

RESEARCH ARTICLE

# Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data"

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Article 8 ECHR was adopted as a classic negative right, which provides the citizen protection from unlawful and arbitrary interference by the state with his private and family life, home and communication. The ECtHR, however, has gradually broadened its scope so that the right to privacy encroaches upon other provisions embodied in the Convention, includes rights and freedoms explicitly left out of the ECHR by the drafters of the Convention and functions as the main pillar on which the Court has built its practice of opening up the Convention for new rights and freedoms. Consequently, Article 8 ECHR has been transformed from a classic privacy right to a personality right, providing protection to the personal development of individuals. Apart from its theoretical significance, this shift might prove indispensable in the age of Big Data, as personality rights protect a different type of interest, which is far more easy to substantiate in the new technological paradigm than those associated with the right to privacy.

**Keywords:** privacy; Big data

## 1. Introduction

There has always been a troubled marriage between privacy and personality rights. Perhaps one of the first to make a sharp distinction between these two types of rights was Stig Strömholm in 1967 when he wrote 'Rights of privacy and rights of the personality: a comparative survey'.<sup>1</sup> He suggested that the right to privacy was a predominantly American concept, coined first by Cooley<sup>2</sup> and made famous by Warren and Brandeis' article 'The right to privacy'<sup>3</sup> from 1890. Personality rights were the key notion used in the European context, having a long history in the legal systems of countries like Germany and France. Although a large overlap exists between the two types of rights, Strömholm suggested that there were also important differences. In short, the right to privacy is primarily conceived as a negative right, which protects a person's right to be let alone, while personality rights also include a person's interest to represent himself in a public context and develop his identity and personality.

The supposed difference between the American and European approach has remained a field of interest. For example, James Q. Whitman has stressed that American privacy laws have as basic rationale the respect for (negative) liberty, while the European approach (distilled from French and German law) focusses on the protection of dignity.<sup>4</sup> This difference regarding the underlying rationales, he argues, also has a considerable impact on the material scope of the respective rights, with the American privacy laws being quite delimited and, from a European perspective, rather minimalistic and the European privacy framework being quite broad and, from an American point of view, rather all-encompassing.<sup>5</sup> Another difference which is often

<sup>1</sup> Stig Strömholm, 'Right of privacy and rights of the personality : a comparative survey' (Nordic Conference on Privacy organized by the International Commission of Jurists, Stockholm, 1967)

<sup>2</sup> Thomas M. Cooley, *A Treatise on the Law of Torts* (Chicago, Callaghan, 1888)

<sup>3</sup> Samuel D. Warren & Louis D. Brandeis, 'The Right to Privacy' [1890] 4 Harvard Law Review No. 5

<sup>4</sup> James Q. Whitman, 'The Two Western Cultures of Privacy: Dignity versus Liberty' [2004] 113 Yale Law Journal 1151

<sup>5</sup> See further: Edward J. Eberle, 'Human Dignity, Privacy, and Personality in German and American Constitutional Law' [1997] Utah L. Rev. 963

coined is that America's tort law is the primary source for privacy protection, while in Europe, privacy is primarily regarded as a constitutional guarantee.<sup>6</sup>

However, in reality, this contrast seems not so sharp. Europeans have for centuries acknowledged the rights of citizens to be protected against arbitrary interferences by governments with their bodily integrity, the privacy of their home and the secrecy of their correspondence. Likewise, American scholars have often argued that there is a need for a stronger focus on dignity as the underlying rationale of privacy protection<sup>7</sup> and for the introduction of personality rights in their legal discourse.<sup>8</sup> Even Warren and Brandies, hailed as the founders of the American approach, formulated the right to privacy as the right to 'an inviolate personality' and viewed 'the right to privacy, as a part of the more general right to the immunity of the person, – the right to one's personality'. Finally, the American Bill of Rights is becoming increasingly important in America's legal privacy discourse,<sup>9</sup> while the Europeans have numerous non-constitutional frameworks for protecting privacy in horizontal relationships. Thus, in reality, the difference between the European and the American approach is blurry and indistinct.

Although the transatlantic divide seems not so evident, the distinction between privacy and personality rights remains a potent one. Privacy rights protect a person against arbitrary interference with personal matters, his private and family life, his body, his property and his home and the secrecy of his correspondence. In essence, privacy is about retracting matters from the public sphere – the word comes from the Latin *privare*, taking something out of the public domain, and is thus the exact opposite of *publicare*, taking something from the private to the public domain.<sup>10</sup> The core rationale underlying the right to privacy is the protection from – it is a negative right to be free from arbitrary interference. Such interference might be initiated by citizens, businesses and states alike (still, this article will focus primarily on governmental interferences). Privacy thus protects the negative freedom of the citizen and entails a negative obligation for the state, i.e. to abstain from abusing its powers, such as by interfering unjustly or arbitrarily with the privacy of its citizens.

Personality rights, by contrast, are not only about negative freedom, 'because personality both presents the self to the world and protects the self from the world. The ambivalence is evident in the ambiguity of the term from which the word personality is derived, the "persona".<sup>11</sup> Stemming from *per + sonare*, or sounding through, a *persona* signified the mask actors wore when entering the stage and thus relates to both the act of concealing and of revealing. In addition to privacy rights, personality rights also contain an element of control over one's public image and over personal information. Consequently, the protection of reputation and honour, the right to data protection and the right to (intellectual) property often falls under the material scope of personality rights, but the scope is often described as even wider. Reference is often made to the German Constitution in which Article 2 paragraph 1 specifies: 'Everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.'<sup>12</sup> This means that potentially every aspect of one's personal development may be protected, provided that it does not violate the rights of others.

Persönlichkeitsrecht, in Germany, is a widely recognized doctrine, based on the constitution and on laws, but primarily defined and emphasized in German case law. 'Based on these Articles and sections 823 and 826 of the Civil Code (Bürgerliches Gesetzbuch - BGB) the German Federal Court, has developed a "general right of personality" known as Allgemeines Persönlichkeitsrecht. Under the general right of personality one can find a number of different rights such as the right to one's image, the right to one's name, and the right to oppose publication of private facts. As opposed to the U.S. law there is no specific right of privacy recognized in German law but privacy rights are covered by this general right of personality. Some of the rights protected under this principle are also protected by specific provisions in the law such as section 22 of the Art Copyright Act (Kunsturhebergesetz–KUG), granting a right to one's image.'<sup>13</sup>

Whitman also explicitly refers to the notion of the development and fulfilment of one's personality as a core principle of the German privacy approach. 'The protection of privacy in the German tradition is

<sup>6</sup> Paul M. Schwartz & Karl-Nikolaus Peifer, 'Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?' [2010] 98 California Law Review 1925

<sup>7</sup> Edward J. Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' [1964] 39 N.Y.U. L. Rev. 962

<sup>8</sup> See further: Roscoe Pound, 'Interests of Personality' [1915] 28 Harvard Law Review No. 4

<sup>9</sup> *Riley v. California* 134 S. Ct. 2473 – 2014 <[http://www.supremecourt.gov/opinions/13pdf/13-132\\_8l9c.pdf](http://www.supremecourt.gov/opinions/13pdf/13-132_8l9c.pdf)>.

<sup>10</sup> Philippe Aries & Georges Duby, *A History of Private Life: Revelations of the Medieval World* (Belknap, Harvard, 1988)

<sup>11</sup> Jeffrey Malkan, 'Stolen Photographs: Personality, Publicity, and Privacy' [1997] 75 Tex. L. Rev. 779

<sup>12</sup> Grundgesetz Art 2.1

<sup>13</sup> Corinna Coors, 'Headwind from Europe: The New Position of the German Courts on Personality Rights after the Judgment of the European Court of Human Rights', [2010] 11 German Law Journal No. 5

regarded as an aspect of the protection of one of the most baffling of German juristic creations: “personality.” Personality is a characteristically dense German concept, with roots in the philosophies of Kant, Humboldt, and Hegel.<sup>14</sup> Whitman holds that the German legal tradition is ‘most especially [focused] on the unfettered creation of the self, on the fashioning of one’s image and the realization of one’s potentialities.’<sup>15</sup> The underlying rationale of personality rights is thus not negative freedom, as with privacy rights, but rather positive freedom; the focus is on the capacity of the individual to develop his identity, create his persona and flourish as a unique individual (for which negative liberty may be a prerequisite). Consequently, personality rights, in contrast to privacy rights, not only entail negative obligations for the state, but also a positive obligation, to facilitate the full flourishing of its citizens.

This contribution will argue that Article 8 of the European Convention on Human Rights (ECHR) was originally adopted as a classic privacy right, but has gradually been interpreted by the European Court of Human Rights (ECtHR) as a personality right. The Convention was adopted in 1950 and in many respects arises from the ashes of the Second World War.<sup>16</sup> It ‘is a product of the period shortly after the Second World War, when the issue of international protection of human rights attracted a great deal of attention. These rights had been crushed by the atrocities of National Socialism, and the guarantee of their protection at the national level had proved completely inadequate.’<sup>17</sup> Like the Universal Declaration on Human Rights (UDHR), to which the European Convention makes explicit reference in its preamble<sup>18</sup> and on which it is based to a large extent,<sup>19</sup> the Convention is primarily concerned with curtailing the powers of totalitarian states and fascist regimes. Not surprisingly, the *travaux préparatoires* of both documents, reflecting the discussions of the authors of both texts, are full of references to the atrocities of the holocaust and the other horrors of the past decades.

Consequently, the main concern of both the Declaration and the Convention is to protect individuals from the arbitrary interference with their rights and freedoms by intrusive governments. This rationale is even more prominent in the Convention than in the Declaration, because the former document only embodies so called ‘first generation’ human rights.<sup>20</sup> While first generation or civil and political rights require states not to interfere with certain rights and freedoms of their citizens in an arbitrary way, socio-economic rights, such as the right to education and to a standard of living, require states to actively pursue and impose such freedoms by adopting legal measures or by taking active steps, rather than requiring them to abstain from action. Consequently, the original rationale for the Convention as a whole was laying down negative obligations for national states and granting negative freedom to citizens.

Of all articles contained in the Convention, these rationales are most prominent in the right to privacy under Article 8 ECHR specifying: ‘Everyone has the right to respect for his private and family life, his home and his correspondence.’ Already under the Declaration, it was this Article that was originally plainly titled ‘Freedom from wrongful interference’.<sup>21</sup> Similarly, under the Convention, the right to privacy is only concerned with negative liberty, contrasting with other qualified rights in which positive freedoms are implicit, such as a person’s freedom to manifest his religion or beliefs (Article 9), the freedom of expression (Article 10) and the freedom of association with others (Article 11). Moreover, Article 8 ECHR does not contain any implicit positive obligation, such as for example under Article 2, the obligation to protect the right to life, under Article 5, to inform an arrested person of the reason for arrest and to bring him or her promptly before a judge, under Article 6, the obligation to ensure an impartial and effective judicial system, and under Article 3 of the First Protocol, the obligation to hold free elections.<sup>22</sup>

<sup>14</sup> Whitman (n 4) 1180

<sup>15</sup> *ibid.* 1182

<sup>16</sup> Gordan L. Weil, *The European Convention on Human Rights: background, development and prospects* (Leyden, Sijthoff, 1963)

<sup>17</sup> Leo Zwaak, ‘General survey of the European Convention’ in P. van Dijk et al (eds), *Theory and practice of the European Convention on Human Rights* (Antwerpen, Intersentia, 2006), 3.

<sup>18</sup> It specifies: “Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948; Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared:...”

<sup>19</sup> The authors of the Convention began their deliberation on the basis of a ‘short list’ of the rights and freedoms contained in the Declaration. A. H. Robertson, ‘Collected edition of the “travaux préparatoires” of the European Convention on Human Rights = Recueil des travaux préparatoires de la Convention Européenne des Droits de l’Homme. Vol. 1 Preparatory Commission of the Council of Europe Committee of Ministers, Consultative Assembly, 11 May-8 September 1949’, The Hague, Nijhoff, 1975.

<sup>20</sup> Karel Vasak, ‘Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights’, UNESCO Courier 30:11, Paris, United Nations Educational, Scientific, and Cultural Organization, 1977.

<sup>21</sup> UN documents: E/HR/3.

<sup>22</sup> Hugh Tomlinson, ‘Positive obligations under the European Convention on Human Rights’, <<http://bit.ly/17U9TDa>>, p. 2.

However, gradually, the ECtHR has interpreted Article 8 ECHR as a personality right, providing positive freedom to the European citizens and positive obligations for states. The key notion for determining whether a case falls under the scope of Article 8 ECHR seems simply whether a person is affected in his identity, personality or desire to flourish to the fullest extent. This practice has had as a consequence that the material scope of the right to privacy has been extended considerably. First, the right to privacy has been used by the Court to provide protection to a number of matters which fall primarily under the realm of other rights and freedoms contained in the Convention, such as the right to marry and found a family, the right to a fair trial and the right to protection of one's reputation (section 2 of this contribution). Second, the right to privacy has come to embody rights and freedoms specifically rejected from the Convention text, for example the right to develop one's personality, the right to property and the right to a residence and legal identity (section 3 of this contribution). Third and finally, Article 8 ECHR has been the main pillar on which the Court has built its practice of opening up the Convention for new rights and freedoms, such as the right to data protection, minority rights and the right to a clean and healthy living environment (section 4 of this contribution).<sup>23</sup>

After having provided the reader with these three examples, from which it appears that the Court has transformed Article 8 ECHR into a personality right, similar to the German constitution, which protects potentially every aspect of one's personal development, the analysis (section 5 of this contribution) will argue why this development is not only of relevance from a theoretical and methodological point of view, but is also of practical importance. The reinterpretation of Article 8 ECHR by the Court can allow it to deal more effectively with key questions revolving around privacy violations stemming from the new technological paradigm, such as "Big Data" processes. One of the core issues is that individual harm is not (easily) substantiated, although this is a precondition for claiming a right under the ECHR.<sup>24</sup> Personality rights protect a different kind of harm than the right to privacy, which is easier to substantiate in the new technological environment.

## 2. Privacy in relation to rights included in the Convention

The Court has since long accepted as a standard that 'the Convention must be read as a whole. Consequently a matter specifically dealt with by one of its provisions may also, in some of its aspects, be regulated by other provisions of the Convention.'<sup>25</sup> Although understandably, the Court holds that there is no strict line between the rights and freedoms contained under the Convention, this has led to a much criticized, practice in which the Court sometimes assesses a case under three or four different provisions, even though the matter is not directly linked to the core of those articles. This has increased the workload of the Court as the decisions have become longer and the provisions under the Convention are interpreted in a way that they also apply to what has been called 'peripheral rights'.<sup>26</sup> It appears as though this development has not so much meant that other rights and freedoms under the Convention provide protection to matters which primarily fall under the realm of Article 8 ECHR. Rather, it has worked the other way around.

This section will provide three prominent examples of this trend. First, the right to privacy appears to have almost wholly subsumed the right to marry and found a family. Second, in the interpretation of the Court, Article 8 ECHR provides procedural guarantees and, to a certain extent, the right to a fair trial. Finally, the protection of a person's reputation and honour, which is one of the grounds upon which a state may legitimately limit the freedom of expression, is accepted as a subjective right under the scope of Article 8 ECHR. It has to be stressed that this trend could be explained by referring to the fact that the Convention, according to the ECtHR, must be read as a whole and consequently, it is often unimportant to the Court which provision is referred to in concrete matters. What is pivotal to the Court is that material protection is provided to claimants. Still, even if this explanation is embraced, it is remarkable that the Court chooses consistently to refer to Article 8 ECHR to protect interests falling directly or indirectly under other provisions of the Convention, but not the other way around, or at least, not on a similar scale.

<sup>23</sup> Some parts are also used in: Bart van der Sloot, 'Privacy as human flourishing: could a shift towards virtue ethics strengthen privacy protection in the age of Big Data?' [2014] 5 (3) JIPITEC 1 which regards the underlying value of Article 8 ECHR.

<sup>24</sup> Bart van der Sloot, 'Privacy in the post-NSA era: time for a fundamental revision?' [2014] 5 (1) JIPITEC 1

<sup>25</sup> *The Belgian Linguistic Case (No.2)* (1968) 1 EHRR 252 App nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 23 July 1968, § 7

<sup>26</sup> Janneke Gerards, 'The Prism of Fundamental Rights' [2012] 8 European Constitutional Law Review 2

## 2.1 The right to marry (Article 12 ECHR)

Both the UDHR, on which the ECHR is based, and the Convention contain a provision on the right to marry and found a family. Article 12 ECHR holds: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.' Its equivalent is found in Article 16 UDHR, which is somewhat more elaborate and specifies: '(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Obviously, Article 12 is related to Article 8 ECHR. Still, there were a number of reasons for the authors of both documents to separate the right to marry and found a family from the right to protection for family life.

First, Article 8 ECHR was conceived as providing only negative liberties to citizens, namely the right to be free from arbitrary interferences by the state. In contrast, Article 12 contains positive liberties, namely that of founding a family and marrying. Thus while Article 12 protects the creation of a family, Article 8 ECHR guarantees respect for already established family life.<sup>27</sup> Second, both provisions have a different background. While the rationale for adopting the right to privacy was primarily connected to concerns over negative liberty, Article 12 was principally regarded as an equality provision, in relation to the ban on racially mixed marriages by the fascist regimes of that time<sup>28</sup> and the position of woman and children, in connection to arranged marriages and child-marriages, still widely spread at that time.<sup>29</sup> Third and finally, following the classic liberal assumption that the individual and the family precede the society and the state, the authors of the Declaration and the Convention believed that governments could never limit or restrict the right to marry and found a family in essence as by doing so, they would undermine their own foundations.<sup>30</sup> This is why Article 12 ECHR does not contain a general limitation clause, as Articles 8, 9, 10 and 11 of the Convention do, but only provides that the national laws may govern the exercise of the right to marry and found a family.<sup>31</sup>

In the case law of the former Commission and the Court, however, the role of Article 12 has been almost completely marginalized.<sup>32</sup> First, Article 12 ECHR has been interpreted in a very conservative and restrictive manner. For example, the Court has excluded from its scope same sex marriages<sup>33</sup> and has allowed far reaching restrictions on the rights of immigrants to marry.<sup>34</sup> Likewise, it has held that the right to found a family only refers to founding a family through biological means and through natural reproduction. Alternative ways to do so, like adoption<sup>35</sup> or artificial insemination,<sup>36</sup> have been denied protection under the scope of Article 12 ECHR. Finally, the Court has held that the room for states to limit and regulate the right to marry and found a family is not narrower than in relation to Article 8, but wider as the right to marry and found a family is strongly connected to moral and cultural standards, which differ from country to country, necessitating a wide margin of appreciation for national states.<sup>37</sup>

<sup>27</sup> See for discussion among others: UN documents A/C.3/SR.124 and A/C.3/SR.125

<sup>28</sup> On this topic: Michelle Mouton, *From nurturing the nation to purifying the Volk: Weimar and Nazi family policy, 1918–1945* (Cambridge University Press, 2007), Lisa Pine, *Nazi family policy, 1933–1945* (Oxford 1997).

<sup>29</sup> Maja K. Eriksson, 'Article 16' in Asbjorn Eide (eds), *The universal declaration of human rights: a commentary* (Oslo, Scandinavian University Press, 1992). Don Browning, 'Meaning of Family in the Universal Declaration of Human Rights' in A. Scott Loveless and Thomas Holman (eds), *The Family in the New Millennium, Vol. I* (Westport, CT, Praeger, 2007)

<sup>30</sup> UN documents E/CN.4/SR.37, p. 11/12. A.H. Robertson, 'Collected edition of the ,travaux préparatoires' of the European Convention on Human Rights; Council of Europe. Vol. 2 Consultative Assembly, second session of the Committee of Ministers, Standing Committee of the Assembly, 10 August-18 November 1949', The Hague, Nijhoff, 1975, p. 100.

<sup>31</sup> *X. v. UK* App no 6564/74 (Commission Decision, 21 May 1975)

<sup>32</sup> In plain numbers, in the more than 60 years since the Convention came to see light, the Court has only found a violation of Article 12 ECHR in 8 cases, which contrasts sharply with the some 1000 violations it found with regard to the right to privacy. See further: Bart van der Sloot, 'Between fact and fiction: an analysis of the case-law on Article 12 of the European Convention on Human Rights' [2014] 4 Child and Family Law Quarterly

<sup>33</sup> *R. and F. v. UK* App no 35748/05 (ECtHR, 28 November 2006) *Parry v. UK* App no 42971/05 (ECtHR, 28 November 2006)

<sup>34</sup> *Patel v. UK* App no 14069/88 (Commission Decision, 14 December 1988), *S. v. UK*, App no 19788/92 (Commission Decision, 06 July 1992), *Klip and Krüger v. UK* App no 33257/96 (Commission Decision, 03 December 1997), *Bacovic v. Sweden* App no 24485/94 (Commission Decision, 30 November 1994), *Sanders v. France* App no 31401/96 (Commission Decision, 16 October 1996)

<sup>35</sup> *Di Lazzaro v. Italy* App no 31924/96 (Commission Decision, 10 July 1997), *Akin v. Netherlands* App no 34986/97 (Commission Decision, 01 July 1998)

<sup>36</sup> *E.L.H. and P.B.H. v. UK* App nos 32094/96 and 32568/96 (Commission Decision, 22 October 1997)

<sup>37</sup> *F. v. Switzerland* App no 11329/85 (ECtHR, 18 December 1987)

Second, by contrast, Article 8 ECHR has been interpreted in a very wide and extensive manner. For example, the Court has accepted that positive liberties are protected under Article 8 ECHR, such as the right to found a family and develop and maintain family ties. Moreover, bastard children and adopted children and families founded through artificial insemination, which do not enjoy protection under Article 12 ECHR, are considered to fall under the scope of family life under Article 8. Likewise, other modes of cohabitation than marriage and cohabiting homosexual couples are approached from the perspective of Article 8 of the Convention.<sup>38</sup> Consequently, Article 8 has almost entirely subsumed the rights contained in Article 12 ECHR. This holds true even for cases which regard specifically the right to marry and found a family. For example, the impossibility to found a family due to involuntary sterilization<sup>39</sup> or the desire to found a family through *in vitro* fertilisation<sup>40</sup> are dealt with under Article 8 and not Article 12 ECHR. Likewise, the legal incapacity of a person to marry is treated as an issue connected to the right to privacy and not the right to marry.<sup>41</sup> As a final example, not only do states have a negative obligation to protect the right to found a family under Article 8, they may under certain circumstances have a positive obligation under that provision, and not Article 12 ECHR, to facilitate artificial insemination, for example, if this is a prisoner's only way to fulfill his desire to found a family with his spouse.<sup>42</sup> In conclusion, although the right to marry and found a family was explicitly excluded from Article 8 ECHR by the authors of the Convention, the Court has overturned that decision. Although these freedoms do not follow from the classic right to privacy, it may be a part of one's personality right as it relates to one's personal development in the relational sphere.

## 2.2 The right to a fair trial (Articles 5, 6, 13 and 34 ECHR)

Though the right to a fair trial is in no way subsumed by the right to privacy, there are numerous examples in which the right to a fair trial and related procedural requirements are granted protection by the Court by referring to Article 8 of the Convention, instead of Articles 5, 6, 13 or 34 ECHR. Peculiar to the Court's case law is that most matters regarding the respect for private correspondence under Article 8 relate either directly or indirectly to the right to a fair trial.<sup>43</sup> The right of prisoners to petition to the Court, their freedom to correspond in private with their lawyer and even the sanctity of a lawyer's office, are all treated as matters that fall under the scope of Article 8 ECHR. The Court acknowledges that in order to petition, one must correspond with the Court, and holds that correspondence with a solicitor is 'a preparatory step to the institution of civil legal proceedings and, therefore, to the exercise of a right embodied in another Article of the Convention, that is, Article 6 (art. 6)'<sup>44</sup> and that 'where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 (art. 6) of the Convention'.<sup>45</sup> Nevertheless, these matters are dealt with under the scope of the right to privacy even although the goal of guaranteeing (the secrecy of) correspondence between a prisoner and a court or his lawyer is not so much guaranteeing his privacy, but safeguarding an effective system of petition and complaint and the right to a fair trial.

More importantly, there are a number of cases in which the Court deals with elements of a right to a fair process directly under Article 8 ECHR. 'It is true that Article 8 (art. 8) contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority's decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and, hence, neither is nor appears to be arbitrary. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8 (art. 8). [] The decision-making process must therefore, in the Court's view, be such as to secure that their views and interests are made known to and duly taken into account by the local authority and that they are able to exercise in due time any remedies available to them.'<sup>46</sup>

<sup>38</sup> See for a more general overview: Ursula Kilkelly, 'The right to respect for private and family life. A guide to the implementation of Article 8 of the European Convention on Human Rights', Human rights handbooks, 2003. <<http://echr.coe.int/NR/rdonlyres/77A6BD48-CD95-4CFF-BAB4-ECB974C5BD15/0/DG2ENHRHAND012003.pdf>>

<sup>39</sup> *I.G. v. Slovakia* App no 15966/04 (ECtHR, 13 November 2012), *V.C. v. Slovakia* App no 18968/07 (ECtHR, 08 November 2011)

<sup>40</sup> *Evans v. UK* App no 6339/05 (ECtHR, 10 April 2007)

<sup>41</sup> *Lashin v. Russia* App no 33117/02 (ECtHR, 22 January 2013)

<sup>42</sup> *Dickson v. UK* App no 44362/04 (ECtHR, 04 December 2007)

<sup>43</sup> As a final example, the obligation to testify against a relative or friend is approached from the angle of Article 8 ECHR. *Van der Heijden v. Netherlands* App no 42857/05 (ECtHR, 03 April 2012)

<sup>44</sup> *Golder v. UK* App no 4451/70 (ECtHR, 21 February 1975) 45

<sup>45</sup> *Niemitz v. Germany* App no 13710/88 (ECtHR, 16 December 1992) 37

<sup>46</sup> *B. v. UK* App no 9840/82 (ECtHR, 8 July 1987) 63-64. See similarly: *R. v. UK* App no 10496/83 (ECtHR, 8 July 1987) *W. v. UK* App

Most cases in which these procedural requirements play a role regard matters of parental authority, such as with regard to the custody over a child by divorced parents or the placing in a foster home of children living in an unstable environment. It follows from the fact that the child's interest always prevails that if a parent is separated for an extensive period from his child, it is often not in the interest of the latter to be reunited with his father, mother or both. From this fact follows an increased interest in a speedy and resolute process, since lengthy procedures may lead to the *de facto* determination of a case.<sup>47</sup> Moreover, a fair balance should be struck between the interests of the mother and the father. Although the Court has been reluctant to focus on substantive rights in such matters, it has granted both parents under the scope of Article 8 ECHR, among others, the right to be heard, to be informed in full about existing reports and documents and to have their interests weighed in a fair and balanced manner,<sup>48</sup> even although these matters are more directly related to Article 6 ECHR and the right to a fair process.

In the case law of the Court, however, these principles have also been increasingly adopted under the right to privacy in other matters, such as the loss of one's home due to destruction or expropriation,<sup>49</sup> cases in which immigrants are expelled<sup>50</sup> and cases that regard the quality of the living environment. For example, the Court has held that where 'a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake. The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question. Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.'<sup>51</sup> Consequently, under Article 8 ECHR, citizens now have a right to actively steer and influence decisions that affect their lives in general, which fits in the scope and purpose of personality rights, but seems at odds with the focus of classic privacy rights.

### **2.3 The protection of honor and reputation (Article 10 ECHR)**

The European Convention is based on the Universal Declaration and likewise, Article 8 ECHR is based on Article 12 UDHR, which holds: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation.' When drafting the Universal Declaration, the inclusion of the protection of honor and reputation was already heavily discussed as it is principally concerned with horizontal relationships and attacks by or through the media.<sup>52</sup> Although it was finally accepted under the UDHR, the authors of the ECHR, only focusing on vertical relationships (between state and citizen) did not include the protection of a person's reputation as a subjective right under the right to privacy, but transferred it to paragraph 2 of Article 10 ECHR, containing the right to freedom of expression.<sup>53</sup>

Article 10 ECHR provides: '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, 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, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.' Consequently, under the Convention, the right to reputation is not a right of the individual, it is one of the grounds on which states may, and not must, legitimately limit the right to freedom of expression and the freedom of the press.

no 9749/82 (ECtHR, 8 July 1987), *Diamante and Pelliccioni v. San Marino* App no 32250/08 (ECtHR, 27 September 2011)

<sup>47</sup> *M. M. v. UK* App no 13228/87 (Commission Decision, 13 February 1990)

<sup>48</sup> *Karrer v. Romania* App no 16965/10 (ECtHR, 21 February 2012). *Diamante and Pelliccioni v. San Marino* App no 32250/08 (ECtHR, 27 September 2011)

<sup>49</sup> *Buckland v. UK* App no 40060/08 (ECtHR, 18 September 2012)

<sup>50</sup> *Alim v. Russia* App no 39417/07 (ECtHR, 27 September 2011). *Liu v. Russia* (no. 2) App no 29157/09 (ECtHR, 26 July 2011)

<sup>51</sup> *Taskin a.o. v. Turkey* App no 46117/99 (ECtHR, 10 November 2004) 119

<sup>52</sup> UN Documents: A/C.3/SR.119

<sup>53</sup> See in general: <[http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART8-CDH\(67\)5-BIL1338891.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART8-CDH(67)5-BIL1338891.pdf)>

This sharp choice has been honored by the Court in the early case law on Article 8 ECHR, in which it was held 'that the right to honor and good name as such is not protected' under the scope of the right to privacy.<sup>54</sup> For example, in 2000, when an applicant complained that the judgments of the domestic courts contained derogatory statements which amounted to a breach of Article 8 of the Convention, the Court held 'that the applicant's complaint relates to a perceived affront to his dignity and reputation caused by statements made by the trial judge when handing down sentence and by the Court of Appeal when upholding that sentence. This is not a matter which falls within the protection guaranteed by Article 8 of the Convention. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention [.]'.<sup>55</sup>

However, gradually, the Court has accepted that under certain circumstances, a person may successfully put forward a case in which the respect for his reputation and honor is the central element. First, by accepting the doctrine of positive obligations, the Court has held that states may be required to limit the freedom of speech in order to ensure respect for a person's reputation and honor, for example by guaranteeing a fair balance between the different interests involved in its national judicial system.<sup>56</sup> Among others, it has been held that '[.] where a question arises of interference with private life through publication in mass media, the State must find a proper balance between the two Convention rights involved, namely the right to respect for private life guaranteed by Article 8 (Art. 8) and the right to freedom of expression guaranteed by Article 10 (Art. 10) of the Convention.'<sup>57</sup> Furthermore, the Court has come to accept that individuals may invoke their interest in the protection of their honor and reputation when the behavior of public authorities affect their legitimate concerns, for example when courts or governmental organizations make public certain private and delicate details about their behavior, mental status or physical disabilities.<sup>58</sup>

Finally, in more recent cases, the Court seems willing to accept a full-fledged right to the protection of one's reputation as an interest protected by Article 8 ECHR. The first time it did so, in the case of *Pfeifer v. Austria* from 2007, the Court referred to its previous case law and drawing from these notions stressed 'that a person's reputation, even if that person is criticized in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her "private life". Article 8 therefore applies.'<sup>59</sup> In its subsequent case law, this line is confirmed<sup>60</sup> and extrapolated to the protection of honor. In a case of 2009 the Court held: 'In more recent cases decided under Article 8 of the Convention, the Court has recognised reputation and also honour as part of the right to respect for private life. In *Pfeifer*, the Court held that a person's reputation, even if that person was criticised in the context of a public debate, formed part of his or her personal identity and psychological integrity and therefore also fell within the scope of his or her "private life". The same considerations must also apply to personal honour.'<sup>61</sup> Consequently, although it was left out deliberately by the Convention authors, the right to protection of reputation and honor is brought back under the scope of Article 8 ECHR and accepted as subjective rights in the Court's recent jurisprudence. The protection of honor and reputation is perhaps the classic difference between privacy and personality rights, being traditionally excluded from the scope of the former and included in the scope of the latter right.

## 2.4 Conclusion

These are but a few examples of a larger trend; others might be found in the encroachment of the right to privacy upon the freedom of association, the freedom of religion and especially the right to bodily integrity. The protection of bodily integrity is linked to the notion of privacy, but was explicitly rejected from the scope of Article 12 UDHR and 8 ECHR by the authors of both documents.<sup>62</sup> In the ECHR, bodily integrity is protected predominantly under Articles 2 and 3 ECHR. Still, the bodily and psychological integrity of a person, especially in the medical sphere, are primarily discussed under the scope of Article 8 ECHR. For example,

<sup>54</sup> See among others: *Asociacion de Aviadores de la Republica, Mata et al. v. Spain* App no 10733/84 (Commission Decision, 11 March 1985), *Saltuk v. Turkey* App no 31135/96 (ECtHR, 24 August 1999)

<sup>55</sup> *Marlow v. UK* App no 42015/98 (ECtHR, 5 December 2000)

<sup>56</sup> See among others: *Rayayd and Unanua v. Spain* App no 31477/96 (Commission Decision, 15 January 1997), *Minelli v. Switzerland* App no 14991/02 (ECtHR 14 June 2005), *GourGuénidzé v. Georgia* App no 71678/01 (ECtHR 17 October 2006), *Von Hannover v. Germany* App no 59320/00 (ECtHR, 24 June 2004).

<sup>57</sup> *N. v. Sweden* App no 11366/85 (Commission Decision, 16 November 1986)

<sup>58</sup> *L. L. v. France* App no 7508/02 (ECtHR, 10 October 2006)

<sup>59</sup> *Pfeifer v. Austria* App no 12556/03 (ECtHR, 15 November 2007) 35

<sup>60</sup> *Rothe v. Austria* App no 6490/07 (ECtHR, 04 December 2012)

<sup>61</sup> *A. v. Norway* App no 28070/06 (ECtHR, 09 April 2009) 64

<sup>62</sup> E/CN.4/21, p. 4



compulsory tuberculin test or chest x-rays,<sup>63</sup> vaccination schemes,<sup>64</sup> gynecological examinations,<sup>65</sup> medical treatments,<sup>66</sup> and being forced to share an environment where smoking is allowed,<sup>67</sup> disciplinary measures and punishments inflicted by a school,<sup>68</sup> psychiatric examination ordered by a Court,<sup>69</sup> the requirement that a prisoner produce a urine sample,<sup>70</sup> a compulsory medical intervention, even if it is of minor importance,<sup>71</sup> the right to euthanasia,<sup>72</sup> the right to abortion,<sup>73</sup> the positive obligation of the state to ensure access to public buildings for the handicapped<sup>74</sup> and providing financial assistants for medical treatment,<sup>75</sup> all must be considered, according to the ECtHR, within the scope of right to privacy.

Although these matters of bodily and psychological integrity fall somewhere in the intermediate zone between the right to privacy and the right to life and to be free from inhuman and degrading treatment, the Court has consistently approached these issues from the perspective of Article 8 ECHR, which is yet another example of its widened scope. In conclusion, Article 8 ECHR has almost wholly subsumed the material scope originally intended for the right to marry and found a family, Article 12 ECHR. Specific to Article 8 ECHR is also that the Court has held that there are procedural requirements implicit in the notion of the right to private life, which has extended the scope of the right to privacy considerably. The Court has finally, against the explicit intentions of the authors of the Convention, accepted the right to protection of one's reputation and honor as a subjective right protected by the right to privacy.

### 3. Privacy in relation to rights excluded from the Convention

The Court has accepted as a principle, that it may not interpret the Convention in a way that goes against the explicit intentions of its drafters. For example, Article 12 ECHR is based on Article 16 UDHR, but although the latter provision explicitly refers to the dissolution of marriage, the ECHR does not. The Court has strictly adhered to its principle of conformity and rejected under Article 12 ECHR a right to divorce, as although it 'is true that the Convention and its Protocols must be interpreted in the light of present-day conditions [], the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate.'<sup>76</sup> A similar line is drawn by the Court in relation to gay marriages, with a reference to the phrase 'men and women', from which it infers that gay marriages are not protected under the scope of Article 12 ECHR.<sup>77</sup>

Consequently, it is very important to the Court to respect the purpose and intention of the authors of the Convention. However, in relation to Article 8 ECHR, the Court seems to adopt a different approach. The previous section already explained how the decision of the authors to exclude a right to reputation from Article 8 ECHR was overturned by the Court. However, the Court has gone even further and granted rights and freedoms that are explicitly rejected from the text of the Convention as a whole, protection under the scope of the right to privacy. Again, three examples will be provided: the right to personal development, the right to property and the right to a residence and a legal identity for immigrants. Again, these matters do not fall under a classic privacy right, but can be linked to the protection of one's identity and the right to personal development.

<sup>63</sup> *Acmanne a.o. v. Belgium* App no 10435/83 (Commission Decision, 10 December 1984)

<sup>64</sup> *Association of parents v. UK* App no 7154/75 (Commission Decision, 12 July 1978). *Wain v. UK* App no 10787/84 (Commission Decision, 02 December 1985). *X. v. Denmark* App no 6907/75 (Commission Decision, 10 December 1975). *Godfrey v. UK* App no 8542/79 (Commission Decision, 04 February 1982). *Storck v. Germany* App no 61603/00 (ECtHR, 16 June 2005)

<sup>65</sup> *Y.F. v. Turkey* App no 24209/94 (ECtHR 22 July 2003), *Tomasi v. France* App no 12850/87 (ECtHR, 27 August 1992)

<sup>66</sup> *X. v. Germany* App no 8509/79 (Commission Decision, 05 May 1981)

<sup>67</sup> *Benito v. Spain* App no 36150/03 (ECtHR, 13 November 2006)

<sup>68</sup> *Costello-Roberts v. UK* App no 13134/87 (ECtHR, 25 March 1993)

<sup>69</sup> *X. v. Germany* App no 8334/78 (Commission Decision, 07 May 1981)

<sup>70</sup> *A.B. v. Switzerland* App no 20872/92 (Commission Decision, 22 February 1995). *Galloway v. UK* App no 34199/96 (Commission Decision, 09 September 1998)

<sup>71</sup> *Peters v. Netherlands* App no 21132/93 (Commission Decision, 06 April 1994), *X. v. Netherlands* App no 8239/78 (Commission Decision, 04 December 1978), *X. v. Austria* App no 8278/78 (Commission Decision, 13 December 1979), *Acmanne* (n 84)

<sup>72</sup> *Pretty v. UK* App no 2346/02 (ECtHR, 29 April 2002), M. A. Sanderson, 'Pretty v. the United Kingdom. App. No. 2346/02' [2002] Vol. 96 *The American Journal of International Law* No. 4

<sup>73</sup> *Brüggemann and Scheuten v. Germany* App no 6959/75 (Commission Decision, 19 May 1976), *R.R. v. Poland* App no 27617/04 (ECtHR, 26 May 2011) 197. See further: E. J. Ireland, 'Do Not Abort the Mission: An Analysis of the European Court of Human Rights Case of R.R. v. Poland' [2013] 38 *North Carolina Journal of International Law & Commercial Regulation* 651

<sup>74</sup> *Zehnalova and Zehnal v. Czech Republic* App no 38621/97 (ECtHR, 14 May 2002)

<sup>75</sup> *Pentiacova and 48 others v. Moldova* App no 14462/03 (ECtHR, 4 January 2005)

<sup>76</sup> *Johnston a.o. v. Ireland* App no 9697/82 (ECtHR, 18 December 1986) 53

<sup>77</sup> *Schalk and Kopf v. Austria* App no 30141/04 (ECtHR, 24 June 2010)

### 3.1 The right to personal development (Articles 22, 26 and 29 UDHR)

Although, the Convention is based on the Universal Declaration on Human Rights, the Convention only contains civil and political rights. Socio-economic rights were transferred to an optional Protocol by the authors of the Convention.<sup>78</sup> By contrast, the Declaration guarantees a number of socio-economic rights and other non-'civil and political rights', such as the right to enjoy the cultural life of the community, the right to a standard living and the right to rest and leisure.<sup>79</sup> The Convention, in contrast to the Declaration, is a legally binding document and while civil and political rights are relatively concrete and can be legally binding, the other category of rights, 'on the other hand, was considered to consist not of legal rights but of programmatic rights, the formulation of which necessarily is much vaguer and for the realisation of which the States must pursue a given policy, an obligation which does not lend itself to incidental review of government action for its lawfulness.'<sup>80</sup> Consequently, such rights are rejected from the scope of the Convention.

Specifically denied by the authors of the Convention are the many references in the Declaration to the right to personal development. Article 22 UDHR holds that everyone has the right to social security and is entitled to realization of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. Article 26 UDHR specifies that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. Finally, Article 29 UDHR states that everyone has duties to the community in which alone the free and full development of his personality is possible. Although the authors regarded dignity and personal development as underlying rationales of the Convention as a whole, they were not accepted as subjective rights due to their vague and unenforceable nature.

Although the right to privacy was originally focussed on providing citizens with the negative right to be free from arbitrary interferences and the negative obligation of states to abstain from such interferences,<sup>81</sup> the Court has gradually diverged from the intention of the authors by accepting both positive obligations for national governments and granting a right to positive freedom to individuals.<sup>82</sup> In a case dating from 1976, the former Commission held: 'For numerous anglo-saxon and French authors the right to respect for "private life" is the right to privacy, the right to live, as far as one wishes, protected from publicity. [H]owever, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfillment of one's own personality.'<sup>83</sup> Following this line, the right to privacy is interpreted increasingly as a right that guarantees the development and expression of one's identity and personality,<sup>84</sup> among others by stressing 'the fundamental importance of [the protection of private life] in order to ensure the development of every human being's personality.'<sup>85</sup>

According to the ECtHR, states are under an obligation, *inter alia*, to allow individuals to receive the information necessary to know and to understand their childhood and early development as this is held to be of importance because of 'its formative implications for one's personality'.<sup>86</sup> Moreover, the right 'to develop and fulfill one's personality necessarily comprises the right to identity and, therefore, to a name'.<sup>87</sup> Consequently, a person has the right to maintain or change his name, especially when a person has undergone an identity-change, such as transsexuals.<sup>88</sup> The Court has also condemned legislation which had the aim or effect of stigmatizing the identity of minority groups, such as bastard children and homosexuals<sup>89</sup> and

<sup>78</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Paris, 20.III.1952 <<http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm>>.

<sup>79</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) Articles 24, 25 and 27

<sup>80</sup> Pieter van Dijk, Fried van Hoof, Arjen van Rijk and Leo Zwaak, *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen, 2006) 6

<sup>81</sup> See among others: *Arvelo Apont v. Netherlands* App no 28770/05 (ECtHR, 3 November 2011)

<sup>82</sup> *Linguistic case* (n 25), *Marckx v. Belgium* App no 6833/74 (ECtHR, 13 June 1979)

<sup>83</sup> *X. v. Iceland* App no 6825/74 (Commission Decision, 18 May 1976)

<sup>84</sup> *Frette v. France* App no 36515/97 (ECtHR, 26 February 2002)

<sup>85</sup> *Varapnickaite-Mazyliene v. Lithuania* App no 20376/05 (ECtHR, 17 January 2012) 43. See further: *Biriuk v. Lithuania* App no 23373/03 (ECtHR, 25 November 2008), *Niene v. Lithuania* App no 36919/02 (ECtHR, 25 November 2008)

<sup>86</sup> *Phinikaridou v. Cyprus* App no 23890/02 (ECtHR, 20 December 2007) 45, *Mikulic v. Croatia* App no 53176/99 (ECtHR, 07 February 2002), *Gaskin v. UK* App no 10454/83 (ECtHR, 07 July 1989)

<sup>87</sup> *K.B. v. Netherlands* App no 18806/91 (Commission Decision, 01 September 1993)

<sup>88</sup> *Goodwin v. UK* App no 28957/95 (ECtHR, 11 July 2002), *B. v. France* App no 13343/87 (ECtHR, 25 March 1992), *I. v. UK* App no 25680/94 (ECtHR, 11 July 2002)

<sup>89</sup> *Di Lazzaro* (n 35), *Marckx* (n 82), *Dudgeon v. UK* App no 7525/76 (ECtHR, 22 October 1981) *Johnson v. UK* App no 10389/83 (Commission Decision, 17 July 1986), *Norris v. Ireland* App no 10581/83 (ECtHR, 26 October 1988), *Brüggemann and Scheuten v. Germany* App no 6959/75 (Commission Decision, 19 May, 1976)

has furthermore held that states may be required under Article 8 ECHR to provide special aid to minorities in order to maintain and develop their identity.<sup>90</sup> It goes too far to provide an exhaustive list of examples,<sup>91</sup> but reference can be made, inter alia, to the obligation to wear prison clothes, which is held to be an interference with a prisoner's private life due to the stigma it creates.<sup>92</sup> To provide yet another example of how broad the scope of this approach is, it has been decided by the Court that the refusal of the authorities to allow an applicant to have his ashes scattered in his garden on his death is so closely related to his private life that it comes within the sphere of Article 8 of the Convention 'since persons may feel the need to express their personality by the way they arrange how they are buried'.<sup>93</sup>

With regard to the development and fulfilment of one's identity in the external sphere, among others, the Court has not only protected (the creation of) the family sphere,<sup>94</sup> it has also accepted that Article 8 ECHR 'protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world'.<sup>95</sup> Moreover, the right to privacy has been extended to the professional sphere, so that wire-tapping professional conversations, the seizures of business documents and the sanctity of the 'home' of a person's professional working place are provided protection under Article 8 ECHR.<sup>96</sup> This is so, according to the Court, because private life 'encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature'<sup>97</sup> and because Article 8 ECHR does not exclude, in principle, 'activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world'.<sup>98</sup> These are but a few of the examples from which it may appear that the right to develop one's identity and personality both in private and in public, both in the personal and the professional realm, has been accepted by the Court as one of the core rationales underlying Article 8 ECHR. This again is an obvious example of the shift of the interpretation of Article 8 ECHR from a classic right to privacy to a more encompassing personality right.

### **3.2 The right to property (Article 1 First Protocol to the ECHR)**

The right to property has not only been rejected from the scope of the Convention as a whole, it has also been rejected from the right to privacy specifically. When drafting the documents, the question was posed a number of times whether or not Article 12 UDHR and Article 8 ECHR should include, besides the concepts already contained therein, a reference to the inviolability of private property. When drafting the UDHR, for example, one of the first drafts, proposed by Panama, not only contained a separate provision on the right to property but also embodied an article that specified: 'Freedom from unreasonable interference with his person, home, reputation, privacy, activities, and property is the right of every one.'<sup>99</sup> Throughout the *travaux préparatoires* of the UDHR, the right to property has been put in and out the provision on privacy at various times.<sup>100</sup>

Likewise, during the drafting phase of the ECHR, a number of delegates felt that the protection of home and to some extent, the protection of family life, also included an economical aspect. Others wanted to include a right to protection of personal property in the Convention as they held that that the right to own property is a pre-condition of personal and family independence.<sup>101</sup> Still at the very end of the discussions, proponents of acknowledging a right to property under the Convention held that 'property is not merely an 'economic right', but an extension of human personality, the essential basis of stable family life'.<sup>102</sup> Even

<sup>90</sup> *Chapman v. UK* App no 27238/95 (ECtHR, 18 January 2001). *Aksu v. Turkey* App nos 4149/04 and 41029/04 (ECtHR, 27 July 2010). *Aksu v. Turkey* App no 4149/04 and 41029/04 (ECtHR, Grand Chamber, 15 March 2012)

<sup>91</sup> See more in detail: Bart van der Sloot (n 23)

<sup>92</sup> *McFeeley v. UK* App no 8317/78 (Commission Decision, 15 May 1980), *X. v. UK* App no 8231/78 (Commission Decision, 06 March 1982)

<sup>93</sup> *X. v. Germany*, App no 8741/79 (Commission Decision, 10 March 1981)

<sup>94</sup> *Kilkelly* (n 38)

<sup>95</sup> *Pretty* (n 72) 61

<sup>96</sup> *Chappell v. UK* App no 10461/83 (ECtHR, 30 March 1989)

<sup>97</sup> *C. v. Belgium* App no 21794/93 (ECtHR, 07 August 1996) 25

<sup>98</sup> *Niemitz* (n 45) 29

<sup>99</sup> UN Documents: E/HR/3, p. 5

<sup>100</sup> UN Documents: E/CN.4/36. E/CN.4/36/ADD.1. E/CN.4/82/Add.12. A/C.3/280. E/CN.4/32. UN Documents: E/CN.4/21, p. 12. See also: E/CN.VAC.1/3, p. 4. See also: E/CN.4/AC.1/8, p. 3

<sup>101</sup> Robertson (n 19) 270–272

<sup>102</sup> Camilo Basilio Schutte, *The European fundamental right of property: article 1 of protocol no. 1 to the European convention on human rights: its origins, its working and its impact on national legal orders* (Deventer, Kluwer, 2004) 16

though this relationship was undisputed, the right to property also contains a purely economic aspect, which, like the right to education, was regarded both non-essential and unenforceable.<sup>103</sup>

Consequently, the protection of economic interests was referred to the first Protocol to the Convention, Article 1, which holds: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.' This provision is even more elaborate than Article 17 of the UDHR, which provides: '(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.'

Nevertheless, in the case law of the Court, property rights and more general economic issues have been accepted under the scope of Article 8 ECHR, therewith again (like with the right to reputation) accepting one of the classic differences between the right to privacy and personality rights, in favour of the latter. First, it is interesting to note that most cases concerning the protection of the home regard the eviction or expropriation of homes and the destruction of a person's home by army forces.<sup>104</sup> Although such practices obviously have an impact on an individual's private and family life, these matters cannot in themselves be qualified as privacy-infringements and arguably, are more related to the right to respect for property and protection against unlawful expropriation.

Second, family property is assessed under the scope of the right to privacy, among others in relation to inheritance matters. For example, in the famous *Marckx* case of 1979, the Court found a violation of Article 8 in combination with Article 14, because the national law of Belgium differentiated between legitimate children and illegitimate children in terms of paternity rights, by reason both of the restrictions on their capacity to receive property from their mother and of their total lack of inheritance rights on intestacy over the estates of their near relatives on their mother's side.<sup>105</sup> More in general, state practices and legal provisions that differentiate between individuals on the basis of their marital status, gender, sexual preference or on any other ground have been dealt with under the scope of Article 8 ECHR, in combination with Article 14 ECHR. For example, when an applicant claimed to have been a victim of discrimination on the ground of his sexual orientation in that the Supreme Court had denied him the status of 'life companion' of his late partner, which had consequences for his right to succeed the tenancy of the flat he had been living in, the Court accepted that this led to an interference with Article 8 together with Article 14 ECHR.<sup>106</sup> Again, it might be suggested that the right to succeed the tenancy is more related to property and economic concerns than to a right to privacy.

Third and finally, as referred to earlier, the Court has held on numerous occasions that the right to privacy also provides protection to the full fulfillment and development of a person's identity in the public sphere. Consequently, it has held that restrictions imposed on access to certain professions may have a significant impact on a person's private life<sup>107</sup> and dismissal from office has been found to interfere with the right to respect for private life.<sup>108</sup> For example, the Court has held that the dismissal of a person 'from the post of judge affected a wide range of his relationships with other persons, including the relationships of a professional nature. Likewise, it had an impact on his "inner circle" as the loss of job must have had tangible consequences for material well-being of the applicant and his family.'<sup>109</sup> Accepting that dismissal from office falls under the scope of Article 8 ECHR not only extends the right to privacy considerably, it also comes close to a right to work, accepted under Article 23 UDHR,<sup>110</sup> which was explicitly rejected from the scope of the Convention by the authors.

<sup>103</sup> Robertson (n 30) 60

<sup>104</sup> *Esmukhambetov a.o. v. Russia* App no 23445/03 (ECtHR, 29 March 2011), *Mzayev a.o. v. Russia* App no 1503/02 (ECtHR, 03 May 2011), *Aksakal v. Turkey* App no 37850/97 (ECtHR, 15 February 2007).

<sup>105</sup> *Marckx* (n 82). *Vermeire v. Belgium* App no 12849/87 (ECtHR, 29 November 1991), *Bourimi v. Netherlands* App no 28369/95 (ECtHR, 03 October 2000)

<sup>106</sup> *Karner v. Austria* App no 40016/98 (ECtHR, 24 July 2003)

<sup>107</sup> See among others: *Sidabras and Dziautas v. Lithuania* App nos 55480/00 and 59330/00 (ECtHR, 27 July 2004), *Coorplan-Jenni GMBH and Hascic v. Austria* App no 10523/02 (ECtHR, 24 February 2005)

<sup>108</sup> *Ozpinar v. Turkey* App no 20999/04 (ECtHR, 19 October 2010)

<sup>109</sup> *Oleksandr Volkov v. Ukraine* App no 21722/11 (ECtHR, 09 January 2013) 166

<sup>110</sup> Universal Declaration of Human Rights Art 23(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family

In any event, again, it might be argued that the protection of job opportunities is more directly related to economic concerns than to issues relating to the respect for private life. In conclusion, although the authors of the Convention were not blind to the idea that 'property is not merely an 'economic right', but also an extension of human personality, the essential basis of stable family life', they choose not only to reject it from the scope of Article 8 ECHR, but from the Convention as a whole, as the right to property was regarded both peripheral and unenforceable.<sup>111</sup> Still in the case law of the Court, property rights and related economic concerns are increasingly granted protection under the scope of Article 8 ECHR if an issue directly or indirectly relates to a person's private life, family life or home. This trend cannot easily be reconciled with the classic focus of the right to privacy, but the right to property is often recognized as an integral part of personality rights.

### 3.3 The right to nationality (Article 15 UDHR)

The Universal Declaration also contains a right to nationality. Article 15 UDHR holds: '(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.' The principled rejection of such a right under the Convention was respected by the Court in its initial jurisprudence on the point of applicants claiming the right to a certain nationality, a residence permit or objected to being extradited to their country of birth. It accepted as principle that states enjoy, as a matter of well-established international law and subject to their treaty obligations, a right 'to control the entry, residence and expulsion of aliens'.<sup>112</sup>

However, gradually, the Court has diverged from its original approach.<sup>113</sup> For example, in 1991, the Court held that the deportation of a foreigner may violate his right to family life noting that 'at the time the deportation order was made, all the applicant's close relatives - his parents and his brothers and sisters - had been living in Liège for a long while; one of the older children had acquired Belgian nationality and the three youngest had been born in Belgium. Mr Moustaquim himself was less than two years old when he arrived in Belgium. From that time on he had lived there for about twenty years with his family or not far away from them. He had returned to Morocco only twice, for holidays. He had received all his schooling in French. His family life was thus seriously disrupted by the measure taken against him, which the Advisory Board on Aliens had judged to be "inappropriate". Having regard to these various circumstances, it appears that, as far as respect for the applicant's family life is concerned, a proper balance was not achieved between the interests involved, and that the means employed was therefore disproportionate to the legitimate aim pursued. Accordingly, there was a violation of Article 8 (art. 8).'<sup>114</sup> In 2001, the Court took this approach a step further and obliged a state to grant a family reunion with a family member living abroad.<sup>115</sup> It has also restricted the governments' margin of appreciation.

With regard to expelling criminal immigrants, the Court adopts a proportionality test, identifying as relevant factors the nature and seriousness of the offence committed by the applicant, the nationalities of the various persons concerned, the length of the applicant's stay in the country, the time elapsed since the offence was committed, the applicant's conduct during that period, the applicant's family situation, such as the length of the marriage and whether there are children of the marriage, and if so, their age, the best interests and well-being of the children in particular in relation to the seriousness of the difficulties which they and the spouse are likely to encounter in the country to which the applicant is to be expelled, whether the spouse knew about the offence at the time when he or she entered into a family relationship, and the solidity of social, cultural and family ties with the host country and with the country of destination.<sup>116</sup>

With regard to non-criminal immigrants and immigration control in the economic interest of a country, the Court seems to adopt an even narrower margin of appreciation for national authorities. It does not so

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an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (4) Everyone has the right to form and to join trade unions for the protection of his interests.

<sup>111</sup> See for example also: *Bernh Larsen Holding AS a.o. v. Norway* App no 24117/08 (ECtHR, 14 March 2013)

<sup>112</sup> See further: *Moustaquim v. Belgium* App no 12313/86 (ECtHR, 18 February 1991) 43

<sup>113</sup> See for this point: Daniel Thym, 'Respect for Private and Family Life under Article 8 ECHR in immigration cases: a human right to regularize illegal stay?' [2008] 57 *International and Comparative Law Quarterly* 1, 87-112. See further: Nida M. Gelazis, 'The European Union and the Statelessness Problem in the Baltic States' [2004] 6 *European Journal of Migration and Law* 225, 226-32. Gwendolyn Sasse, 'EU Conditionality and Minority Rights' [2005] EUI Working Papers RSCAS No. 2205/16 <[http://www.iue.it/RSCAS/WP-Texts/05\\_16.pdf](http://www.iue.it/RSCAS/WP-Texts/05_16.pdf)>. James Hughes, "'Exit" in Deeply Divided Societies: Regimes of Discrimination in Estonia and Latvia and the Potential for Russophone Migration' [2005] 43 *Journal of Common Market Studies* 739-762

<sup>114</sup> *Moustaquim* (n 112) 45-47. *Cruzvaras a.o. v. Sweden* App no 15576/89 (ECtHR, 20 March 1991)

<sup>115</sup> *Sen v. Netherlands* App no 31465/96 (ECtHR, 21 December 2001) 40-42

<sup>116</sup> *Boultif v. Switzerland* App no 54273/00 (ECtHR, 02 August 2001). *Uner v. Netherlands* App no 46410/99 (ECtHR, 18 October 2006)

much weigh the economic interest involved against the individual interest, but rather determines whether in the particular circumstances of the case, an exception should be made to the general, in itself legitimate, policy. For example, when the Dutch government decided to expel an immigrant, which would have seriously affected her and the ties with her child, because she had not pursued to regularize her stay in the Netherlands until more than three years after first arriving in that country and her stay there had been illegal throughout her stay, the Court held that 'by attaching such paramount importance to this latter element, the authorities may be considered to have indulged in excessive formalism.'<sup>117</sup> Thus, although the policy was deemed legitimate in itself, the application of the regulation in this particular case placed an excessive burden on the claimant.

In more recent cases, the Court has gone even further.<sup>118</sup> It has also held that the concept of private life alone, without a reference to the interests of family members, can legitimize a claim for a residence permit or an objection to being extradited if a person's private life is so intrinsically connected to a specific country, among others in relation to language, work, friends, other social contacts, the possibility to develop his personality and explore his identity, the fact that that person's quality of life would be severely diminished by his exclusion from that country's territory, etcetera. The Court has held not only that under circumstances, governments must grant a residence permit or reunite a family, but also that the granting of a residence permit as such falls principally within the protective scope of Article 8 ECHR.<sup>119</sup> Furthermore, even although a state never authorized a stay of an illegal immigrant in the first place, it may still be held to grant a permanent residence permit.<sup>120</sup> Consequently, on the point of a right to obtain a residence permit and therewith a legal status and identity, it has been accepted by the Court that such matters fall under the scope of Article 8 ECHR. Although such a right is not directly linked to the classic conception of the right to privacy, it may be connected to one's personal development and the possibility to build a new life in a new country.

### 3.4 Conclusion

There are other examples of the trend, in which the Court accepts rights explicitly rejected from the scope of the Convention under Article 8 ECHR, the most famous one perhaps being the right to education, which was seen as a non-essential or peripheral right.<sup>121</sup> The right to education was discussed by the Convention authors together with the protection of family life, as later protected under the scope of Article 8 ECHR, and the right to found a family, provided in Article 12 ECHR, under the umbrella concept of 'family rights'.<sup>122</sup> Still, in contrast to the other two rights, the right to education was referred to the first Protocol of the Convention, Article 2, specifying: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.' However, rather early in its case law, in the famous *Linguistic case* of 1968, the Court discussed under both the right to education and the right to privacy a matter which regarded a Belgium law under which French speaking parents living in the Dutch-speaking part of the country could only provide their children with an education in French if they would send them to the other part of the country.<sup>123</sup>

Although the Commission held that that under certain circumstances it is possible that the right to privacy might also apply to educational matters, it was very skeptical and hesitant to do so. The Court summarized the Commission's position as follows: 'In the view of the Commission, which confirmed before the Court the unanimous opinion expressed on this point in its Report, Articles 8 and 12 (art. 8, art. 12) of the Convention and Article 2 of the Protocol (P1-2) each govern "a clearly defined sector of private and family life". The Commission deduces from this that "even if it is accepted" that those three provisions might, "in certain circumstances", "be applied jointly or in conjunction", one must beware of interpreting any one of them in a way which would involve an extension of the "rights recognised by the other two". In particular, "it is not conceivable that Article 8 (art. 8) should encroach on the sphere of Article 2 of the Protocol (P1-2)

<sup>117</sup> *Rodrigues Da Silva and Hoogkamer v. Netherlands* App no 50435/99 (ECtHR, 31 January 2006) 44

<sup>118</sup> *Slivenko v. Latvia* App no 48321/99 (ECtHR, 09 October 2003). *Sisojeva a.o. v. Latvia* App no 60654/00 (ECtHR, 15 January 2007) *Nasri v. France* App no 19465/92 (ECtHR, 13 July 1995)

<sup>119</sup> *Aristimuno Mendizabal v. France* App no 51431/99 (ECtHR, 17 January 2006)

<sup>120</sup> *Rodrigues Da Silva and Hoogkamer v. Netherlands* App no 50435/99 (ECtHR, 31 January 2006)

<sup>121</sup> <[http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-2-CDH\(67\)2-BIL2292567.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-2-CDH(67)2-BIL2292567.pdf)> at 15

<sup>122</sup> Robertson (n 19) 220

<sup>123</sup> *Linguistic case* (n 25)

or even less that it should add something to that Article". Any such result would, moreover, "be contrary to the intention of the Contracting Parties as is clearly revealed" by the "preparatory work". The object then of Article 8 (art. 8) "is not to guarantee the right to education, considered as a corollary of the freedom of private life, or the rights of parents with regard to their children's education, considered as a consequence of the right to respect for private and family life".<sup>124</sup> The Court, however, seemed less hesitant and assessed the claim of the parents both under Article 2 of the first Protocol and under Article 8 ECHR independently as it held that 'the Convention must be read as a whole. Consequently a matter specifically dealt with by one of its provisions may also, in some of its aspects, be regulated by other provisions of the Convention',<sup>125</sup> which apparently also applied to the provisions from the Protocols.

This line has had two consequences in the jurisprudence of the Court. First, it has been adopted as principle that Article 2 of the Protocol must be read in the light of, among others, the right to privacy.<sup>126</sup> Secondly, the right to privacy has been applied to a number of matters which primarily relate to educational issues. For example, in the case of *Cyprus v. Turkey* from 2001, it was found that there were restrictions in Cyprus on the freedom of movement of Greek-Cypriot and Maronite schoolchildren living in the northern part of the country attending schools in the south, that although there was a system of primary-school education for the children of Greek Cypriots living in northern Cyprus, there were no secondary schools for them, and finally, that the schoolbooks that were used were subjected to a "vetting" procedure, that this procedure was cumbersome and that a relatively high number of school-books were being objected to by the Turkish-Cypriot administration. The Court used these facts not only to assess whether Turkey had interfered with Article 2 of the first Protocol, but also to find a violation of Article 8 ECHR.<sup>127</sup>

Consequently, although of the three 'family rights', the right to education was explicitly rejected from the Convention by its authors, by interpreting the right to education in the light of the right to privacy and by assessing educational matters under the scope of Article 8 ECHR, it is at least partially brought back under the scope the Convention by the Court. This is only yet another example of general trend, which may also be discovered in relation to the protection of one's identity and the development of one's personality to the fullest, which was rejected from the scope of the Convention, the right to a residence permit, a legalized stay and family reunion and the protection of property, the inclusion of economic concerns and even the dismissal from work under the scope of the right to privacy.

#### 4. Privacy in relation to rights not included in the Convention

The first case in which the Court accepted the 'living instrument' doctrine, *Tyler v. the United Kingdom* from 1978, regarded the issue of whether corporal punishment, still a common practice at that time in some states but increasingly denounced and rejected by others, could be seen as an inhuman or degrading treatment or punishment in violation of Article 3 ECHR. The Court held that 'the Convention is a living instrument which [] must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field'.<sup>128</sup> Seeing the Convention as a living document has allowed the Court to interpret the provisions in modern daylight and provide new freedoms under the existing provisions of the ECHR. This section will argue that although this doctrine has had the effect that the realm of most provisions under the Convention has broadened, it is Article 8 ECHR that has functioned as the main reference when the Court accepts new rights and freedoms under the Convention. Again, three examples of this trend will be provided, namely the inclusion of the right to data protection, the protection of minority identity and the right to a healthy living environment.

##### 4.1 The right to data protection

The right to data protection is related to, but nevertheless different from, the right to privacy. Reference can be made to the European Union's Charter of Fundamental Rights from 2000,<sup>129</sup> in which Article 7, containing the right to privacy, specifies that everyone has the right to respect for his or her private and family life, home and communications. Article 8 holds that everyone has the right to the protection of personal data

<sup>124</sup> *ibid.*

<sup>125</sup> *ibid.*

<sup>126</sup> *Kjeldsen, Busk Madsen and Pedersen v. Denmark* App nos 5095/71, 5920/72 and 5926/72 (ECtHR, 7 December 1976). See further: *Folgero a.o. v. Norway* App no 15472/02 (ECtHR, 29 June 2007)

<sup>127</sup> *Cyprus v. Turkey* App no 25781/94 (ECtHR, 10 May 2001)

<sup>128</sup> *Tyler v. UK* App no 5856/72 (ECtHR, 25 April 1978)

<sup>129</sup> European Union Charter of Fundamental Rights, 2000/C 364/01, 18 December 2000.

concerning him or her, that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. It also holds that everyone has the right of access to data which has been collected concerning him or her and the right to have it rectified and that compliance with these rules shall be subject to control by an independent authority. This is what is called the right to data protection, which in Europe, is most prominently protected by the EU's Data Protection Directive,<sup>130</sup> but also by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, from the Council of Europe.<sup>131</sup>

Both rights have a quite distinct background, tradition and rationale. The right to data protection is of more recent origin<sup>132</sup> and is tied in many ways to the rise of modern technology with which the collection, storing and processing of personal data has become increasingly easy.<sup>133</sup> The right to data protection is focused on horizontal, rather than vertical relationships, and provides the citizen with protection against companies like Google and Facebook. It should be noted that 'personal data', a key notion in the Data Protection Directive, is not the same as private or privacy sensitive data.<sup>134</sup> It may also refer to public and non-sensitive information, if this could be used to identify someone. 'Even ancillary information, such as "the man wearing a black suit" may identify someone out of the passers-by standing at a traffic light.'<sup>135</sup>

Following the living instrument doctrine, the Court has been willing to accept a number of the notions essential to the right to data protection under the scope of the right to privacy.<sup>136</sup> It has accepted, for example, that storing personal data, such as transcripts of telephone conversations, photos, hospital records or bodily material, triggers the application of Article 8 ECHR, it has held that if a large collection of sensitive personal data is in government hands, in principle, the individual has a right to access such information and the Court has laid down certain limits on the use and transfer of personal data by and to third parties. Similar to most data protection rules, the Court has accepted that personal data may only be collected for specific and legitimate purposes and has accepted a positive obligation for states to lay down adequate data protection rules.<sup>137</sup>

Moreover, following the line that private life also protects one's public and professional life, the Court has been willing to apply Article 8 ECHR on public data and on professional communications,<sup>138</sup> which has allowed it to find that the systematic collection and storing of data by security services on particular individuals constituted an interference with these persons' private lives, even if that data was collected in a public place or concerned exclusively the person's professional or public activities.<sup>139</sup> Likewise, a GPS device attached to a person's car, collecting and storing data concerning that person's whereabouts and movements in the public sphere, was also found to interfere with Article 8 ECHR.<sup>140</sup> As a final example, large surveillance systems, collecting the personal data of potentially all citizens of the state, is accepted as an issue falling under the right to privacy.<sup>141</sup> Consequently, though not all principles embodied under the European Data Protection Directive are accepted under the Convention,<sup>142</sup> a number of principles of the right to data protection are guaranteed under the scope of Article 8 ECHR. The protection of personal data is yet another classic difference between the right to privacy and personality rights.

<sup>130</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive)

<sup>131</sup> Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28.I.1981.

<sup>132</sup> See also: A. C. Evans, 'European Data Protection Law', [1981] 29 American Journal of Comparative Law 4 571-582

<sup>133</sup> Dennis Campbell and Joy Fisher, *Data Transmission and Privacy* (Dordrecht, Nijhoff 1994). Organisation for Economic Co-operation and Development, *Guidelines on the Protection of Privacy and Transborder flows of Personal Data* (Paris 1981) Hans Georg Woertge, *Die Prinzipien des Datenschutzrechts und ihre Realisierung im geltenden Recht* (Heidelberg, Decker, 1984)

<sup>134</sup> Data Protection Directive 95/46/EC ("DPD") Art 2(a)

<sup>135</sup> Working Party 29, 'Opinion 4/2007 on the concept of personal data', Brussels, 01248/07/EN, WP 136, 20 June 2007, 13

<sup>136</sup> See for the classic cases: *P.G. and J.H. v. UK* App no 44787/98 (ECtHR, 25 September 2001), *Perry v. UK* App no 63737/00 (ECtHR, 17 July 2003), *Klass a.o. v. Germany* App no 5029/71 (ECtHR, 6 September 1978), *Malone v. UK* App no 8691/79 (ECtHR, 2 August 1984), *Leander v. Sweden* App no 9248/81 (ECtHR, 26 March 1987)

<sup>137</sup> Köpke v. Germany App no 420/07 (ECtHR, 5 October 2010) See in general: Alastair R. Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Oxford, 2004)

<sup>138</sup> *Copland v. UK* App no 62617/00 (ECtHR, 3 April 2007), *Halford v. UK* App no 20605/92 (ECtHR, 25 June 1997)

<sup>139</sup> See: *Peck v. UK* App no 4467/98 (ECtHR, 28 January 2003), *Amann v. Switzerland* App no 27798/95 (ECtHR, 16 February 2000), *Rotaru v. Romania* App no 28341/95 (ECtHR, 04 May 2000)

<sup>140</sup> *Uzun v. Germany* App no 35623/05 (ECtHR, 2 September 2010)

<sup>141</sup> *Hadzhiev v. Bulgaria* App no 22373/04 (ECtHR, 23 October 2012)

<sup>142</sup> Paul De Hert and Serge. Gutwirth, 'Data Protection in the Case Law of Strasbourg and Luxembourg: Constitutionalisation in Action' in Serge Gurtwirth, Yves Poulet, Paul de Hert, Sjaak Nouwt and Cecille de Terwagne (eds), *Reinventing data protection*, (Springer Science, Dordrecht, 2009) 3-44



## 4.2 Minority rights

In the early jurisprudence of the former Commission and the Court, it was held that a second home, a building site, a professional working place, a temporary shelter or other unconventional houses did not fall under the scope of 'home'. For example, with regard to the search of a person's car, which functioned as his home, the Commission held: '[...] la Commission estime que le domicile – "home" – dans le texte anglais de l'article 8 (art. 8) est une notion précise qui ne pourrait être étendue arbitrairement et que, par conséquent, la fouille de la voiture en stationnement dans les circonstances de la présente affaire, ne saurait être assimilée à une fouille domiciliaire qui entre dans le domaine d'application de l'article 8 (art. 8).'<sup>143</sup> However, like the Declaration, the Convention is drafted in two official languages, English and French, and like the Universal Declaration on Human Rights, the French version of the European Convention does not refer to 'maison', 'chez' or 'residence' but rather to the concept 'domicile'. Domicile has a broader scope than the concept of 'home' and might, for example, be used to refer to professional dwellings. In its more recent case law, it is the concept of 'domicile', rather than 'home', that is increasingly referred to by the Court.

The Court has held as principle that the concept of 'home' is not limited to those buildings which are lawfully occupied or which have been lawfully established.<sup>144</sup> Furthermore, accepting caravans and other mobile homes and temporary shelters under the concept of 'home' has had important consequences for Gypsies and other nomadic groups,<sup>145</sup> who generally do not possess a fixed shelter or home.<sup>146</sup> This doctrine has gradually been expanded to include certain minority rights and the protection of minority life styles. For example, the Commission has been willing '[...] to accept that the consequences, arising for the applicants from the construction of the hydroelectric plant, constitute an interference with their private life, as members of a minority, who move their herds and deer around over a considerable distance. It is recalled that an area of 2,8 km<sup>2</sup> will be covered by water as a result of the plant. In addition, it must be acknowledged that the environment of the said plant will be affected. This could interfere with the applicants possibilities of enjoying the right to respect for their private life.'<sup>147</sup>

This line has had specific consequences for Romas and Gypsies, which the Court regards as vulnerable groups in need of special protection. For example, the Court has stressed in reference to an applicant that the '[...] occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures affecting the applicant's stationing of her caravans therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition.'<sup>148</sup>

What is more, states may be under the positive obligation to take active measures to respect and facilitate the development of these minority identities. The Court has emphasized the '[...] emerging international consensus amongst the Contracting States of the Council of Europe, recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves, but also to preserve a cultural diversity of value to the whole community.'<sup>149</sup> This right to respect for minority life requires states to accept 'that special consideration should be given to their needs and their different lifestyle, both in the relevant regulatory framework and in reaching decisions in particular cases' in order to allow them to fully explore, develop and express their identity, and that governments 'should pursue their efforts to combat negative stereotyping of the Roma', among others, because 'any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group'.<sup>150</sup>

<sup>143</sup> *X. v. Belgium* App no 5488/72 (Commission Decision, 30 May 1974)

<sup>144</sup> *McKay-Kopecka v. Poland* App no 45320/99 (ECtHR, 19 September 2006), *McGonnell v. UK* App no 28488/95 (ECtHR, 8 February 2000)

<sup>145</sup> *Lay v. UK* App no 13341/87 (Commission Decision, 14 July 1988)

<sup>146</sup> *Smith v. UK* App no 14455/88 (Commission Decision, 4 September 1991), *Smith v. UK* App no 18401/91 (Commission Decision, 6 May 1993)

<sup>147</sup> *G. and E. v. Norway* App no 9278/81 (Commission Decision, 3 October 1983)

<sup>148</sup> Chapman (n 90) 73

<sup>149</sup> *Aksu v. Turkey* App nos 4149/04 and 41029/04 (ECtHR, 27 July 2010) 49

<sup>150</sup> *Aksu v. Turkey* App nos 4149/04 and 41029/04 (ECtHR, Grand Chamber, 15 March 2012) 58 & 75

The right to the respect for minority identity and the protection of the minority life style, partially accepted under the recent case law of the Court, are commonly considered as rights of groups, such as minorities and indigenous people. These group rights are so called 'third generation' rights, which go beyond the scope of the first generation rights, the classic civil and political rights, and the socio-economic rights, which are referred to as second generation rights, which are mostly characterized as individual rights.<sup>151</sup> Third generation rights, focus on solidarity and respect in international, interracial and intergenerational relations. Beside the minority rights, third generation rights include the right to peace, the right to participation in cultural heritage and the right to live in a clean and healthy living environment, which is discussed next.

### 4.3 Environmental protection

In an early case from 1986, regarding the level of noise caused by airports in the vicinity of an individual's house, the Commission has previously held that Article 8 ECHR 'cannot be interpreted so as to apply only with regard to direct measures taken by the authorities against the privacy and/or home of an individual. It may also cover indirect intrusions which are unavoidable consequences of measures not at all directed against private individuals. In this context it has to be noted that a State has not only to respect but also to protect the rights guaranteed by Article 8 para. 1. Considerable noise nuisance can undoubtedly affect the physical well-being of a person and thus interfere with his private life. It may also deprive a person of the possibility of enjoying the amenities of his home.'<sup>152</sup> In subsequent case law, it was accepted that similarly, noise nuisance may be produced by nuclear power plants working day and night in a rural area<sup>153</sup> and by nightclubs near someone's home.<sup>154</sup>

Although the Court has not yet been willing to guarantee the right to preservation of the natural environment as such under the scope of Article 8 ECHR,<sup>155</sup> gradually building on the notion of protection against noise pollution, the former Commission and the Court have been willing to discuss more and broader effects on the general living environment, such as radiation and vibrations emitted by a transformer,<sup>156</sup> electro smog<sup>157</sup> and air pollution, smog and fumes.<sup>158</sup> Although the Court has accepted that environmental pollution must reach a minimum level of severity, it has also specified that this is a relative concept which depends on all circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life.<sup>159</sup>

The notion of quality of life, in particular, is a rather vague concept, the Court acknowledges: 'There is no doubt that serious industrial pollution negatively affects public health in general. However, it is often impossible to quantify its effects in each individual case, and distinguish them from the influence of other relevant factors, such as age, profession etc. The same concerns possible worsening of the quality of life caused by the industrial pollution. The "quality of life" is a very subjective characteristic which hardly lends itself to a precise definition.'<sup>160</sup> Not only is the notion of 'quality of life' under Article 8 ECHR rather abstract, the causal relationship between the unhealthy living environment and specific, personal harm is generally difficult to prove. Still, the Court is willing to refer to notions of 'not implausible' and 'not impossible', as a standard of proof, to find a violation of Article 8 ECHR. Consequently, the shift from a privacy to a personality right has meant that a number of third generation rights have been included under Article 8 ECHR, such as the possibility to develop and express one's minority identity and to life in a pleasant environment.

### 4.4 Conclusion

In conclusion, the Court has accepted a variety of rights not contained in the Convention, especially with a reference to the right to privacy. This includes the right to data protection, to live in a clean and healthy living environment and the right of minorities to protect, develop and express their minority identity. Again, these are just a few of the examples; another example may be the right to a name, which is neither accepted

<sup>151</sup> Karel Vasak (n 20)

<sup>152</sup> *Rayner v. UK* App no 9310/81 (Commission Decision, 16 July 1986)

<sup>153</sup> *Spire v. France* App no 13728/88 (Commission Decision, 17 May 1990)

<sup>154</sup> *Moreno Gomez v. Spain* App no 4143/02 (ECtHR, 16 November 2004). *Villa v. Italy* App no 36735/97 (ECtHR, 14 November 2000)

<sup>155</sup> *Kyrtatos v. Greece* App no 41666/98 (ECtHR, 22 May 2003)

<sup>156</sup> *Morcuende v. Spain* App no 75287/01 (ECtHR, 6 September 2005)

<sup>157</sup> *Luginbuhl v. Switzerland* App no 42756/02 (ECtHR, 17 January 2006)

<sup>158</sup> *López Ostra v. Spain* App no 16798/90 (ECtHR, 9 December 1994)

<sup>159</sup> *Dubetska a.o. v. Ukraine* App no 30499/03 (ECtHR, 10 February 2011), *Fadeyeva v. Russia* App no 55723/00 (ECtHR, 9 June 2005)

<sup>160</sup> *Ledyayeva, Dobrokhotova, Zolotareva and Romashina v. Russia* App nos 53157/99, 53247/99, 56850/00 and 53695/00 (ECtHR, 26 October 2006) 90

under the UDHR and ECHR, but is accepted in subsequent human rights documents.<sup>161</sup> Still, the Court has accepted the right to a name with a reference to Article 8 ECHR. 'The right to develop and fulfill one's personality necessarily comprises the right to identity and, therefore, to a name'.<sup>162</sup> In forming, creating and maintaining one's identity, the Court has held that personal names may be of pivotal importance. Consequently, it has assessed cases under the scope of Article 8 ECHR in which a spouse complained that she had to adopt the surname of her husband, even though she was known by her maiden name in her inner circle and in professional relationships. The Court has also accepted that under certain circumstances, children have the right to choose their forename or their surname and finally the Court has granted that individuals have the right to alter their birth-given name.<sup>163</sup>

## 5. Analysis

The 'living instrument' doctrine has meant that all provisions under the Convention have been interpreted broadly. The right to freedom of expression has been applied to the modern media environment, the right to education has also been interpreted in the light of Article 9 ECHR and minority rights are approached from the perspective of the freedom of religion, the right to expression and the right to education. Still, these 'new' freedoms are often directly associated with the core of those rights, which is different for the right to privacy. For example, the Court has accepted that minorities are provided protection under a number of provisions under the Convention and its Protocols, such as the freedom from discrimination (14 ECHR), from which the right not to be discriminated against on the basis of a minority identity is derived; the right to education (Article 2 1e Protocol), from which the right to special cultural or linguistic protection for the education of children is derived; the freedom of religion (9 ECHR), from which it follows that minorities and adherents of minority religions have a protected status; and the right to freedom of expression (Article 10 ECHR), in relation to which it has been accepted that minorities have a special claim to express their minority views.<sup>164</sup> In contrast to the right to maintain and develop one's minority identity and life style, which is not implicit in the respect for a person's private life or home, these are all matters that are either directly or indirectly linked to the core of those Convention rights.<sup>165</sup>

The same might be argued in relation to environmental issues.<sup>166</sup> For example, in the first case in which the right to a clean and healthy living environment was invoked (and rejected), the former Commission did not refer to Article 8 but held: 'The applicants have complained under environmental aspects of the use for military purposes of parts of a certain marshland situated in the same region as the villages in which they live. However, under Art. [34] of the Convention, it is only the alleged violation of one of the rights and freedoms set out in the Convention that can be the subject of an application presented by a person, non-governmental organisation or group of individuals. With regard to the present complaint, no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention and in particular by Arts. 2, 3 or 5 as invoked by the applicant. It follows that the application is incompatible *ratione materiae* with the provisions of the Convention [...]'.<sup>167</sup> However, both because of the broad and subjective concept of the term 'quality of life' and because of the lowered standards of proof, the Court has increasingly dealt with environmental issues under the right to privacy, instead of under the scope of Article 2 or 3 which seem more akin to the right to a clean and healthy living environment.

Even with regard to the right to data protection, perhaps intuitively linked most to the concept of privacy, the former Commission and the Court originally approached this doctrine from the perspective of a number of provisions under the Convention. For example, when the EU Data Protection Directive came into force in 1995, Paul de Hert assessed in how far the rules contained therein were already protected under the ECHR.

<sup>161</sup> It may already be derived from ICCPR, Art 24

<sup>162</sup> K.B. (n 87)

<sup>163</sup> See further: *Tekeli v. Turkey* App no 29865/96 (ECtHR, 16 November 2004), *Guillot v. France* App no 22500/93 (ECtHR, 24 October 1996), *Salonen v. Finland* App no 27868/95 (Commission Decision, 2 July 1997) *Bijleveld v. Netherlands* App no 42973/98 (ECtHR, 27 April 2000), *G.M.B. and K.M. v. Switzerland* App no 36797/97 (ECtHR, 27 September 2001), *Tjerna v. Finland* App no 18131/91 (ECtHR, 25 November 1994)

<sup>164</sup> Tarlach E. McGonagle, *Minority rights, freedom of expression and of the media: dynamics and dilemmas* (Cambridge, Intersentia, 2011), Joshua Castellino, *Global minority rights*, (Burlington, Ashgate, 2011)

<sup>165</sup> The same might be argued in relation to the right to a name, which seems more directly connected to the right to marry and found a family under ECHR Art 12.

<sup>166</sup> Daniel García San José, *Environmental protection and the European Convention on Human Rights* (Strasbourg, Council of Europe Publishing, 2005) 67-68

<sup>167</sup> *X. v. Germany* App no 7407/76 (Commission Decision, 13 May 1976). See also: Richard Desgagne, 'Integrating Environmental Values into the European Convention on Human Rights', [1995] 89 *American journal of International Law* 2 263-294.

He referred not only to Article 8, but also to Articles 5 and 6 when analyzing the procedural requirements of the data protection rules, to Article 13 when it regarded the access to personal information, Article 10 when analyzing the right to be informed about the processing of one's personal data and Article 9 when he assessed the issue of special protection of sensitive personal data. He held in reference to guaranteeing data protection rules under the Convention: 'Article 8 ECHR is an important point of reference, but it is far from the only one. After all, aspects related to Data Protection can be found in the case law on Article 5, 6, 10 and 13 of the ECHR []'.<sup>168</sup> However, the Court has since approached the topic of data protection more and more from the angle of the right to privacy and less and less from the perspective of other rights embodied by the Convention, so that in the recent jurisprudence, data protection rules primarily fall under the scope of Article 8 ECHR.<sup>169</sup>

Consequently, the right to privacy has seen a vast expansion of its scope, not only by functioning as the doctrine to which the Court often refers when accepting new freedoms and third generation rights under the scope of the Convention, but also because Article 8 has been used to revert the exclusion of certain rights and freedoms from the ECHR and because it has encroached on a number of other rights specified in the Convention, such as the right to marry and found a family, the right to a fair trial, the right to reputation and honor, the right to property, the right to legalized stay and legal identity for immigrants, and the right to develop and express one's identity and personality.<sup>170</sup> There seems no logical end to the expansion of the realm of Article 8 ECHR as the Court is faced with new questions and challenges on a daily basis. To give a few examples, reference can be made to those tentatively describing the development of 'fourth generation human rights'.<sup>171</sup> It does not matter whether reference is made to a right to general 'information management',<sup>172</sup> the 'rights of indigenous peoples',<sup>173</sup> the 'right to sustainable development of the future generation',<sup>174</sup> women's rights, the rights of future generations, rights of access to information, and the right to communicate<sup>175</sup> or rights needed due to 'phenomena like the great developments in the area of biotechnology (with very conflictive issues such as the cloning of and experimenting with stem cells for therapeutic or reproductive purposes) or the Internet (and the problem of its regulation)'.<sup>176</sup> Most, if not all, of these 'new' fourth generation human rights, suggested by different authors and commentators, would presumably, if accepted, be approached by the Court from the angle of Article 8 ECHR.

This contribution has argued that the authors of the Convention intended Article 8 ECHR as a classic right to privacy, providing a negative right to citizens, to be free from arbitrary interference with their private and family life, home and communications, and a negative obligation for states, not to abuse their power by arbitrarily interfering with the rights of their citizens. The ECtHR, however, has given Article 8 ECHR a much broader interpretation, providing protection to a host of matter relating to the development of an individual's personality. Under this interpretation, citizens may claim positive freedoms and states may be held to actively facilitate citizens in their quest for developing their personality. Consequently, article 8 ECHR has transformed into a personality right. Personality rights do not only protect the individual from arbitrary interference with his private life, but traditionally include, inter alia, a positive freedom to control personal information, protect one's property, engage in reputation management, and develop one's identity and personality to the fullest extent.<sup>177</sup> However, the scope is potentially much broader and could include almost every aspect of one's individual development.

<sup>168</sup> Paul de Hert, *Human Rights and Data Protection. European Case-Law 1995–1997 [Mensenrechten en bescherming van persoonsgegevens. Overzicht en synthese van de Europese rechtspraak 1955–1997]* (Jaarboek ICM, 1997 Antwerpen, Maklu, 1998) 91. Original text: 'Artikel 8 EVRM vormt een belangrijk aanknopingspunt, maar is lang niet het enige. Dataprotectionaspecten kunnen immers teruggevonden worden in de jurisprudentie inzake artikel 5, 6, 10 en 13 EVRM.'

<sup>169</sup> <[http://www.echr.coe.int/NR/rdonlyres/4FCF8133-AD91-4F7B-86F0-A448429BC2CC/0/FICHES\\_Protection\\_des\\_donn%C3%A9es\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/4FCF8133-AD91-4F7B-86F0-A448429BC2CC/0/FICHES_Protection_des_donn%C3%A9es_EN.pdf)>.

<sup>170</sup> Again, these are just a few or the examples; another example may be the right to a name, which is neither accepted under the UDHR and ECHR, but is accepted in subsequent human rights documents. It may already be derived from ICCPR Art 24. K.B. (n 87). See further: *Tekeli v. Turkey* App no 29865/96 (ECtHR, 16 November 2004), *Guillot v. France* App no 22500/93 (ECtHR, 24 October 1996), *Salonen v. Finland* App no 27868/95 (Commission Decision, 2 July 1997), *Bijleveld v. Netherlands* App no 42973/98 (ECtHR, 27 April 2000), *G.M.B. and K.M. v. Switzerland* App no 36797/97 (ECtHR, 27 September 2001), *Tjerna v. Finland* App no 18131/91 (ECtHR, 25 November 1994)

<sup>171</sup> <<http://www.s-j-c.net/main/english/images/humanrightsfinal.pdf>>.

<sup>172</sup> <<http://www.thejakartapost.com/news/2006/09/04/fourth-generation-human-rights.html>>.

<sup>173</sup> M. Brinton Lykes, 'Human rights violations as structural violence' in Daniel J. Christie, Richard V. Wagner and Deborah A. Winter (eds), *Peace, Conflict, and Violence: Peace Psychology for the 21st Century* (Englewood Cliffs, New Jersey, Prentice-Hall, 2001)

<sup>174</sup> <[http://www.csmcd.eu/downloads/Generations\\_of\\_Human\\_Rights.pdf](http://www.csmcd.eu/downloads/Generations_of_Human_Rights.pdf)>.

<sup>175</sup> Richard P. Claude and Burns H. Weston, *Human Rights in the World Community: Issues And Action* (University of Pennsylvania Press, 2006) 26

<sup>176</sup> Fernando Falcón y Tella, *Challenges for human rights*, (Martinus Nijhoff Publishers, Leiden, 2007) 66

<sup>177</sup> See further on this topic: William E. Modellmog, 'Disowning "Personality": Privacy and Subjectivity in The House of Mirth' [1998]

To understand the difference between the two types of rights, reference can be made to Feinberg who, defining harm as a setback to interests, distinguished between two types of interests. 'According to one of these, a person's more ultimate goals and aspirations are his more important ones: such aims as producing good novels or works of art, solving a crucial scientific problem, achieving high political office, successfully raising a family []. By a quite different and equality plausible standard, however, a person's most important interests are by no means as grand and impressive as these. They are rather his interests, presumably of a kind shared by nearly all his fellows, in the necessary means to his more ultimate goals, whatever the latter may be, or later come to be. In this category, are the interests in the continuance for a foreseeable interval of one's life, and the interests in one's own physical health and vigor, the integrity and normal functioning of one's body, the absence of absorbing pain and suffering or grotesque disfigurement [].'<sup>178</sup> Consequently, the first category of, what Feinberg calls, ulterior interests are interests that protect the individual's desire to attain as gratifying a life as possible. By contrast, the second category of, what Feinberg calls, welfare interests protect everyone's concerns regarding the minimum necessities of human life.

Privacy protection has always been linked to the protection of welfare interests. It is said to protect either a person's autonomy,<sup>179</sup> his human dignity<sup>180</sup> or the 'person as a person', meaning his capacity to choose as a rational individual.<sup>181</sup> These interests are the minimum conditions of a human (worthy) life, as without autonomy, dignity or respect for their rational capacity, people are treated not as humans but as animals. By contrast, personality rights protect the individual's interests in striving for the maximum gratifying life. Not only is there a difference between the character of these two rights, there is also an important difference on the matter of defining harm. Welfare interests, those connected to the minimum standards of human life, are shared (to a large extent) by every human being. They thus contain a relatively large objective and verifiable component. Ulterior interests, by contrast, differ from person to person. What person A regards as a maximum gratifying life, for example hiking mountains, may sound ridiculous to person B, who's dream it is to write a novel. Ulterior interest are thus highly subjective as only the subject itself can reasonably assess whether these interests are hampered and to what extent.

It is interesting to see that the Court has not only approached Article 8 ECHR as granting protection to a person's identity and personality, therewith focusing on ulterior interests, but has also accepted a subjective test for establishing harm (as a setback to interests), namely by referring to the 'quality of life' of a claimant. To recall, the Court has acknowledged that the notion 'quality of life' 'is a very subjective characteristic which hardly lends itself to a precise definition.' It is important to stress that this term was first coined in environmental cases, but has since been used in a wide variety of cases, especially in those in which the Court has extended the scope of Article 8 ECHR in the direction of a personality right, such as when discussing the rights of transsexuals<sup>182</sup> and gender reassignment surgery,<sup>183</sup> the protection of minorities, such as gypsies,<sup>184</sup> and the protection of one's psychological integrity.<sup>185</sup> It would be too much to discuss all those cases in detail

70 American Literature 2, Randall. P. Bezanson, 'Privacy, personality, and social norms', [1991] 41 Case W. Res. 681, Adrian Popovici, 'Personality rights – A Civil Law Concept', [2004] 50 Loy. L. Rev. 349, Edward J. Damich, 'The right of personality: a Common-law basis for the protection of the moral rights of authors' [1988-1989] 23 Ga. L. Rev. 1, Luis A. Aviles, 'Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico', [1998] 67 University of Puerto Rico Law Review 343, Corinna Coors (n 13)

<sup>178</sup> Joel Feinberg, *Harm to others* (New York, Oxford University Press 1984) 37

<sup>179</sup> See among others: Beate Roessler, *The Value of Privacy* (Polity Press, Cambridge, 2005) Alan. F. Westin, *Privacy and Freedom* (The Bodley Head, London, 1970)

<sup>180</sup> Inness focusses on intimacy: Julie C. Inness, *Privacy Intimacy and isolation* (Oxford University Press, New York, 1992)

<sup>181</sup> Stanley I. Benn, 'Privacy, Freedom, and Respect for Persons' in: Ferdinand Schoeman (edn), *Philosophical Dimensions of Privacy: an Anthology* (Cambridge University Press, Cambridge, 1984)

<sup>182</sup> *Horsham v. UK App no 23390/94* (Commission Decision, 21 January 1997) 54, *Sheffield v. UK App no 22985/93* (Commission Decision, 21 January 1997) 53. See further: Sharon Cowan, 'Gender is no substitute for Sex': A comparative Human Rights analysis of the legal regulation of sexual identity', [2005] 13 Feminist Legal Studies 1 67-97, Alastair Mowbray, 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law' [2009] 9 *Human Rights Law Review* 2. Paul Johnson, 'Heteronormativity and the European Court of Human Rights' [2012] *Law Critique* 23. See for the relationship between Strasbourg and Luxembourg: Helen Stalford, 'Concepts of Family Under EU Law – Lessons From the ECHR' [2002] *International Journal of Law, Policy and the Family* 16

<sup>183</sup> *L. v. Lithuania App no 27527/03* (ECtHR, 11 September 2007) 47. See further: Toma Birmontienė, 'The Development of Health Law as a Way to Change Traditional Attitudes in National Legal Systems. The Influence of International Human Rights Law: What is Left for the National Legislator?' [2010] 17 *European Journal of Health Law*

<sup>184</sup> *Chapman v. UK App no 27238/95* (ECtHR, 18 January 2001) 73, *Coster v. UK App no 24876/94* (ECtHR, 18 January 2001) *Beard v. UK App no 24882/94* (ECtHR, 18 January 2001), *Lee v. UK App no 25289/94* (ECtHR, 18 January 2001). *Chapman v. UK App no 27238/95* (ECtHR, 18 January 2001). *Jane Smith v. UK App no 25154/94* (ECtHR, 18 January 2001). See further: Y. Donders, 'Do cultural diversity and human rights make a good match?' [2010] 61 *International Social Science Journal* 199

<sup>185</sup> *Dorđević v. Croatia App no 41526/10* (ECtHR, 24 July 2012) 152. See further: Despina Tziola, 'Is disability harassment inhuman

here, but in general it can be said that with the Court transforming the right to privacy into a personality right, it also increasingly accepts a subjective standard for determining harm.

This is important because in "Big Data" processes, it becomes increasingly difficult to demonstrate harm to one's welfare interests. Big Data, for the purpose of this study, is defined as gathering massive amounts of data without a pre-established goal or purpose, about an undefined number of people, which are processed on a group or aggregated level through the use of statistical correlations.<sup>186</sup> The essence of these types of cases is thus that the individual element is mostly lost. Data are not gathered about a specific person or group (for example those suspected of having committed a particular crime), rather, they are gathered about an undefined number of people during an undefined period of time without a pre-established reason. The potential value of the gathered data becomes clear only after they are subjected to analysis by computer algorithms, not on beforehand.<sup>187</sup> These data, even if they are originally linked to specific persons, are subsequently processed by finding statistical correlations. It may appear that the data string – Muslim + vacation to Yemen + visit to website X – leads to an increased risk of a person being a terrorist. The data are not based on personal data of specific individuals, but processed on an aggregated level and the profiles are formulated at a group level.<sup>188</sup>

Often, an individual is simply unaware that his personal data are gathered by either his fellow citizens (e.g. through the use of their smartphones), by companies (e.g. by tracking cookies) or by governments (e.g. through covert surveillance). But even if a person would be aware of these data collections, given the fact that data gathering and processing is so widespread and omnipresent, it will quite likely be impossible for him to keep track of every data processing which includes (or might include) his data, to assess whether the data controller abides by the legal standards applicable, and if not, to file a legal complaint. And if an individual does go to court to defend his rights, he has to demonstrate a personal interest, i.e. personal harm, which is a particularly problematic notion in Big Data processes. For example, what concrete harm has the data gathering by the NSA done to an ordinary American or European citizen? This also shows the fundamental tension between the traditional legal and philosophical discourse and the new technological reality – while the traditional discourse is focused on individual rights and individual interests, data processing often affects a structural and societal interest. Connecting these types of processes to individual harm to one's autonomy or dignity proves increasingly difficult.<sup>189</sup>

The same is true in many ways for the right to data protection, which is devised especially for large scale processing of personal data. This right too was originally devised as a negative doctrine, focussing predominantly on the duties of care of data processors. More and more, however, it has been turned into a doctrine that aims at protecting the personal interests of data subjects, inter alia by granting them rights to control data, to object to certain types of processing, to claim a right to be forgotten or data portability. Likewise, the enforcement of the rules has always been a task of the Data Protection Authorities (DPAs), and still is, though it is increasingly put into the hands of the data subject, who are allowed to submit claims before the DPA, a judge, or another formal institution. Consequently, the problems entailed with privacy protection in the age of Big Data, namely that it is focussed on individual interests and subjective rights, is also, to a large extent, applicable to the right of data protection.<sup>190</sup>

This is why many scholars increasingly focus on harm to ulterior interests, instead of welfare interests, when discussing privacy violations resulting from Big Data processes. Neil Richards has for example stressed that 'surveillance is harmful because it can chill the exercise of our civil liberties. With respect to civil liberties,

treatment? App. No 41526/10 (European Court of Human Rights)' [2013] 1 Int. J. Human Rights and Constitutional Studies 2

<sup>186</sup> Viktor Mayer-Schönberger & Kenneth. Cukier, *Big Data: A Revolution that will Transform how we Live, Work, and Think* (Boston, Houghton Mifflin Harcourt, 2013). Terrence Craig & Mary E. Ludloff, *Privacy and Big Data: The Players, Regulators, and Stakeholders* (Sebastopol, O'Reilly Media, 2011). Kate Crawford & Jason Schultz, 'Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms' [2014] 55 Boston College Law Review 93

<sup>187</sup> Rob Kitchin, *The Data Revolution: Big Data, Data infrastructures & their consequences* (Los Angeles, Sage, 2014). Andrew McAfee & Erik Brynjolfsson, 'Big Data: The management Revolution: Exploiting vast new flows of information can radically improve your company's performance. But first you'll have to change your decision making culture' [2012] Harvard Business Review, Mark Andrejevic, 'The Big Data Divide' [2014] International Journal of Communication 8

<sup>188</sup> Chris Jay Hoofnagle, 'How the Fair Credit Reporting Act Regulates Big Data', <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2432955](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2432955)>. International Working Group on Data Protection in Telecommunications, 'Working Paper on Big Data and Privacy. Privacy principles under pressure in the age of Big Data analytics', 55th Meeting, 5 – 6 May 2014, Skopje. Kord Davis with Doug. Patterson, 'Ethics of Big Data: Balancing Risk and Innovation', <[http://www.commit-nl.nl/sites/default/files/Ethics%20of%20Big%20Data\\_0.pdf](http://www.commit-nl.nl/sites/default/files/Ethics%20of%20Big%20Data_0.pdf)>.

<sup>189</sup> Bart van der Sloot, 'Privacy in the post-NSA era: time for a fundamental revision?' [2014] 1 *JIPITEC*

<sup>190</sup> See for an elaborate analysis on this point: Bart van der Sloot, 'Do data protection rules protect the individual and should they? An assessment of the proposed General Data Protection Regulation' [2014] 4 International Data Privacy Law 4

consider surveillance of people when they are thinking, reading, and communicating with others in order to make up their minds about political and social issues. Such intellectual surveillance is especially dangerous because it can cause people not to experiment with new, controversial, or deviant ideas.<sup>191</sup> He argues that in order to protect our intellectual freedom to think without state oversight or interference, we need, what he calls, “intellectual privacy.”<sup>192</sup> Intellectual privacy protects a person’s freedom to develop one’s identity and personality to the fullest, by experimenting freely in private and in public, offline and online.

The interest of a person to flourish to the fullest extent is clearly an ulterior interest. Richards also stresses the need for a subjective standard for determining harm, as he criticizes the American courts. ‘In *Laird v. Tatum*, the Supreme Court held that it lacked jurisdiction over the claims that the surveillance violated the First Amendment rights of the subjects of the program, because the subjects claimed only that they felt deterred from exercising their First Amendment rights or that the government could misuse the information it collected in the future. The Court could thus declare that “[a]llegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”’<sup>193</sup> On this point, the ECtHR seems to have an advantage. It grants protection to a wide variety of matters related in general to the development of one’s personality and identity, it accepts not only the protection of welfare but also of ulterior interests and it increasingly uses a subjective notion, the quality of life, to determine whether complainants have suffered from particular privacy violations.

This approach by the ECtHR could prove indispensable in the age of Big Data, in which it is increasingly difficult to pinpoint actual and concrete harm to an individual’s (welfare) interests. Of course, Foucault had already proposed in 1975 to pay particular attention to the harm that follows from the mere knowledge that one is or might be watched.<sup>194</sup> It might be argued that the so called chilling effect hampers individuals in the unfettered creation of their identity, the possibility to experiment with different kind of roles and ultimately, the development of one’s personality.<sup>195</sup> This argument only seems to gain in power as the technological developments unfold. Big data processes do not so much undermine the minimum conditions of human life, but they may have an effect on a person’s goals and aspiration and may cause a type of harm which is hard to demonstrate or verify. If the Court wants to ensure that Article 8 ECHR retains its relevance in the age of Big Data, it would be wise, in such cases, to focus on ulterior interests instead of welfare interests and adopt a subjective notion of harm. The first real test for the Court will be a case which has been recently submitted, regarding NSA-like data gathering by the British Secret Services.<sup>196</sup>

<sup>191</sup> Neil M. Richards, ‘The Dangers of Surveillance’ [2013] 126 Harvard Law Review 1934 <<http://harvardlawreview.org/2013/05/the-dangers-of-surveillance/>>

<sup>192</sup> N. M. Richards, ‘Intellectual Privacy’, [2008] 87 TEX. L. REV. 387

<sup>193</sup> Richards (n 191) 1943

<sup>194</sup> Michel Foucault, *Surveiller et punir: naissance de la prison* (Paris, Gallimard, 1975)

<sup>195</sup> Erving Goffman, *The Presentation of Self in Everyday Life* (Garden City, Doubleday & Company, 1959)

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