoretical terms. As was explained in chapter 1, this participatory vision of privacy is explicitly held by the German Constitutional Court. According to the Constitutional Court, the right to privacy is recognised in art. 2.1 of the Basic Law as an aspect of the right to the free development of one's personality and is conceived as a right to the control over one's area of seclusion and secrecy. The coverage of this right is by no means left in the hands of society. Nor can the right to privacy be restricted in an automatic manner for

the protection of just any conflicting interest, even if this is an interest in law-enforcement[1]. This right can only be restricted on the basis of the principle of reasonableness, which requires that restrictions pursue aims of overriding importance (in the case of law enforcement, for example, restrictions must aim at protecting particularly serious crimes), that they be adequate means and the least intrusive means to attain their aims and, finally, that they be proportionate to the aims they pursue, that is that they be imposed as a result of a balance between the interest in the protection of privacy, on the one hand, and the interest in pursuing the aim in question, on the other. In addition, the use at trial of evidence obtained through a privacy wrong is considered part of this wrong and therefore forbidden by the Constitution[2]. These general considerations apply with particular clarity in the context of the right to the secrecy of telecommunications. As in the case of privacy, the coverage of this right is defined on objective grounds without reference to social considerations, its protected scope is defined on the basis of the principle of reasonableness and, finally, the exclusionary rule applies systematically in cases of unconstitutional telecommunication surveillance.

Taken alone, the German case also offers an example of the advantages that a participatory approach to privacy has over a purely individualistic approach. For it is true that the German Constitutional Court conceives of privacy in participatory terms, yet in the context of certain private relations other courts have shown an attitude towards the right to privacy that does not conform with a participatory vision of this right. This is particularly the case with the right to the secrecy of telecommunications as exercised in the context of labour relationships. In chapter 7 we saw that the Federal Labour Court (*Bundesarbeitsgericht*) has admitted that the fundamental right to the secrecy of telecommunications applies with third party effect vis-à-vis the employer. We also saw, however, that this Court tends to subordinate the protection of this right to the well-being of the work place in a rather automatic manner. The Federal Labour Court thus seems to disregard the idea that the protection of privacy should be enhanced as a condition for free participation in public life and that this is so also when the right to privacy is exercised against private individuals. Indeed, this is even more so when the holder of the right to privacy is subject to a power relationship with respect to the individual against whom this right is exercised, as is the case with the relationship between the employee and the employer.

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[1]See BVerfGE 84, 192 at 195. With reference to law enforcement, see BVerfGE 34, 238 at 249, where the Constitutional Court affirmed that the right to privacy in one's spoken word can only be restricted for the prosecution of particularly serious crimes.

[2]BVerfGE 34, 238 at 250 is a clear example of the application of the principle of reasonableness and of the exclusionary rule in this context.

Let me finally come to the third leading idea of this thesis. In chapters 4 and 5 I have tried to illustrate the advantages of defining both the coverage and the protected scope of the right to the secrecy of telecommunications in clear terms. I have tried to illustrate the advantages of a clear definition by comparing the recognition of this right in the ECHR and in Germany, on the one hand, and in the United States, on the other. In the two former systems, the right to the secrecy of telecommunications is recognised in clear terms and by reference to a clear rationale, so that there can be little doubt as to when it is at stake. In consonance with this, the protected scope of this right is defined in terms which are also rather clear (as clear as they can possibly be, given that the protected scope of a right is the result of striking a balance between this right and other conflicting interests) and reasonably wide. In the United States, on the other hand, the right to the secrecy of telecommunications is recognised within the fourth amendment as part of the right to privacy, defined in rather loose terms.

That the definition of privacy and of the right to privacy is far from clear cut was discussed in chapter 1. Even if, as was proposed in that chapter, privacy is understood as secrecy and seclusion, the conceptual boundaries of the right to privacy remain rather loose, much looser than those of the right to the secrecy of telecommunications when this is independently recognised. The ill-defined character of privacy affects both the coverage and the protected scope of the fourth amendment right. Its coverage is defined by the existence of a 'reasonable expectation of privacy'. Its protected scope, in as far as it is defined by the warrant requirement, is drawn out on the basis of policy considerations concerning the extent to which an interest in privacy is at stake that is more worthy of protection than the general interest in safety and law enforcement. As a result, the boundaries of both the coverage and the protected scope of the fourth amendment right appear rather shaky. If we now put this circumstance together with the attitude of the Supreme Court of minimising the importance of privacy, then we can see that these two aspects of the Court's doctrine on the fourth amendment are perfectly complementary. On the one hand, leaving the coverage of the fourth amendment right in the hands of society contributes to its ill definition, and so does the subordination of the protected scope of this right to the interest in law enforcement. On the other hand, the ill-defined character of privacy also helps the Court to minimise the importance of the right to privacy; indeed, it provides a broad margin for the Court to portray its mistrust of this right and to restrict both its coverage and its protected scope at wish.

In spite of being recognised as an aspect of privacy, however, the right to the secrecy of telecommunications has so far escaped ill definition in the United States. So far it has escaped even the negative consequences of the individualistic approach to

privacy. This has been made possible by the existence of a statutory right to the secrecy of telecommunications. The secrecy of telecommunications has traditionally received clear and generous statutory protection in the USC, namely since the enactment of the Communication Act in 1934[3]. This Act tried to make up for the fact that, under the property reading of the fourth amendment, the Supreme Court denied that the right to the secrecy of telecommunications was included within the Bill of Rights. By way of compensation, the Communication Act not only recognised this right but also granted it nearly absolute protection, that is it subjected its protection to very limited exceptions. Currently, the definition of both the coverage and the protected scope of this right in the USC is still clear and generous; the USC even imposes the systematic application of the exclusionary rule in cases of unlawful telecommunication surveillance. The clarity of the statutory regulation of the right to the secrecy of telecommunications determines that relatively few cases on this right need arrive before the Supreme Court and that most of these cases need not be determined on constitutional grounds. Rather, the Supreme Court tends to deal with the right to the secrecy of telecommunications on the basis of statutory patterns, both because it has the policy of avoiding constitutional issues whenever possible and because the statutory regulation of this right is in any case clearer and more complete. Eventually, the Court combines a statutory with a constitutional level of reasoning, but even then it relies for the most part on statutory patterns when deciding on the right to the secrecy of telecommunications. As a result, the Supreme Court most often deals with a right to the secrecy of telecommunications which is clearly defined and broadly protected.

This situation is not ideal, however. It is not ideal that, to a great extent, the clear and generous definition of the constitutional right to the secrecy of telecommunications be left up to the ebbs and flows of political majorities, for this betrays the role of this right as a defender of the position of minorities and as a guarantee of a correct political discourse. At present, statutory concern with the protection of telecommunications seems high, yet there is no guarantee that it will be so tomorrow; indeed, the role of the constitutional right to the secrecy of telecommunications should be to guarantee precisely that. Moreover, as the Supreme Court has sometimes affirmed, the constitutional right to the secrecy of telecommunications ultimately remains different from the statutory version of this right. We therefore have a scenario in which the statutory right to the secrecy of telecommunications is both well defined and systematically protected via the exclusionary rule, yet where its corresponding constitutional right is neither. The higher standards set by the statutory regulation of this right might make the deficiencies of its

[3]Act of June 19, 1934, c. 652, 48 Stat. 1064, U.S.C.

corresponding constitutional right appear less obvious and as a result their solution might appear less urgent; nevertheless, these deficiencies subsist. The constitutional right to the secrecy of telecommunications continues to be part of the right to privacy and this continues to be ill-defined and regarded as suspicious. In the context of the secrecy of telecommunications, these deficiencies might come to light more clearly any time, particularly if there should be a change in the statutory approach to this right. Only the coverage of the constitutional right to the secrecy of telecommunications has so far been defined in rather clear terms on purely constitutional grounds. Cases on this issue have however been so few that it is difficult to predict whether, should the occasion arise, the Supreme Court would not prefer to define also this sub-sphere of the fourth amendment on sociological grounds, which is its better established doctrine.

These were then the leading ideas of the thesis. Of course, throughout this comparative study other issues have arisen which were not necessarily related to these ideas. I hope to have dealt with them convincingly. At this point, I would only like to recall one aspect of the German regulation of the constitutional right to the secrecy of telecommunications which deserves particularly strong criticism. I am thinking of art. 10.2.2 of the Basic Law as developed by the G 10. In chapter 6 we saw that art. 10.2.2 of the Basic Law authorises the possibility, regulated by the G 10, that individuals who suspect that their telecommunications have been or are being intercepted have no recourse to the judiciary if the interception has been or is being carried out for the protection of national security or of the democratic system. Instead, the lawfulness of such interceptions is controlled by a non-judicial board created ad hoc by Parliament and whose work is carried out in the greatest secrecy. This, I believe, constitutes an unreasonable restriction of the constitutional rights to the secrecy of telecommunications and to judicial recourse. Admittedly, the restriction has a legitimate aim (it aims at keeping secret information about measures of surveillance of particular importance); I however think that it is unnecessary to attain it. Indeed, it seems to me that information about telecommunication surveillance could be kept secret even if measures of surveillance are subject to judicial review.

Let me now go back to my original claim as to how the secrecy of telecommunications can be best guaranteed. If my claim is correct, it then suggests that certain changes in the approach to this right are advisable in some of the systems I have studied in this thesis, most notably in that of the United States. To begin with, the two-level structure of the negative right to the secrecy of telecommunications should be respected consistently both in Germany and in the United States. This should not prove difficult to achieve, since both the German Constitutional Court and the Supreme Court of the United States rely on a basic two-level structure of the right. Arguing that this

structure should be respected in every case without exception can thus be taken as a simple quest for coherence in the case-law of these two Courts.

More difficult might be for these two Courts to recognise a positive subjective dimension to the right to the secrecy of telecommunications, because this implies granting the individual particularly powerful claims against the public power. Indeed, since the organs of the ECHR do not belong to a particular national legal system, they are in a more comfortable position to develop a doctrine which both strengthens the position of individuals vis-à-vis the public power and imposes positive burdens, even financial burdens upon the public power. They only need be careful not to go too far, so as not to antagonise the Contracting Parties, upon which the successful functioning of the Convention ultimately depends. National courts are bound to be less strict with the national public power. For them to impose such positive duties upon national public power and thus restrict its margin of policy action, on the other hand, they must believe that a particularly important right is at stake. The right to the secrecy of telecommunications might appear important enough in Germany, where the protection of individual privacy is regarded as a pillar of the constitutional democratic State on discourse-theoretical grounds. It is much less likely that this right can appear important enough in the United States.

In order that the position of the constitutional right to the secrecy of telecommunications can be improved in the United States, the Supreme Court's approach to privacy would need to undergo a radical change. The Supreme Court would have to stop regarding privacy as suspect and perceive it with a more positive eye, ideally even as a condition for free individual participation in public life. This would favour the recognition of a positive subjective dimension to the right to privacy, hence to the right to the secrecy of telecommunications. A more positive approach to the right to privacy would also help to compensate for the loose boundaries of this right and would accord it a more solid stand when balanced against other interests; moreover, it would constitute the first and fundamental step towards making the exclusionary rule apply as a real remedy against privacy wrongs. Being recognised as part of the right to privacy, the position of the constitutional right to the secrecy of telecommunications would be improved with such a doctrinal change.

Things could however be even better for the secrecy of telecommunications in the United States if only this were recognised as an independent fundamental right; at least its boundaries as a fundamental right should be clearly defined as a sub-area of the all embracing right to privacy. Also in the ECHR and Germany the consistent protection of the right to the secrecy of telecommunications requires that it continues to

be defined in clear terms. This implies that the coverage of this right should not be enlarged to embrace open-channel modes of telecommunication. The secrecy of telecommunications carried out through open channels may be worthy of constitutional protection, yet this should not be granted at the expense of the efficient protection of closed-channel telecommunications. In order to protect the former while preserving protection of the latter, the secrecy of open-channel telecommunications should be regarded as an aspect of the right to privacy.

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