

MINOR DISSERTATION

LL.M. (Public Law)

**JUSTIFYING LIMITATIONS ON PRIVACY: THE INFLUENCE OF THE
PROPORTIONALITY TEST IN SOUTH AFRICAN AND GERMAN LAW.**

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I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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TABLE OF CONTENTS

TABLE OF CONTENTS	2
INTRODUCTION	5
§ 1 THE CONSTITUTIONAL RIGHT TO PRIVACY.....	8
A) The constitutional right to privacy in the Republic of South Africa.....	8
B) The constitutional right to privacy in the Federal Republic of Germany...	9
I. The constitutional right to privacy in the German constitution.....	9
II. The constitutional right to privacy in the European Convention on Human Rights	11
§ 2 THE SCOPE OF PROTECTION	13
A) The right to self-preservation.....	13
B) Protection against the publication of private facts and the presentation of a person in a false light.....	15
C) Appropriation	18
§ 3 LIMITATIONS.....	19
A) Limitations of the right to privacy in the South African Constitution.....	19
B) Limitations of the rights to privacy in the German Constitution.....	19
I. Are infringements of the right to privacy in the German law not justifiable?.....	19
II. Legal basis	21
§ 4 PROPORTIONALITY WITH RESPECT TO LIMITATIONS OF THE RIGHT TO PRIVACY	23
A) Proportionality in the South African Constitution	23

B) Proportionality in the German Constitution.....	24
I. Severity of limitation.....	25
II. The free democratic constitutional order	28
C) The proportionality test.....	29
I. The spheres theory	29
1. The intimate sphere	30
a) The scope of protection.....	30
b) Can the intimate sphere be defined?.....	32
c) Theoretical derivation of an inviolable sphere	35
d) Criticism	38
2. Private sphere and social sphere?	39
a) The private sphere	39
b) The social sphere.....	41
c) Application in the South African Constitutional law?.....	42
3. Individual cases	44
a) Cases that South African judges have to consider	44
b) Cases that German judges have to consider	44
II. Governmental surveillance	47
1. Factors for the proportionality test.....	48
a) The case of <i>Mistry v Interim National Medical and Dental Council of South Africa</i>	48
b) Measures carried out to access, observe or record communication and other non-official information without a person's consent or awareness.....	49
c) Scope of the intrusion.....	51
2. Increased requirements for justification	52
a) Restrictive interpretation of the concept of risk	53
b) Procedural compensation	54

aa) Duty to inform, duty of disclosure and duty of deleting the data	54
bb) Protection of the core area of a person's private life	55
cc) Application to South African Constitutional law.....	57
3. Individual cases	57
a) In South African law	57
b) In the European Convention on Human Rights.....	58
CONCLUSION	60
REFERENCES.....	62

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INTRODUCTION

As the revelations in the so-called “NSA data scandal” have recently shown,¹ privacy remains a relevant and pressing issue which is discussed all over the world. Since computers are developing further, it has become unproblematic for the state to observe its citizens. New technologies make it effortless to put a trace on an individual’s telephone without the need for human listeners. This allows for the danger of broad-spectrum wiretap activities. Furthermore, people increasingly utilize electronic forms of communication (E-Mail, chat, etc.), making it easier for the state to gain information compared to the previous decades where letters had to be manually opened. The invention of new technologies amplifies the capabilities of law enforcement authorities constantly, which often infringe on the defendant’s right to privacy (e.g. IMSI-catcher, access to electronic communication, tracking of IP addresses, etc.).² Thus, as Jonathan Burchell concludes, “threats to individual privacy are greater now than ever envisaged, even by an Aldous Huxley or George Orwell.”³

The constitutional right to privacy is not absolute in the majority of cases.⁴ The state must have an ability to access its citizens’ data in order to solve crimes, employ people (background checks), collect taxes, compile statistical data, pay subsidies, check applications for asylum, etc. In this respect, states are increasingly confronted with the key issue, at which point there is an appropriate balance between handling public tasks (such as a functioning criminal justice) and an individual’s right to privacy. The effective scope of the right of privacy is determined by the principle of proportionality.⁵ Only by balancing the conflicting

¹ See A. Maurer, “Why the NSA PRISM program should terrify America”, in: The Washington Times, 25.08.2013, available online: <http://communities.washingtontimes.com/neighborhood/red-pill-blue-bill/2013/aug/25/metadata-matters-ongoing-nsa-scandal/>

² C. Gusy, in: VerwArch 2010, p. 319 et seq.; M. Gercke/P. W. Brunst, Praxishandbuch Internetstrafrecht, § 5 et seq.

³ J. Burchell, in: EJCL 2009, p. 1.

⁴ For the South African constitution: *McQuiod-Mason*, Constitutional law of South Africa, Art. 38.5 (a); for the German constitution: *H. Dreier*, Grundgesetz-Kommentar, Art. 2 Abs. 1 GG, marginal note 68; *M. Borowski*, Grundrechte als Prinzipien, p. 281; for the ECHR: *Leander v. Sweden*, no. 9248/81, 26 March 1987.

⁵ For the South African constitution: *McQuiod-Mason*, Constitutional law of South Africa, Art. 38.5 (a); for the German constitution: *H. Dreier*, in: H. Dreier (ed), Grundgesetz-Kommentar, Vol. 1, Art. 2 Abs. 1 GG, marginal number 87; similar: *H.-D. Horn*, in: Stern/Becker (ed), Grundrechte-Kommentar, Art. 2 GG, marginal number 98; *H.-D. Horn*, in: Stern/Becker, Grundrechte-

interests can it be determined which particular sector of the right to privacy the state is not allowed to enter.⁶ Accordingly, the principle of proportionality is the core of the examination of the constitutional justification of the right to privacy.⁷ The factor of proportionality is intended to prevent the state from “cracking a walnut with a sledgehammer”⁸. Therefore, it establishes whether or not a balanced relation between ends and means exists. The aim of the dissertation is to analyse how the factor of proportionality influences the right of the state to infringe on the right of privacy in the South African and the German Constitution.

This problem is of great practical importance. In many states there is a “legal explosion,”⁹ in which the legislature and jurisprudence attempt to weigh the balance between the protection of a man’s right to privacy and the legitimate interest of a state to obtain information (e.g. for the investigation of crimes).¹⁰ Proportionality plays a role primarily for surveillance measures, as the citizen’s risk of degenerating to a “transparent society” rises steadily due to the increasing mechanization and performance of computer systems. This problem is also evident on other sectors of the right to privacy. For instance, German commentators regard the right to choose life-prolonging or life-sustaining measures in medical situations as protected by the right to privacy, since this is part of a person’s autonomy.¹¹ This right is becoming progressively important, since the society is aging and medicine is improving. These new findings make life-prolonging measures possible over longer periods. In this situation, the patient can argue using his/her right to privacy whether he/she wishes to make

Kommentar, Art. 2 GG, marginal note 98, for the ECHR: *J. A. Frowein*, in: Frowein/Peukert, Vorb. Art. 8 - 11 EMRK, marginal note. 17; *J. Pätzold*, in: Karpenstein/Mayer, EMRK, Art. 8 EMRK, marginal note 97.

⁶ *T. Mayen*, Der grundrechtliche Informationsanspruch des Forschers gegenüber dem Staat, p. 118 et seq., with further references.

⁷ *H.-D. Horn*, in: Stern/Becker (ed), Grundrechte-Kommentar, Art. 2 GG, marginal number 98.

⁸ *T. Henne*, in: DVBl. 2002, p. 1094.

⁹ *J. H. Barton*, in: Stanford Law Review 1975, p. 567; *G. Duttge*, in: Der Staat 1997, p. 281 et seq.

¹⁰ See: *G. Duttge*, in: Der Staat 1997, p. 281 et seq.

¹¹ *M. Martini*, in: JA 2009, p. 841.

use of these opportunities.¹² The exact boundaries and conditions of this claim, however, have to be defined at the level of proportionality.

¹² For the German law: *P. Baltz*, *Lebenserhaltung als Haftungsgrund*, p. 242 with further references.

§ 1 THE CONSTITUTIONAL RIGHT TO PRIVACY

A) The constitutional right to privacy in the Republic of South Africa

The right to privacy is a central right in the South African Constitution since it is connected to human dignity.¹³ Moreover, many personal autonomy rights were “flagrantly invaded”¹⁴ under the apartheid state in South Africa and the state engaged in “widespread abuse of rights protecting information”¹⁵. Most of this offensive legislation upon which the abuse was predicated has been repealed today.¹⁶ The constitutional right to privacy is protected by section 14 of the 1996 South African constitution. According to this, “everyone has the right to privacy, which includes the right protecting one’s self or one’s home from being searched, their property searched, their possessions seized or the privacy of their communications infringed.” Whereas most constitutions (including the German constitution) protect the general right of personality and specific infringements of privacy like searches, seizures and infringements of the privacy of communications in separate sections, the South African constitution guarantees all these rights in one section.¹⁷

The South African Constitutional Court defines privacy as “an individual condition of life characterised by seclusion from the public and publicity [which] implies an absence of acquaintance with the individual or his personal affairs in this state”.¹⁸ This definition is only able to give a general framework, since it is too broad to subsume all specific facts of privacy. Thus, the scope of the right to privacy has to be defined by case law and is open to changes¹⁹.

¹³O’Keeffe v Argus Printing and Publishing Co Ltd 1954 3 SA 244 (C) 247F-249D; Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1979 1 SA 441 (A) 455H-456H; I. Currie/J. de Waal, The Bill of Rights Handbook, p. 275; J. Neethling/J. M. Potgieter/P. J. Visser, Law of delict, p. 333.

¹⁴D. McQuid-Mason, in: Constitutional law of South Africa, Chapter 38.3 (a) (i) (aa).

¹⁵D. McQuid-Mason, in: Constitutional law of South Africa, Chapter 38.3 (a) (i) (bb).

¹⁶D. McQuid-Mason, in: Constitutional law of South Africa, Chapter 38.3 (a) (i) (bb).

¹⁷I. Currie/J. de Waal, The Bill of Rights Handbook, Chapter 14.1.

¹⁸Bernstein v Bester NO 1996 (2) SA 751 (CC) at para 68.

¹⁹D. McQuid-Mason, in: Constitutional law of South Africa, Chapter 38.2 (c).

B) The constitutional right to privacy in the Federal Republic of Germany

I. The constitutional right to privacy in the German constitution

Other than in the South African constitution there is no explicit right to privacy in the German constitution.²⁰ The German Federal Constitutional Court (herein after referred to as the *Bundesverfassungsgericht*) deduced the right of privacy from the general freedom of action²¹ [Section 2(1) of the Basic law – hereinafter referred to as *Grundgesetz (GG)* –] in conjunction with human dignity [Section 1(1) *GG*].²² Presently, the so-called “general right of personality” is accepted as

²⁰ *Bernstein v Bester NO* 1996 (2) SA 751 (CC) at para 77.

²¹ According to the general freedom of action every person is allowed to do whatever he/she wants to do. The state *always* needs a justification, when it limits this right, no matter how trivial the prohibition is, see: BVerfGE 6, 32 (36) [Elfes]; BVerfGE 80, 137 (152 et seq.) [Reiten im Walde]; BVerfGE 113, 88 (103) [Streikeinsatz von Beamten]; BVerfGE 115, 97 (109) [Halbteilungsgrundsatz]; *U. Di Fabio*, in: Maunz/Dürig, GG, Art. 2 Abs. 1 GG, marginal number 12; *H. Dreier*, in: H. Dreier (ed), Grundgesetz-Kommentar, vol 1, Art. 2 Abs. 1 GG, marginal number 27; *V. Epping*, Grundrechte, marginal number 547; *C. Starck*, in: von Mangoldt/Klein/Starck, GG I, Art. 2 Abs. 1 GG, marginal number 8; *B. Pieroth/B. Schlink*, Grundrechte, marginal number 414; *H. D. Jarass*, in: Jarass/Pieroth, Grundgesetz, Art. 2 GG, marginal number 2 f.; *J. F. Lindner*, Theorie der Grundrechtsdogmatik, S. 455; *H.-U. Gallwas*, Grundrechte, marginal number 282; *H. Sodan*, in: Beck'scher Kompakt-Kommentar zum Grundgesetz, Art. 2 GG, marginal number 12; *H. Hofmann*, in: Schmidt-Bleibtreu/Hofmann/Hopfauf (eds), GG, Art. 2 GG, marginal number 22; *K. Stern*, Das Staatsrecht der Bundesrepublik Deutschland, vol IV/1, p. 883 ff.; *A. Burghart*, in: Leibholz/Rinck, GG, Bd. I, Art. 2 GG, marginal number 21.

²² BVerfGE 120, 224 (238) [Geschwisterbeischlaf]; BVerfGE 65, 1 (41) [Volkszählung]; *C. Degenhart*, in: JuS 1992, p. 361 et seq.; *W. Kahl*, Die Schutzergänzungsfunktion von Art. 2 Abs. 1 Grundgesetz, p. 6 et seq.; *I. Härtel*, in: Grote/Härtel/Hain et al., Die Ordnung der Freiheit, p. 235; *J. Isensee*, in: Merten/Papier, Handbuch der Grundrechte in Deutschland und Europa, § 26, marginal number 56; *U. Di Fabio*, in: Maunz/Dürig, GG, Art. 2 Abs. 1 GG, marginal number 128; *H. Dreier*, in: H. Dreier (ed), Grundgesetz-Kommentar, Vol. 1, Art. 2 Abs. 1 GG, marginal number 68; *H. Sodan*, in: Beck'scher Kompakt-Kommentar zum Grundgesetz, Art. 2 GG, marginal number 5; *D. Murswiek*, in: M. Sachs (ed), Grundgesetz, Art. 2 GG, marginal number 63; *I. Härtel*, in: Grote/Härtel/Hain et al., Die Ordnung der Freiheit, p. 235; *H.-D. Horn*, in: Stern/Becker (eds), Grundrechte-Kommentar, Art. 2 GG, marginal number 35 et seq.; *M. Borowski*, Grundrechte als Prinzipien, p. 275; *C. Starck*, in: von Mangoldt/Klein/Starck, GG I, Art. 2 Abs. 1 GG, marginal number 15; *C. Drews*, Die Wesensgehaltsgarantie des Art. 19 II GG, p. 259; *N. Teifke*, Das Prinzip Menschenwürde, p. 16; *A. Katz*, Staatsrecht, § 30 I, marginal number 676; *M. Baston-Vogt*, Der sachliche Schutzbereich des zivilrechtlichen allgemeinen Persönlichkeitsrechts, p. 117; *P. Kunig*, in: Jura 1993, p. 603; *P. Kunig*, in: von Münch/Kunig (eds), Vol. I, Art. 2 GG, marginal number 30.

an independent²³ human right.²⁴ The general right of personality is supposed to complement the explicitly mentioned fundamental rights – such as freedom of belief (Section 4 GG) or freedom of speech [Section 5(1) GG] – and ensures that the basic conditions of the supreme constitutional principle of human dignity [Section 1(1) GG] are preserved by creating a “protected personal sphere of life”.²⁵ Due to the breadth of the concept of a “protected personal sphere of life” and the rapidly changing social and moral value system, there can be no exact definition of the general right of personality.²⁶ As a result, the jurisprudence emphasizes that the general right of personality is open to development²⁷ and overcomes this problem by providing examples²⁸. As a matter of course, these categories can, due to the capacity for development, only be generic for the right to privacy and result from the wide-ranging concept of personality being very versatile.²⁹

²³ A. Podlech, in: Denninger/Hoffmann-Riem/Schneider/Stein (eds), AK-GG, Art. 2 Abs. 1 GG, § 59a; W. v. Heintschel-Heinegg/N. Pallas, Grundrechte, marginal number 258.

²⁴ W. Cremer, Freiheitsgrundrechte, p. 464; M. Sachs, Verfassungsrecht II, B2, marginal number 59; H. Sodan, in: Beck'scher Kompakt-Kommentar zum Grundgesetz, Art. 2 GG, marginal number 9; A. Burghart, in: Leibholz/Rinck, GG, Vol. I, Art. 2 GG, marginal number 4.

²⁵ C. Hillgruber, in: Umbach/Clemens (ed), Grundgesetz, Vol. I, Art. 2 Abs. 1 GG, marginal number 45; H.-D. Horn, in: Stern/Becker (eds), Grundrechte-Kommentar, Art. 2 GG, marginal number 34; P. Byers, Die Videoüberwachung am Arbeitsplatz unter besonderer Berücksichtigung des neuen § 32 BDSG, p. 37.

²⁶ D. Lorenz, in: JZ 2005, p. 1125; H.-D. Horn, in: Stern/Becker (eds), Grundrechte-Kommentar, Art. 2 GG, marginal number 37.

²⁷ BVerfGE 54, 148 (153 et seq.) [Eppler]; BVerfGE 65, 1 (41) [Volkszählung]; BVerfGE 79, 256 (268) [Kenntnis der eigenen Abstammung]; W. Schmitt Glaeser, in: Isensee/Kirchhof (ed), Handbuch des Staatsrechts der Bundesrepublik Deutschland, 2nd edition, Vol. VII, marginal number 129, marginal number 28; H. Dreier, in: H. Dreier (ed), Grundgesetz-Kommentar, Vol. I, Art. 2 Abs. 1 GG, marginal number 69; P. Kunig, in: von Münch/Kunig (eds), Vol. I, Art. 1 GG, marginal number 10; E. Zech, Gewebebanken für Therapie und Forschung, p. 20; G. Manssen, Staatsrecht II, marginal number 227; M. M. Meinke, In Verbindung mit, p. 64 et seq.; H.-U. Gallwas, Grundrechte, marginal number 345.

²⁸ Similiar: D. Grimm, in: Grimm/Schwerdtner, Schutz der Persönlichkeit, p. 4; H. D. Jarass, in: Jarass/Pieroth, Grundgesetz, Art. 2 GG, marginal number 39 et seq.; D. Murswiek, in: M. Sachs (ed), Grundgesetz, Art. 2 GG, marginal number 68 et seq.

²⁹ C. Hillgruber, in: Umbach/Clemens (eds), Grundgesetz, Vol. I, Art. 2 Abs. 1 GG, marginal number 46; P. Kunig, in: von Münch/Kunig (eds), Vol. I, Art. 2 GG, marginal number 31.

II. The constitutional right to privacy in the European Convention on Human Rights

Since the Federal Republic of Germany is a convention state of the European Convention on Human Rights (ECHR), the German jurisprudence has to consider section 8 ECHR and the case law of the European Court of Human Rights (ECtHR) when conducting the proportionality test for limitations of the general right of personality.³⁰ Thus, the paper has also to analyze Article 8 ECHR and the case law of the European Court of Human Rights in order to get a complete picture of the German legal situation.

According to Section 8(1) of the European Convention on Human Rights, everyone has the right to respect for his/her private and family life, his/her home and his/her correspondence. The protection of privacy in the European Convention on Human Rights is not identical with the general right of personality,³¹ but the two rights overlap in the first clause of Section 8(1) ECHR.³² Therefore, this provision fulfils the function of the general right of personality in the European Convention on Human Rights.³³

Like the *Bundesverfassungsgericht*, the European Court of Human Rights refuses to provide an explicit definition of the right to privacy due to its complexity.³⁴ According to settled case law, Art 8(1) ECHR protects an area in which the holder of the fundamental right can create and maintain an identity which guarantees

³⁰ BVerfGE 111, 307 (317 – 318) [EGMR-Entscheidungen]; *H. D. Jarass*, in: Jarass/Pieroth, Grundgesetz, Art. 2 GG, marginal number 60; *H.-D. Horn*, in: Stern/Becker (Hrsg.), Grundrechte-Kommentar, Art. 2 GG, marginal number 95; see for the structural explanation „völkerrechtsfreundliche Auslegung“: *H. Kube*, in: Isensee/Kirchhof (eds), Handbuch des Staatsrechts der Bundesrepublik Deutschland, 3rd edition, vol VII, marginal number 148, 90; *J. M. Schilling*, Deutscher Grundrechtsschutz zwischen staatlicher Souveränität und menschenrechtlicher Europäisierung, p. 59 et seq.; critical: *R. Pfeffer*, Das Verhältnis von Völkerrecht und Landesrecht, p. 183 et seq.

³¹ *J. Pätzold*, in: Karpenstein/Mayer (eds), EMRK, Art. 8 EMRK, marginal number 2; *T. Marauhn/K. Meljnik*, in: Grote/Marauhn (eds), EMRK/GG, Chapter 16, marginal number 7.

³² Similar: *V. Epping*, Grundrechte, marginal number 613.

³³ *R. Uerpman-Witzack*, in: Ehlers (ed), Europäische Grundrechte und Grundfreiheiten, § 3, marginal number 3.

³⁴ *Niemitz v. Germany*, no. 13710/88, 16 December 1992, § 29, ECHR; *Van Küick v. Germany*, no. 35968/97 ECHR, 12. June 2003, Headnote 4; *J. Pätzold*, in: Karpenstein/Mayer (ed), EMRK, Art. 8 EMRK, marginal number 5.

the free development of the individual.³⁵ This gives a person a negative right of defence "in the sense of a right of a state-free area", and a positive claim against the state ("positive obligations"³⁶).³⁷

³⁵ *Odièvre v. France*, no. 42326/98 13 February 2003, Headnote 2, ECHR.

³⁶ *Mikulic v Croatia*, no. 53176/99, § 65, ECHR 2002-I; *K.H. v. Slovakia*, no. 32881/04, 28. April 2009, § 45, ECHR.

³⁷ *F. Fischer*, in: Fischer, Rheinischer Kommentar zur EMRK, Art. 8 EMRK, marginal number 1 et seq.

§ 2 THE SCOPE OF PROTECTION

In this chapter we have to get an overview about the question to what extent the South African constitution and the German *Grundgesetz* protect privacy, since the question of justification can't be analysed isolated from the scope of protection. Thus, the scope of protection has first to be defined to determine which limitations need a justification and a proportionality test. We will be able to compare the South African and the German right to privacy better, if they are classified. They can be categorized into the right to self-preservation, the protection against the publication of private facts and the presentation of a person in a false light and appropriation, since these are the three basic factors of the right to privacy.³⁸ In the South African Constitution, these categories are mostly shaped by pre-constitutional cases. In this respect, the supremacy of the Constitution does not mean that all previous notions of privacy will be forgotten and fall into disuse.³⁹ The courts will inevitably retain those existing common-law actions that are in harmony with the values of the constitution.⁴⁰

A) The right to self-preservation

The South African constitutional right to privacy protects people from intrusions and interferences with private life.⁴¹ In pre-constitutional cases this right was violated by illegally entering⁴² or bugging⁴³ a person's home, questioning a prisoner improperly⁴⁴, watching a person undressing⁴⁵ or taking a bath⁴⁶

³⁸ *M. Martini*, in: JA 2009, p. 840; *D. McQuid-Mason*, in: Constitutional law of South Africa, Chapter 38.2 (a) (iii).

³⁹ *D. McQuid-Mason*, in: Constitutional law of South Africa, Chapter 38.2.

⁴⁰ *D. McQuid-Mason*, in: Constitutional law of South Africa, Chapter 38.2.

⁴¹ *D. McQuid-Mason*, in: Constitutional law of South Africa, Chapter 38.2 (a) (iii) (aa).

⁴² *S v Boshoff* 1981 (1) SA 393, 396 (T). *S v I* 1976 (1) SA 781 (RA); *De Fourd v Council of Cape Town* (1898) 15 SC 399, 402.

⁴³ *D. McQuid-Mason*, in: Constitutional law of South Africa, Chapter 38.2 (a) (iii) (aa).

⁴⁴ *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A); *Gosschalk v Rossouw* 1966 (2) SA 476, 492 (C).

⁴⁵ *R v R* 1954 (2) SA 134, 135 (N); *R v Daniels* 1938 TPD 312, 313.

⁴⁶ *R v Schoonberg* 1926 OPD 247.

secretly, observe a person,⁴⁷ taking blood tests⁴⁸ or tapping a person's phone⁴⁹ without permission and reading a person's private documents⁵⁰ or correspondence⁵¹ without authorization.⁵²

Similarly, the German constitution guarantees a right to withdraw from contact. This ensures that the confidentiality of personal matters is protected.⁵³ The term "withdrawal from contact" must be understood in a social and real way.⁵⁴ Hence, the scope of protection is congruent with the secrecy of postal, telegraphic and telephonic communications [section 10(1) GG] and the right to inviolability of the home [section 13(1) GG].⁵⁵ The right to self-preservation also includes the protection of private diary entries in criminal proceedings⁵⁶ and acknowledges the right to not receive unwanted advertisements.⁵⁷ Moreover, the "right to confidentiality and integrity of IT systems," developed in 2008, protects individuals from intelligence services that secretly monitor the internet.⁵⁸

In the European Convention on Human Rights, section 8(1) establishes the negative obligations in a state to the right to privacy in the narrow sense of the word.⁵⁹ This gives a person the right to establish a life on an individual's own terms without state involvement in the decision-making process.⁶⁰ Thus, a protected sphere is created, in which a person lives his/her life according to his/her choice and can develop his/her personality, as well as the ability to make

⁴⁷ *Epstein v Epstein* 1987 (4) SA 606 (C).

⁴⁸ *C v Minister of Correctional Services* 1996 (4) SA 292, 300 (T); *Seetal v Pravitha & another NO* 1983 (3) SA 827, 861-862 (D); *M v R* 1989 (1) SA 416, 426-7 (O); *Nell v Nell* 1990 (3) SA 889, 895-896 (T).

⁴⁹ *D. McQuid-Mason*, in: Constitutional law of South Africa, Chapter 38.2 (a) (iii) (aa).

⁵⁰ *Reid-Daly v Hickman* 1981 (2) SA 315, 323 (ZA).

⁵¹ *S v Hammer* 1994 (2) SACR 496, 498 (C).

⁵² *D. McQuid-Mason*, in: Constitutional law of South Africa, Chapter 38.2 (a) (iii) (aa).

⁵³ *M. Martini*, in: JA 2009, p. 840.

⁵⁴ *B. Pieroth/B. Schlink*, Grundrechte, marginal number 394.

⁵⁵ *D. Murswiek*, in: M. Sachs (ed), Grundgesetz, Art. 2 GG, marginal number 69.

⁵⁶ BVerfGE 80, 367 (373 et seq.) [Tagebuch].

⁵⁷ BVerfG NJW 1991, 910 [Werbepostsendungen].

⁵⁸ BVerfGE 120, 274 (306) [Online-Durchsuchungen].

⁵⁹ *A. Peters/T. Altwicker*, Europäische Menschenrechtskonvention, § 26 marginal number 1; *C. Grabenwarter/K. Pabel*, Europäische Menschenrechtskonvention, § 22 marginal number 9.

⁶⁰ *C. Grabenwarter/K. Pabel*, Europäische Menschenrechtskonvention, § 22, marginal number 12.

contact with other people, including sexual relations.⁶¹ The protection does not end when the individual leaves the private space and acts in public, since a person must – particularly in the context of demonstrations⁶² – have a possibility to adjourn to a public space without observation.⁶³ The right to self-preservation comprises the confidentiality of communication contents and call data from state interference (for example, by tapping telephone conversations and recording them or secret recordings in a prison cell).⁶⁴ In addition, it protects the psychological and physical integrity of a human being.⁶⁵ Therefore, every medical examination or treatment which is executed under duress – even if it is only a marginal medical act – is an infringement of section 8(1) ECHR.⁶⁶

B) Protection against the publication of private facts and the presentation of a person in a false light

South Africa's constitutional right to privacy protects against the publication of private facts and the presentation of a person in a false light.⁶⁷ Here, the disclosure or publishing of private facts which are obtained by illegal telephone tapping,⁶⁸ a police informer's identity⁶⁹, a story about young children abducted from the custody of their parents,⁷⁰ the content of stolen documents⁷¹ or photographs of a retired schoolteacher portraying him as a young man in the company of a well-known singer⁷² and the attempted photographing of security policemen mentioned by counsel at a trial as having been responsible for the

⁶¹ *J. Meyer-Ladewig*, Art. 8 EMRK, § 7 with reference to *P.G. and J.H. v. the United Kingdom*, no. 44787/98, 25. September 2001, § 56, ECHR 2001-IX.

⁶² *J. A. Frowein*, in: *Frowein/Peukert*, EMRK, Art. 8 EMRK, marginal number 6.

⁶³ *C. Grabenwarter/K. Pabel*, Europäische Menschenrechtskonvention, § 22, marginal number 9 (,reasonable expectation of privacy'-test).

⁶⁴ *A. Peters/T. Altwicker*, Europäische Menschenrechtskonvention, § 26, marginal number 13.

⁶⁵ *A. Peters/T. Altwicker*, Europäische Menschenrechtskonvention, § 26, marginal number 4 et seq.

⁶⁶ *J. A. Frowein*, in: *Frowein/Peukert*, EMRK, Art. 8 EMRK, marginal number 8.

⁶⁷ *D. McQuid-Mason*, in: *Constitutional law of South Africa*, Chapter 38.2 (a) (iii) (bb) and (cc).

⁶⁸ *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 463 (A).

⁶⁹ *Swanepoel v Minister van Veiligheid en Sekuriteit* 1999 (4) SA 549, 553 (T), [1999] 3 All SA 285 (T).

⁷⁰ *Rhodesian Printing and Publishing Co Ltd v Duggan* 1975 (1) SA 590 (RA).

⁷¹ *Goodman v Von Moltke* 1938 CPD 153.

⁷² *Mhlongo v Bailey* 1958 (1) SA 370 (W).

death of a detainee⁷³ need a justification.⁷⁴ Moreover, a doctor encroaches this right by telling his colleagues that his patient was suffering from AIDS without having his permission⁷⁵ and unauthorized publication of a photograph and story about an unmarried mother who conceived a child by a well-known rugby player⁷⁶.

The German constitution guarantees that a person can create and maintain an identity and must not be forced to reveal it.⁷⁷ This includes the exceedingly important right to informational self-determination, which ensures that every person can freely determine if, to whom, when and how he/she would like to share personal data to his/her environment.⁷⁸ Another area is the self-determination of one's sexual life⁷⁹, which gives a person the right to confess his/her sexual orientation.⁸⁰ It also includes the right to decide whether and how one wants to have children⁸¹, get married⁸², know his/her parentage⁸³ and to choose about the question whether one wants to receive life-prolonging or life-sustaining measures⁸⁴.

In the European Convention on Human Rights, the name, the sexual preference and sexual life, the right to knowledge of one's parentage, the protection of one's reputation, the determination of paternity⁸⁵, and the identification with a gender⁸⁶ are basic elements of privacy. Moreover, the lifestyle and the ethnic identity of minorities are protected by the right to privacy.⁸⁷ Thus, the European

⁷³ *La Grange v Schoeman* 1980 (1) SA 885 (E).

⁷⁴ *D. McQuid-Mason*, in: Constitutional law of South Africa, Chapter 38.2 (a) (iii) (bb).

⁷⁵ *Jansen van Vuuren NNO v Kruger* 1993 (4) SA 842 (A).

⁷⁶ *National Media Ltd v Jooste* 1996 (3) SA 262, 271 (A).

⁷⁷ *M. Martini*, in: JA 2009, p. 841.

⁷⁸ *T. Bunger/M. Block*, *Der „Gläserne Mensch“*, p. 7.

⁷⁹ BVerfGE 47, 46 (73) [Sexualkundeunterricht].

⁸⁰ BVerfGE 47, 46 (73) [Sexualkundeunterricht].

⁸¹ BVerfGE 88, 203 (254) [Schwangerschaftsabbruch II].

⁸² BVerfGE 49, 286 (298) [Transsexuelle I].

⁸³ BVerfGE 117, 202 (225 et seq.) [Vaterschaftsfeststellung].

⁸⁴ *M. Martini*, in: JA 2009, p. 841.

⁸⁵ See *A. Peters/T. Altwicker*, *Europäische Menschenrechtskonvention*, § 26, marginal number 9 et seq.

⁸⁶ See: *J. Meyer-Ladewig*, Art. 8 EMRK, marginal number 7 and *J. Pätzold*, in: Karpenstein/Mayer (eds), EMRK, Art. 8 EMRK, marginal number 6 et seq.

⁸⁷ *A. Peters/T. Altwicker*, *Europäische Menschenrechtskonvention*, § 26 marginal number 12; *J. A. Frowein*, in: Frowein/Peukert, EMRK, Art. 8 EMRK, marginal number 11.

Court of Human Rights considers the lifestyle of caravan dwellers, such as the Roma, if this is an integral part of ethnic identity, as protected by Section 8(1) ECHR.⁸⁸ Moreover, the right to informational self-determination is protected by Section 8(1) ECHR.⁸⁹ For this reason, the European Court of Human Rights and the European Commission considers the collection and storage of data about a person as an encroachment of section 8(1) ECHR.⁹⁰ Other aspects are the protection of a person's reputation and the right to one's own image.⁹¹ In addition, section 8(1) ECHR protects the right to self-determination as a positive obligation.⁹² This right protects the requirements which are necessary to lead a private life.⁹³ Hence, it is a state's duty to ensure the protection of privacy with all its legislative, jurisdictional and administrative organs.⁹⁴ Moreover, it has to establish the legal conditions which allow a subject to take action against somebody who infringes a person's right to privacy.⁹⁵ The right of residence, which provides a foreigner or a stateless person in a convention state the opportunity to found and maintain a private life and the right to receive a living wage, which is a prerequisite for leading a private life, are outflows of the right to self-determination.⁹⁶ Furthermore, the state has to fulfil numerous positive obligations. Thus, authorities must provide access to the social security file if it contains information about the childhood and biography of an applicant.⁹⁷

⁸⁸ *Chapman v. the United Kingdom*, no. 27238/95, 18. January 2001, ECHR, § 73; *A. Peters/T. Altwicker*, Europäische Menschenrechtskonvention, § 26, marginal number 12.

⁸⁹ *Uzun v. Germany*, no. 35623/05, 2. September 2010, ECHR, § 46.

⁹⁰ *J. A. Frowein*, in: Frowein/Peukert, EMRK, Art. 8 EMRK, marginal number 5.

⁹¹ *C. Grabenwarter/K. Pabel*, Europäische Menschenrechtskonvention, § 22, marginal number 11.

⁹² *A. Peters/T. Altwicker*, Europäische Menschenrechtskonvention, § 26 marginal number 1.

⁹³ *F. Fischer*, in: Fischer, Rheinischer Kommentar zur EMRK, Art. 8 EMRK, marginal number 20.

⁹⁴ *J. A. Frowein*, in: Frowein/Peukert, EMRK, Art. 8 EMRK, marginal number 11 et seq.

⁹⁵ *J. A. Frowein*, in: Frowein/Peukert, EMRK, Art. 8 EMRK, marginal number 11 with further references.

⁹⁶ *F. Fischer*, in: Fischer, Rheinischer Kommentar zur EMRK, Art. 8 EMRK, marginal number 20.

⁹⁷ *K.H. . v. Slowakia*, no. 32881/04, 28. April 2009, ECHR, § 45 et seq.

C) Appropriation

Furthermore, section 14 of the South African constitution protects against appropriation.⁹⁸ Appropriation means in that context that a person's image or likeness is used without their consent: for example, the unauthorized use of a photograph for an advertisement.⁹⁹ The German constitution¹⁰⁰ and the European Convention on Human Rights¹⁰¹ also gives a person the right to choose which image of oneself is conveyed to the public. This protects the holder of the fundamental right from falsifying, distorting or unsolicited representation by others. In particular, this includes the right to one's own image¹⁰², word¹⁰³ and name¹⁰⁴, the right to reply¹⁰⁵ and the right to re-socialization¹⁰⁶. Furthermore, governmental institutions are only allowed to collect or disclose information that relates to the close personal sphere of a person's life to the public, if this infringement can be justified.¹⁰⁷

⁹⁸ *D. McQuid-Mason*, in: Constitutional law of South Africa, Chapter 38.2 (a) (iii) (dd).

⁹⁹ *D. McQuid-Mason*, in: Constitutional law of South Africa, Chapter 38.2 (a) (iii) (dd).

¹⁰⁰ *M. Martini*, in: JA 2009, p. 841.

¹⁰¹ See: *J. Meyer-Ladewig*, Art. 8 EMRK, marginal number 27 et seq.

¹⁰² BVerfGE 35, 202 (220) [Lebach].

¹⁰³ BVerfGE 54, 148 (155) [Eppler].

¹⁰⁴ BVerfG NJW 2009, p. 663 [Freie Vornamenswahl].

¹⁰⁵ BVerfGE 63, 131 (142 et seq.) [Gegendarstellung].

¹⁰⁶ BVerfGE 64, 261 (276 et seq.) [Hafturlaub].

¹⁰⁷ *D. Murswiek*, in: M. Sachs (ed), Grundgesetz, Art. 2 GG, marginal number 71.

§ 3 LIMITATIONS

A) Limitations of the right to privacy in the South African Constitution

Constitutional rights and freedoms are not absolute in the South African constitution.¹⁰⁸ A limitation of fundamental right, such as the right to privacy, must however, be constitutionally justified in terms of the provisions of the limitation clause in section 36(1) of the Constitution.¹⁰⁹ Here, the applicant must first demonstrate that the exercise of the right to privacy has been limited.¹¹⁰ In a second stage, the respondent must establish that the infringement was justifiable.¹¹¹ Since this is mostly a question of proportionality, the details will be explained in the next section.

B) Limitations of the rights to privacy in the German Constitution

I. Are infringements of the right to privacy in the German law not justifiable?

The fundamental right to human dignity is absolute in the German Constitution and no limitations are permitted at all.¹¹² Thus, a proportionality test never takes place.¹¹³ Even an infringement on one person's dignity in order to protect the

¹⁰⁸ I. Currie/J. de Waal, *The Bill of Rights Handbook*, p. 163.

¹⁰⁹ Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd, in re: Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 (1) SA 545 (CC) at para 20.

¹¹⁰ S. Woolman/H. Botha, in: *Constitutional law of South Africa*, Chapter 34.2 (a)

¹¹¹ S. Woolman/H. Botha, in: *Constitutional law of South Africa*, Chapter 34.2 (a)

¹¹² BVerfGE 34, 238 (245) [Tonband]; BVerfGE 80, 367 (373) [Tagebuch]; E. Benda, in: NJW 2001, p. 2147 et seq.; W. Höfling, in: M. Sachs (ed), *Grundgesetz*, Art. 1 GG, marginal number 11; P. Kunig, in: von Münch/Kunig (eds), Vol. I, Art. 1 GG, marginal number 4; C. Enders, in: Stern/Becker (eds), *Grundrechte-Kommentar*, Art. 1 GG, marginal number 21 et seq.; J. F. Lindner, *Theorie der Grundrechtsdogmatik*, p. 186; H. D. Jarass, in: Jarass/Pieroth, *Grundgesetz*, Art. 1 GG, marginal number 16; R. Zippelius, in: Dolzer/Kahl/Waldhoff/Graßhof (eds), *Bonner Kommentar*, Art. 1 Abs. 1 u. 2 GG, marginal number 37 et seq.; A. Burghart, in: Leibholz/Rinck, GG, Vol. I, Art. 1 GG, marginal number 1.

¹¹³ A. K. Weilert, *Grundlagen und Grenzen des Folterverbotes in verschiedenen Rechtskreisen*, p. 404; H. Dreier, in: H. Dreier (ed), *Grundgesetz-Kommentar*, Vol. 1, Art. 1 I GG, marginal number 132;

dignity of many other humans is not justifiable.¹¹⁴ Since the general right of personality is deduced from the right to general freedom of action [Section 2(1) GG] and the right to human dignity [Section 1(1) GG] it is questionable to what extent infringements can be justified.

According to the prevailing opinion in the legal literature and jurisprudence, infringements of the general right of personality are in most cases justifiable.¹¹⁵ This is explained by the fact that in the construction of the general right of personality, the limitable section 2(1) GG plays the central role;¹¹⁶ human dignity [Art. 1(1) GG] influences the general right of personality only subordinately¹¹⁷ and acts more as "programmatic guidance and policy interpretation"¹¹⁸. Such a construction of the right is mainly derived from the wording of Section 2(1) GG, which speaks of "free development of personality," the essential component of the protection of privacy.¹¹⁹ In this respect, human dignity is only affected by very intimate encroachments. The state must refrain from these infringements of the general right of personality, as they can't be justified.

H. Sodan, in: Beck'scher Kompakt-Kommentar zum Grundgesetz, Art. 1 GG, marginal number 27; *R. Will*, in: Roggan, Mit Recht für Menschenwürde und Verfassungsstaat, p. 30.

¹¹⁴ *M. Herdegen*, in: Maunz/Dürig, GG, Art. 1 GG, marginal number 73.

¹¹⁵ *D. Murswiek*, in: M. Sachs (ed), Grundgesetz, Art. 2 GG, marginal number 103.

¹¹⁶ So: *H. Dreier*, in: H. Dreier (ed), Grundgesetz-Kommentar, Vol. 1, Art. 2 Abs. 1 GG, marginal number 68; *H. D. Jarass*, in: NJW 1989, p. 857; *H. D. Jarass*, in: Jarass/Pieroth, Grundgesetz, Art. 2 GG, marginal number 36; *C. Degenhart*, in: JuS 1992, p. 361 et seq.; *P. Kunig*, in: von Münch/Kunig (eds), Vol. I, Art. 2 GG, marginal number 30; *P. Kunig*, in: Jura 1993, p. 603; *H. Sodan*, in: Beck'scher Kompakt-Kommentar zum Grundgesetz, Art. 2 GG, marginal number 5; *D. Murswiek*, in: M. Sachs (ed), Grundgesetz, Art. 2 GG, marginal number 63; *U. Di Fabio*, in: Maunz/Dürig, GG, Art. 2 Abs. 1 GG, marginal number 128; *H. Schneider*, Die Güterabwägung des Bundesverfassungsgerichts bei Grundrechtskonflikten, p. 88 et seq.; *H.-D. Horn*, in: Stern/Becker (eds), Grundrechte-Kommentar, Art. 2 GG, marginal number 35 et seq.; *C. Starck*, in: von Mangoldt/Klein/Starck, GG I, Art. 2 Abs. 1 GG, marginal number 15; *W. Kahl*, Die Schutzergänzungsfunktion von Art. 2 Abs. 1 Grundgesetz, p. 6 et seq.; *I. Härtel*, in: Grote/Härtel/Hain et al., Die Ordnung der Freiheit, p. 235; *D. Lorenz*, in: Dolzer/Kahl/Waldhoff/Graßhof (ed), Bonner Kommentar, Art. 2 Abs. 1 GG, marginal number 27; of a different opinion: *A. v. Arnould*, in: ZUM 1996, p. 287; *H. Hofmann*, in: Schmidt-Bleibtreu/Hofmann/Hopfauf (eds), GG, Art. 1 GG, marginal number 58.

¹¹⁷ *D. Murswiek*, in: M. Sachs (ed), Grundgesetz, Art. 2 GG, marginal number 63.

¹¹⁸ *H. Dreier*, in: H. Dreier (ed), Grundgesetz-Kommentar, Vol. 1, Art. 2 Abs. 1 GG, marginal number 68; *M. Borowski*, Grundrechte als Prinzipien, p. 281.

¹¹⁹ *G. Beaucamp/J. Seifert*, in: JA 2004, p. 540.

II. Legal basis

As laid down in section 2(1) GG (“einfacher Gesetzesvorbehalt”)¹²⁰ a limitation of the right to privacy can in the German law only be justified if it is based on a statutory provision. The same applies to the European Convention on Human Rights. According to section 8(2) ECHR, any infringement of the right to privacy always requires a reservation of statutory powers.¹²¹ Since there are also states with a common law system within the scope of the European Convention on Human Rights, it doesn’t necessarily need to be a formal statute.¹²²

Due to the fact that the requirement of a legal basis is an outflow of the principle of proportionality, not only procedural but also substantive requirements are to be subject to the requirement of legality.¹²³ The holder of the fundamental right must have the chance to access and recognize the consequences of a law which encroaches his/her right to privacy.¹²⁴ Moreover, it has to offer protection against arbitrary intrusions.¹²⁵ The requirements on certainty and degree of regulation of this law depends mainly on its scope of application, on the type of governmental action which is based on this law, and the number and status of the

¹²⁰ BVerfGE 117, 202 (227) [Vaterschaftsfeststellung]; BVerfGE 120, 180 (199, 201) [Caroline von Monaco III]; *G. Beaucamp/J. Seifert*, in: JA 2004, p. 542; *F. Hufen*, Staatsrecht II, § 11, marginal number 23; *H.-D. Horn*, in: Stern/Becker (Hrsg.), Grundrechte-Kommentar, Art. 2 GG, marginal number 93; *U. Di Fabio*, in: Maunz/Dürig, GG, Art. 2 Abs. 1 GG, marginal number 133; *C. Starck*, in: von Mangoldt/Klein/Starck, GG I, Art. 2 Abs. 1 GG, marginal number 21; *D. Lorenz*, in: Dolzer/Kahl/Waldhoff/Graßhof (Hrsg.), BK, Art. 2 Abs. 1 GG, marginal number 402; *M. Martini*, in: JA 2009, p. 844; *W. v. Heintschel-Heinegg/N. Pallas*, Grundrechte, marginal number 271; *H. D. Jarass*, in: Jarass/Pieroth, Grundgesetz, Art. 2 GG, marginal number 58; *H. Sodan*, in: Beck’scher Kompakt-Kommentar zum Grundgesetz, Art. 2 GG, marginal number 12; *H. Wilms*, Staatsrecht II, marginal number 327, 376; *A. Streibel*, Rassendiskriminierung als Eingriff in das allgemeine Persönlichkeitsrecht, p. 141;

¹²¹ *F. Fischer*, in: Fischer, Rheinischer Kommentar zur EMRK, Art. 8 EMRK, marginal number 6. Similar: *A. Peters/T. Altwicker*, Europäische Menschenrechtskonvention, § 25, marginal number 5.

¹²² *R. Uerpman-Witzack*, in: Ehlers (ed), Europäische Grundrechte und Grundfreiheiten, § 3, marginal number 22; *C. D. Classen*, in: Manssen/Banaszak, Grundrechte im Umbruch, p. 62; *W. Frenz*, Handbuch Europarecht, Vol. 4, marginal number 1250; *J. Pätzold*, in: Karpenstein/Mayer (eds), EMRK, Art. 8 EMRK, § 92; see as well: *Leander v. Sweden*, no. 9248/81, 26. March 1987, ECHR, § 52 et seq.

¹²³ *J. Meyer-Ladewig*, Art. 8 EMRK, marginal number 102; similar: *J. A. Frowein*, in: Vorb. zu Art. 8 - 11 EMRK, marginal number 2.

¹²⁴ *J. Pätzold*, in: Karpenstein/Mayer (ed), EMRK, Art. 8 EMRK, marginal numbers 93, 95; *J. Meyer-Ladewig*, Art. 8 EMRK, marginal number 102.

¹²⁵ *Rekvényi v. Hungary*, no. 25390/94, 20. March 1999, ECHR, § 59; *Uzun v. Germany*, no. 35623/05, 2. September 2010, ECHR; *J. Pätzold*, in: Karpenstein/Mayer (eds), EMRK, Art. 8 EMRK, marginal numbers 93, 95; *J. Meyer-Ladewig*, Art. 8 EMRK, marginal number 102.

persons who are concerned from that measure.¹²⁶ Thus, the European Convention on Human Rights sets stringent requirements of national laws which allow for government measures, such as wiretapping:¹²⁷ “The nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed”.¹²⁸ If a law doesn’t fulfil these requirements, the infringement of privacy is not “prescribed by law”¹²⁹ and thus the interference is unlawful.¹³⁰ These strict requirements must not only be fulfilled for the collection of data, but also for storing and sharing them, since these measures usually proceed in secret.¹³¹

¹²⁶ J. Pätzold, in: Karpenstein/Mayer (ed), EMRK, Art. 8 EMRK, marginal number 94.

¹²⁷ *Khan v. the United Kingdom*, no. 35394/97, 12. May 2000, ECHR, § 26.

¹²⁸ *Weber u. Saravia v. Germany*, no. 54934/00, 29. June 2006, § 95, ECHR 2006-XI.

¹²⁹ A. Peters/T. Altwicker, Europäische Menschenrechtskonvention, § 26, marginal number 19.

¹³⁰ T. Schilling, Internationaler Menschenrechtsschutz, § 247.

¹³¹ *Rotaru v. Rumania*, no. 28341/95 04. May 2000, ECHR, § 57 et seq.

§ 4 PROPORTIONALITY WITH RESPECT TO LIMITATIONS OF THE RIGHT TO PRIVACY

A) Proportionality in the South African Constitution

According to 36(1) of the Constitution, the right to privacy may only be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose.¹³²

Thus, the core of the constitutional justification for encroachments of section 14 is the proportionality test.¹³³ The proportionality test is a central component in the South African constitution and was significantly influenced by the case of *S v Makwanyane*.¹³⁴ Passage 104 of this case was originally a description for the analysis which had to be undertaken in section 33 of the interim constitution¹³⁵, but it formed the basis of the text when the limitation clause – now section 36 – was codified in the final constitution.¹³⁶ According to section 36, there is no absolute standard that can be laid down for determining reasonableness and necessity of infringements in a democratic society; these circumstances have to be balanced on a case by case basis.¹³⁷ In this balancing process, the relevant

¹³² Parts of the South African legal literature criticize that this provision was inspired by the Canadian Charter's limitation clause, the South African courts, however, don't follow the stringent test laid down by the Canadian Supreme Court in *R v Oakes*; see: *S. Woolman/H. Botha*, in: Constitutional law of South Africa, Chapter 34.2 (b).

¹³³ *Mistry v Interim National Medical and Dental Council of South Africa & others*, 1998 (7) BCLR 880 (CC), 1998 (4) SA 1127 (CC) at para 30.

¹³⁴ *H. Mostert*, The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany, p. 352 et seq.; *A. Barak*, Proportionality, p. 343.

¹³⁵ *I. Currie/J. de Waal*, The Bill of Rights Handbook, p. 177.

¹³⁶ *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6, 30 (CC), 1998 (12) BCLR 1517 (CC) at para 34.

¹³⁷ *S v Makwanyane* [1995] ZACC 3, 1995 (3) S.A. 391 at para 104.

considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.¹³⁸ Thus, no general answers can be given to the question of proportionality of an encroachment of the right to privacy, but rather the individual case must be analysed. Until now, there aren't many cases which deal with the issue of proportionality with respect to limitations of the right to privacy. However, the understanding of the constitutional right to privacy can be drawn from a central passage in *Bernstein v Bester*:

“The relevance of such an integrated approach to the interpretation of the right to privacy is that this process of creating context cannot be confined to any one sphere, and specifically not to an abstract individualistic approach. The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.”¹³⁹

B) Proportionality in the German Constitution

The principle of proportionality is not explicitly expressed in the German constitution.¹⁴⁰ Its structural roots are mainly seen in the principle of the rule of

¹³⁸ *S v Makwanyane* [1995] ZACC 3, 1995 (3) S.A. 391 at para 104.

¹³⁹ *Bernstein v Bester NO* 1996 (2) SA 751 (CC) at para 67.

¹⁴⁰ *p. Huster/J. Rux*, in: Epping/Hillgruber (ed), GG, Art. 20 GG, marginal number 176.

law and in the fundamental rights themselves.¹⁴¹ The principle of proportionality “demands that an encroachment on fundamental rights has to serve a legitimate purpose and be suitable, necessary, and appropriate as a means to this end”.¹⁴² A law is appropriate when the gravity of the encroachment, in an overall evaluation, is not disproportionate to the gravity of the reasons justifying it.¹⁴³

I. Severity of limitation

The more severe the limitation of the right is, the stronger its justification must be in law.¹⁴⁴ Thus, the legislator has to regulate the aspects which are essential for the realization of fundamental rights of the people by itself.¹⁴⁵ However the question, what is essential for the realization of fundamental rights, cannot be answered in general; instead all circumstances of the case must be analysed.¹⁴⁶ In its classical function, the general right of personality guarantees that a person is protected from unlawful public interferences in the personality realisation.¹⁴⁷ Here, the (1.) severity of governmental measures and (2.) the prevention of encroachments on fundamental rights must be considered to determine if an aspect is essential for the realization of fundamental rights.¹⁴⁸

¹⁴¹ BVerfGE 35, 382 (400) [Ausländerausweisung].

¹⁴² BVerfG, 1 BvR 370/07 from 27.2.2008, marginal number 152; *L. Hirschberg*, Der Grundsatz der Verhältnismässigkeit, p. 2.

¹⁴³ BVerfG, 1 BvR 370/07 from 27.2.2008, marginal number 161.

¹⁴⁴ This principle of materiality can be deduced from the rule of law [section 20(3) GG], in conjunction with the principle of democracy [section 20(1) GG], see: BVerfGE 33, 125 (158) [Facharzt]; BVerfGE 84, 212 (226) [Aussperrung]; *P. Lerche*, in: Merten/Papier, Handbuch der Grundrechte in Deutschland und Europa, marginal number 62, marginal number 5 et seq.

¹⁴⁵ *A. Röthel*, Normkonkretisierung im Privatrecht, p. 64; *M. Mayer*, Untermaß, Übermaß und Wesensgehaltgarantie, p. 105.

¹⁴⁶ *J. Staupe*, Parlamentsvorbehalt und Delegationsbefugnis, p. 239 et seq.

¹⁴⁷ *P. Kunig*, in: von Münch/Kunig (eds), Volume I, Art. 2 GG, marginal note 40; *U. Di Fabio*, in: Maunz/Dürig, GG, Art. 2 Abs. 1 GG, marginal note 132; *D. Grimm*, in: Grimm/Schwerdtner, Schutz der Persönlichkeit, p. 19; *G. Wiese*, in: Dauner-Lieb/Hommelhoff/Jacobs et al., Festschrift für Horst Konzen zum siebzigsten Geburtstag, p. 989; for the right to informational self-determination: *M. Thiel*, Die „Entgrenzung“ der Gefahrenabwehr, p 224 et seq.

¹⁴⁸ *J. Staupe*, Parlamentsvorbehalt und Delegationsbefugnis, p. 240; *F. Reimer*, in: Hoffmann-Riem/Schmidt-Assmann/Vosskuhle et al., Grundlagen des Verwaltungsrechts, § 9, marginal number 48 (Footnote 372).

1. Infringements of the general right of personality are typically severe. This is a consequence of the fact that the general right of personality protects the "closer personal sphere of personal life"¹⁴⁹ and the "preservation of the fundamental conditions in which the individual can develop and maintain his/her individuality."¹⁵⁰ For measures carried out to access, observe or record communications and other non-official information about a person (hereinafter referred to as "government surveillance"), the intensity can be derived from the fact that the collected information often allows the state to determine an accurate conception of an individual's personality.¹⁵¹ The other aspects of the general right of personality protect very basic right-intensive sectors, such as the right to know one's parentage¹⁵², the right to select one's name¹⁵³ and the right to free determination of one's reproduction¹⁵⁴. These are not about short-term, one-time actions, but as a rule, live-bearing and individuality-forming decisions.

2. The second factor after the factual situation.¹⁵⁵ Here, the preventive protection of fundamental rights is of central importance when the individual appears to be particularly at risk from interferences by the executive.¹⁵⁶ In almost no areas of the fundamental rights, humans are subjected to as high risks of interference from the executive as in the general right of personality. This is particularly evident in the highly relevant field of government surveillance. The executive constantly needs information from the citizens. Without this data, proper taxation would not be possible, the prosecution could not operate, benefits could not be distributed correctly,¹⁵⁷ statistics could not be created, subsidies could not be paid not appropriately, the reliability of employees in sensitive areas (such as

¹⁴⁹ See: *U. Di Fabio*, in: Maunz/Dürig, GG, Art. 2 Abs. 1 GG, marginal number 147; *C. Hillgruber*, in: Umbach/Clemens (eds), Grundgesetz, Vol. I, Art. 2 Abs. 1 GG, marginal number 45.

¹⁵⁰ *A. Peukert*, Güterzuordnung als Rechtsprinzip, p. 81.

¹⁵¹ See the "mosaic theory" in § 2 B) II. 1. a).

¹⁵² BVerfGE 117, 202 [Vaterschaftsfeststellung].

¹⁵³ BVerfGE 104, 373 (387 - 388) [Ausschluss von Doppelnamen].

¹⁵⁴ BVerfGE 88, 203 (254) [Schwangerschaftsabbruch II].

¹⁵⁵ *J. Staupe*, Parlamentsvorbehalt und Delegationsbefugnis, p. 240 with reference to BVerfGE 53, 30 (51) [Mülheim-Kärlich].

¹⁵⁶ *J. Staupe*, Parlamentsvorbehalt und Delegationsbefugnis, p. 240.

¹⁵⁷ *H. P. Bull*, Gefühle der Menschen in der 'Informationsgesellschaft' - wie reagiert das Recht?, p. 11.

airports) could not be verified and asylum applications could not be handled. The list could be extended indefinitely.

This high risk which is raised by the "collecting mania" of states is also shown by the possibility of bank account scannings which was actually intended only for exceptional cases.¹⁵⁸ Since its introduction in 2005, the number of queries has climbed from less than 9000 to more than 62000 scannings in 2011, with an upward trend.¹⁵⁹ With the increasing mechanization and medical progress, states will have to expand their powers of intervention especially in law enforcement to ensure effective crime control and prevention. Moreover, the financial authorities are increasingly reliant on the establishment of comprehensive reporting requirements in order to guarantee a proper taxation. Thus, in the future, a rising amount of government surveillance can be expected.

Additionally, some areas of the general right of personality are compromised by interferences of the executive.¹⁶⁰ This is often the result from the fact that the protection of the general right of personality is often linked to high financial cost.¹⁶¹ As an example, the right to rehabilitation results in average costs of 32.000 € (about 416.000 Rand) for each prisoner in Federal Republic of Germany. Since states have high debts and must cut costs, it is feared that individual rehabilitation programs are neglected.¹⁶² Moreover, decisions that are made in the field of the right to privacy often have an enormous political explosive potential. This applies especially to the personality development elementary field of identity formation and assertion (e.g. gay marriage, embryo research, surrogate parenting, euthanasia, etc.). In this respect it is feared that the authorities behave hesitantly because they are afraid of unpopular consequences

¹⁵⁸ BVerfGE 118, 168 (197) [Kontostammdaten].

¹⁵⁹ See <http://www.sueddeutsche.de/geld/datenschutz-staat-greift-mehr-und-mehr-konto-daten-ab-1.1255978>

¹⁶⁰ BVerfGE 45, 187 (238 - 239) [Lebenslange Freiheitsstrafe]; BVerfGE 98, 169 (200) [Arbeitspflicht].

¹⁶¹ Statistisches Bundesamt, *Justiz auf einen Blick*, 2011, p. 56; *H. Entorf*, in: *APuZ* 2010, p. 16.

¹⁶² See *Frankfurter Allgemeine Zeitung* (30.06.2006): *Sicherheit und Resozialisierung - Die Kassen der Justiz sind leer: Droht deshalb ein Schäbigkeitswettbewerb der Länder?*

or reject applications and pass on the responsibility to other government agencies.

II. The free democratic constitutional order

The general right of personality is central for protecting the *free democratic constitutional order* of the basic law. The *free democratic constitutional order* is a "summary of all the fundamental and defining constitutional principles".¹⁶³ The repeated mention of this term in central parts of the German basic law shows its great importance.¹⁶⁴ A precise definition of the free democratic basic order does not exist.¹⁶⁵ However, the *Bundesverfassungsgericht* describes the concept as a constitutional set-up which is based on the self-determination of the people, the will of the majority, freedom and equality, excluding any violence and arbitrary rule.¹⁶⁶

In this respect, these are goals on which every governmental action has to be based on,¹⁶⁷ since that is the only way to ensure that the political order is always prepared to defend a militant democracy.¹⁶⁸ In this respect, the free development of a human's personality is a cornerstone of the *free democratic constitutional order*.¹⁶⁹ Thus, even a perfectly balanced right to vote is useless if it is not ensured that a human is granted the opportunity for personal development. Only when the people have the opportunity to develop an independent and self-responsible opinion, strong democratic structures can emerge.¹⁷⁰ Therefore the general right of personality is of central importance since this protects "the actual identity of the individual, and thus the (inner) being, which is the prerequisite self-

¹⁶³ H. Maurer, Staatsrecht I, § 23, marginal note 5; similar: M. Deiters, in: Thiel, Wehrhafte Demokratie, p. 293.

¹⁶⁴ K. Stern, Das Staatsrecht der Bundesrepublik Deutschland, Vol. I, p. 556.

¹⁶⁵ G. Dürig/H. H. Klein, in: Maunz/Dürig, GG, Art. 18 GG, marginal number 55.

¹⁶⁶ BVerfGE 2, 1 [SRP-Verbot]; see also: H. Butzer, in: Beck'scher Online-Kommentar GG, Art. 18 GG, marginal number 10.

¹⁶⁷ K. Stern, Das Staatsrecht der Bundesrepublik Deutschland, Volume I, p. 573.

¹⁶⁸ K. Stern, Das Staatsrecht der Bundesrepublik Deutschland, Volume I, p. 558.

¹⁶⁹ BVerfGE 2, 1 [SRP-Verbot]; R. Klüber, Persönlichkeitsschutz und Kommerzialisierung, p. 35.

¹⁷⁰ T. J. Geiger, Vorstudien zu einer Soziologie des Rechts, p. 129 et seq.; M. Rehbinder/T. Würtenberger, Abhandlungen zur Rechtssoziologie, p. 225.

determined action. Thus, the protection of the general right of personality is the foundation for an active development of personality."¹⁷¹ Based on the central importance and the enormous relevance of the *free democratic constitutional order*, the general right of personality must be protected sufficiently. Hence, the protection of the general right of personality must be given a high weight in the proportionality test, so that only important reasons can allow limitations.

C) The proportionality test

Since the right to privacy can vary both in terms of type and consequence, different criteria have to be set, to test if an infringement into the general right to personality is appropriate or not. In this respect, it has to be distinguished between government surveillance for infringements of privacy rights that protect information (II.) and other limitations (I.).

I. The spheres theory

The so-called spheres theory was developed in the German jurisprudence to categorize the proportionality test for infringements of the right to privacy.¹⁷² The aim of this model is to bring a certain structure into the difficult and complex

¹⁷¹ G. Britz, *Kulturelle Rechte und Verfassung*, p. 211.

¹⁷² H. Kube, in: Isensee/Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Germany*, 3rd edition, Vol. VII, § 148, marginal number 86. The spheres theory is often criticized in the legal literature; see: M. Martini, in: JA 2009, p. 844; H.-D. Horn, in: Stern/Becker (eds), *Grundrechte-Kommentar*, Art. 2 GG, marginal number 103; G. Manssen, *Staatsrecht II*, marginal number 244; H. Dreier, in: H. Dreier (ed), *Grundgesetz-Kommentar*, Vol. 1, Art. 2 Abs. 1 GG, marginal number 88; P. Kunig, in: von Münch/Kunig (eds), Vol. I, Art. 2 GG, marginal number 41; A. Podlech, in: Denninger/Hoffmann-Riem/Schneider/Stein (eds), *AK-GG*, Art. 2 Abs. 1 GG, marginal number 36 et seq. Here, the lack of contouring and the resulting relativity of the spheres are put forward as the main points of criticism (*U. Di Fabio*, in: Maunz/Dürig, *GG*, Art. 2 Abs. 1 GG, marginal number 157 et seq.; *K. Rogall*, *Informationseingriff und Gesetzesvorbehalt im Strafprozess*, p. 32 et seq.; *H. Dreier*, in: H. Dreier (ed), *Grundgesetz-Kommentar*, Vol. 1, Art. 2 Abs. 1 GG, marginal number 88). In this respect, one could only speak of "gradual shades", but not of "separate districts": (*P. Petersen*, *Grenzen des Verrechtlichungsgebotes im Datenschutz*, p. 11; *C. Starck*, in: von Mangoldt/Klein/Starck, *GG I*, Art. 2 Abs. 1 GG, marginal number 16; *C. Hillgruber*, in: Umbach/Clemens (eds), *Grundgesetz*, Vol. I, Art. 2 Abs. 1 GG, marginal number 87; *A. Podlech*, in: Denninger/Hoffmann-Riem/Schneider/Stein (eds), *AK-GG*, Art. 2 Abs. 1 GG, marginal number 37.

area of appropriateness of infringements into the general right of personality in order to gain legal certainty for the people and the state.¹⁷³ Therefore, three spheres are to be differentiated. In the above cited passage of the case *Bernstein v Bester* the South African Constitutional Court seems to adopt the spheres theory. In the following section the content of the spheres theory and question to what extent the spheres theory can be adapted into the South African law has to be analysed.

1. The intimate sphere

a) The scope of protection

In *Bernstein v Bester*, the Constitutional Court assumes that a certain area of the right to privacy can't be limited ("In the context of privacy this would mean that it is only the inner sanctum of a person [...] which is shielded from erosion by conflicting rights of the community"). This absolute protected area of privacy is called the intimate sphere.¹⁷⁴ The Constitutional Court seems to narrowly define the intimate sphere. In *Case v Minister of Safety and Security* in which section 2(1) of the Indecent or Obscene Photographic Matter Act was repealed, Judge Didcott J has argued for an absolutely protected sphere in the context of pornography, since it is according to his opinion only a person's business what erotic material he/she may choose to keep within the privacy of his/her home, and only for a personal use there. This was "certainly not" the business of society or the state. Thus, any ban imposed on the possession of such material for that solitary purpose invaded the right to privacy.¹⁷⁵ However, this statement was qualified by

¹⁷³ *U. Di Fabio*, in: Maunz/Dürig, GG, Art. 2 Abs. 1 GG, marginal number 157 et seq.; *K. Rogall*, Informationseingriff und Gesetzesvorbehalt im Strafprozess, p. 32 et seq.; *H. Dreier*, in: H. Dreier (ed), Grundgesetz-Kommentar, Vol. 1, Art. 2 Abs. 1 GG, marginal number 88.

¹⁷⁴ *Bernstein v Bester* NO 1996 (2) SA 751 (CC) at para 77.

¹⁷⁵ *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC); 1996 (5) BCLR 608 at para 91.

some of the other judges who were concerned about such issues as child pornography.¹⁷⁶

The Constitutional Court does not define the scope of privacy exhaustively, but names some examples ("his/her family life, sexual preference and home environment"). The broad wording of these areas causes legal uncertainty. Thus, it has to be questioned whether a comparison to the German legal situation can define this sphere more precisely. Like in the South African constitutional law, the intimate sphere in the *Grundgesetz* is an area of privacy that is protected absolutely.¹⁷⁷ According to the German *Bundesverfassungsgericht* the intimate sphere is characterized by its highly personal content.¹⁷⁸ It is only described negatively:¹⁷⁹ An infringement that is based on interaction with other humans is principally not absolute.¹⁸⁰ Processes that take place in communication with others can however be included in the intimate sphere. This depends on whether the social reference is strong enough.¹⁸¹ The *Bundesverfassungsgericht* does not precisely define the conditions under which a case is so personal or the social reference is so strong that it must be absolutely protected; this depends on the particular case.¹⁸² Up to now, there has not been a single case in which the *Bundesverfassungsgericht* has considered the intimate sphere of the general right

¹⁷⁶ *D. McQuid-Mason*, in: Constitutional law of South Africa, Chapter 38.2 (a) (iii) (cc) with refer to Judge's Langa's statement at para 99 and Judge's Madala's statement at para 107.

¹⁷⁷ BVerfGE 27, 1 (6) [Mikrozensus]; BVerfGE 27, 344 (350) [Ehescheidungsakten]; BVerfGE 80, 367 (373) [Tagebuch]; BVerfGE 90, 263 (270) [Ehelichkeitsanfechtung]; *K. Stern*, Das Staatsrecht der Bundesrepublik Germany, Vol. IV/1, p. 206 et seq.; *H. Sodan*, in: Beck'scher Kompakt-Kommentar zum Grundgesetz, Art. 19 GG, marginal number 10; *H.-D. Horn*, in: Stern/Becker (eds), Grundrechte-Kommentar, Art. 2 GG, marginal number 110; *K. H. Gössel*, in: Meyer/Geppert/Dehnicke, Gedächtnisschrift für Karlheinz Meyer, p. 140; *H.-D. Horn*, in: Stern/Becker (eds), Grundrechte-Kommentar, Art. 2 GG, marginal number 110; *B. Remmert*, in: Maunz/Dürig, GG, Art. 19 Abs. 2 GG, marginal number 36 et seq.; *M. Middendorf*, in: Jura 2003, p. 232 et seq.; *P. M. Huber*, in: von Mangoldt/Klein/Starck, GG I, Art. 19 GG, marginal number 175; *H. D. Jarass*, in: Jarass/Pieroth, Grundgesetz, Art. 2 GG, marginal number 62; *A. Streibel*, Rassendiskriminierung als Eingriff in das allgemeine Persönlichkeitsrecht, p. 141; *W. v. Heintschel-Heinegg/N. Pallas*, Grundrechte, marginal number 273.

¹⁷⁸ BVerfGE 34, 238 (248) [Tonband]; BVerfGE 80, 367 (374) [Tagebuch]; BVerfGE 109, 279 (313 et seq.) [Großer Lauschangriff]; BVerfGE 120, 224 (239) [Geschwisterbeischlaf].

¹⁷⁹ *M. Desoi/A. Knierim*, in: DÖV 2011, p. 399; critical: *H.-D. Horn*, in: Stern/Becker (eds), Grundrechte-Kommentar, Art. 2 GG, marginal number 104 et seq.

¹⁸⁰ BVerfGE 27, 1 (7) [Mikrozensus].

¹⁸¹ BVerfGE 6, 389 (433) [Homosexualität I].

¹⁸² BVerfGE 120, 224 (239) [Geschwisterbeischlaf].

of personality as violated.¹⁸³ However, it mentioned in *obiter dicta* that it considers pregnancy¹⁸⁴ and sexual identity¹⁸⁵ as parts of the intimate sphere. Since this describes only two areas of the innermost sphere of human life, a generally accepted definition of the intimate sphere cannot be deduced.

On the contrary, there are a number of cases in which the *Bundesverfassungsgericht* doesn't consider the intimate sphere as violated. For instance, the free use of drugs is not covered by the intimate sphere.¹⁸⁶ Moreover, records of divorce proceedings are not part of the inviolable area of private life.¹⁸⁷ The same applies to medical records, including the statements about the medical history, diagnostic and therapeutic measures.¹⁸⁸ Furthermore, secretly recorded private tape recordings which are taken for criminal investigation procedures are also not covered by the intimate sphere, if it is merely a business conversation in which no personal matters are discussed.¹⁸⁹ In addition, the removal of body cells and the subsequent molecular genetic analysis in order to detect a DNA identification pattern is not to part of the intimate sphere.¹⁹⁰ Diary-like records are also excluded from absolute protection.¹⁹¹

b) Can the intimate sphere be defined?

Hence, a precise definition of the intimate sphere has yet to be formulated in the German and South African law.¹⁹² Thus, it has to be examined whether it is possible to describe the intimate sphere entirely. If this was the case, there would be an absolute legal certainty. The state would know which infringements are not

¹⁸³ B. Pieroth/B. Schlink, Grundrechte, marginal number 396; M. Desoi/A. Knierim, in: DÖV 2011, p. 398 (400); C. Starck, in: von Mangoldt/Klein/Starck, GG I, Art. 2 Abs. 1 GG, marginal numbers 50 and 88.

¹⁸⁴ BVerfGE 39, 1 (42) [Schwangerschaftsabbruch I].

¹⁸⁵ BVerfGE 116, 243 (264) [Transsexuelle IV].

¹⁸⁶ BVerfGE 90, 145 (171) [Cannabis].

¹⁸⁷ BVerfGE 27, 344 (351) [Ehescheidungsakten].

¹⁸⁸ BVerfGE 32, 373 (379) [Ärztliche Schweigepflicht].

¹⁸⁹ BVerfGE 34, 238 (248) [Tonband].

¹⁹⁰ BVerfGE 103, 21 (31) [Genetischer Fingerabdruck I].

¹⁹¹ BVerfGE 80, 367 (373) [Tagebuch].

¹⁹² N. Teifke, Das Prinzip Menschenwürde, p. 20.

allowed, because they cannot (under no circumstances) be justified. Moreover, the holder of the fundamental right would be able to determinate immediately which interventions he/she has to tolerate and which not. This would not only help to prevent citizens from developing distrust against certain authorities, since the state has clearly defined limits. Moreover, this would help to reduce the case loads of courts.

However, the term “intimate sphere” is subject to constant social change. Hence, the core area of a person's private life was protected long before the South Africa and Germany have established a constitutional right to privacy. Already the Roman law protected a person against indiscretions and breach of secrecy, which constituted a piece of inner cultural history of the Roman people.¹⁹³ Furthermore, the U.S. Constitution contains in its fourth amendment a "right to be let alone".¹⁹⁴ However, the bourgeoisie in the continental European and Anglo-Saxon countries at the end of the 19th Century didn't feel threatened by state's interferences into the core area of their private life, but rather by their neighbours and slowly developing yellow press.¹⁹⁵

Only when new communications technologies were invented people feared the violation of their right to privacy in their homes ("my home is my castle"), since that caused new potential dangers: For instance, phones could be tapped and due to the improvement of cameras, intimate insights of a person's private life could be gained.¹⁹⁶ This was increasingly seen as a threat because an intact family was necessary for a successful career in the middle of the 19th century; regardless of what was hidden behind the facade of the supposed idyll.¹⁹⁷ Furthermore, it became easier to spread intimate information (for example via radio) about respected citizens, which was able to cause “mental pain and distress, far greater

¹⁹³ *R. v. Jhering*, Rechtsschutz gegen injuriöse Rechtsverletzungen, p. 157; *A. Heldrich*, in: Heinrichs/Heldrich/Schlechtriem et al., *Recht im Spannungsfeld von Theorie und Praxis*, p. 332; *O. Mallmann*, Zielfunktionen des Datenschutzes, p. 16.

¹⁹⁴ *Y. S. Lee/D. H. Rosenbloom*, *A reasonable public servant*, p. 113.

¹⁹⁵ *W. Schmitt Glaeser*, in: Isensee/Kirchhof (Hrsg.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, 2. Auflage, vol VII, § 129, marginal number 11; *O. Mallmann*, Zielfunktionen des Datenschutzes, p. 20 with further references

¹⁹⁶ *O. Mallmann*, Zielfunktionen des Datenschutzes, p. 20 with further references

¹⁹⁷ *O. Mallmann*, Zielfunktionen des Datenschutzes, p. 19.

than could be inflicted by mere bodily injury"¹⁹⁸. Moreover, a further danger developed gradually: Due to the increasing commercialization of private data people saw themselves as defenceless information objects.¹⁹⁹ Thus, credit investigation companies were developed, which collected data of citizens and pictures of celebrities were used for press products or advertisements without permission.²⁰⁰

Looking at this historical development, it must be noted that a precise definition of intimate sphere can't be found, since the right to privacy and thus, what is regarded to be the core of a person's private life is subject to permanent transition. This applies especially for the sexual morality, which has a high influence in determining the intimate sphere.²⁰¹ Here, this constant change can for instance be seen on the improved position of homosexual people in the society. The jurisprudence must conform thereto. A rigid definition of the intimate sphere wouldn't have the ability to keep pace with the changes in society and also ward off future threats. Thus, it is very likely that in 50 years sexuality is still protected by the right to privacy. However, the question where the absolutely protected area of sexual life begins could be answered completely differently, since that depends on the particular morality, which is subject to a permanent process of change.

In addition, the contrast between the issues that citizens demand and their actual actions is growing. On the one hand, there is a global development that people fight increasingly for a stronger protection of the right to informational self-determination.²⁰² On the other hand, there is a growing tendency for self-display.

¹⁹⁸ S. Warren/L. Brandeis, in: Harvard Law Review 1890, p. 196.

¹⁹⁹ O. Mallmann, Zielfunktionen des Datenschutzes, p. 22 et seq.

²⁰⁰ O. Mallmann, Zielfunktionen des Datenschutzes, p. 22 et seq. with further references.

²⁰¹ See *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6, 30 (CC), 1998 (12) BCLR 1517 (CC) at para 32: "Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy."

²⁰² W. Schmitt Glaeser, in: Isensee/Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, 2nd edition, Volume VII, § 129, marginal note 13 - 14.

²⁰³ A shame barrier is in some cases barely recognizable.²⁰⁴ Whereas in the 19th Century it was very important to express a harmonious family picture, today family members fight each other publicly. What some commentators called thirty years ago as "an unprecedented journalistic affinity for exhibitionism"²⁰⁵, because of the production of talk shows, countless memoirs and autobiographies has increased by a multiple in the last few years. Until recently, it was only possible for a small group of people to carry their private life to the public (talk show guests, authors of autobiographies, etc.). In the course of progression of technology, everyone now has the ability to share his/her intimacies through social networks or blogs. The success of these portals shows that people make frequent use of this. In this respect, the scope of the intimate sphere of the affected persons is increasingly narrowed as this area can only be touched if he/she has a legitimate expectation of privacy.²⁰⁶

c) **Theoretical derivation of an inviolable sphere**

This intimate sphere is an exception from the principle of proportionality. Thus, not even fundamental interests (for example, the protection of the public against terrorism) can justify infringements of the private sphere. However, in South African law there is no basis in the constitution for an absolute sphere for *any* right:

"I reiterate that the rights contained in the Bill of Rights are not absolute. Rights have to be exercised with due regard and respect for the rights of others. Organised society can only operate on the basis of rights being exercised harmoniously with the rights of others. Of course, the rights exercised by an individual may come into conflict with the

²⁰³ *W. Berg*, in: JöR N.F. 1984, p. 67.

²⁰⁴ *W. Schmitt Glaeser*, in: Isensee/Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, 2nd edition, Volume VII, § 129, marginal note 13 - 14.

²⁰⁵ *W. Berg*, in: JöR N.F. 1984, p. 67.

²⁰⁶ *Bernstein v Bester NO 1996 (2) SA 751 (CC)* at para 75. Here, there is no difference to the German law; see: BVerfGE 80, 367 (374) [Tagebuch].

rights exercised by another, and where rights come into conflict, a balancing process is required".²⁰⁷

The South African Constitutional Court does not explain in *Bernstein v Bester* why any part of the right to privacy is absolutely protected. It seems to have borrowed this concept from German law which does acknowledge an intimate sphere.²⁰⁸ Here, the absolute intimate sphere is explained by its proximity to human dignity, which in German law, is not infrangible. This absoluteness is not only the result of the wording "inviolable" in section 1(1) GG.²⁰⁹ Rather, it shows the absolute will that the terrible atrocities which happened during the Nazi regime must never be repeated.²¹⁰ In contrast to the Weimar constitution, which preceded the Nazi era and in which the protection of human dignity was only mentioned parenthetically in section 151(1) in connection with the order of economic life,²¹¹ the dignity is the "supreme constitutional value" in the *Grundgesetz*.²¹² The central position of human dignity in the *Grundgesetz* is a "response to a totalitarian government system"²¹³ and is meant to protect the foundations of a civilized society.²¹⁴ Thus, it constitutes a clear rejection of the persecution of minorities, racism, "euthanasia", human experiments, inhuman punishments, complete deprivation and humiliation.²¹⁵ Another "historical disaster"²¹⁶ is to be forestalled at all costs. Whereas in the Nazi era, the principle "you are nothing,

²⁰⁷ See *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2002 (6) SA 370 (CC), 2002 (12) BCLR 1285 (CC) at para 89

²⁰⁸ See: *Bernstein v Bester NO* 1996 (2) SA 751 (CC) at para 77 et seq.

²⁰⁹ *F. Hufen*, in: JuS 2010, p. 9; *M. Herdegen*, in: Maunz/Dürig, GG, Art. 1 GG, marginal number 73; *H. D. Jarass*, in: Jarass/Pieroth, Grundgesetz, Art. 1 GG, § 16.

²¹⁰ *C. D. Classen*, in: DÖV 2009, p. 693; *J. F. Lindner*, Theorie der Grundrechtsdogmatik, p. 186; *W. Härle*, Menschsein in Beziehungen, p. 379; *C. Walter*, in: Bahr/Heinig, Menschenwürde in der säkularen Verfassungsordnung, p. 127; *H. John*, Die genetische Veränderung des Erbgutes menschlicher Embryonen, p. 101; *J. Neuner*, Grundrechte und Privatrecht aus rechtsvergleichender Sicht, p. 168.

²¹¹ *S. Hein*, Grundrechte in der Weimarer Reichsverfassung, p. 14; *H. Brenneisen*, in: Brenneisen, Rechtsprechung des BVerfG, p. 12 (Footnote 6).

²¹² BVerfGE 109, 279 (311) [Großer Lauschangriff]; similar: *A. Burghart*, in: Leibholz/Rinck, GG, Vol. I, Art. 1 GG, marginal note 2.

²¹³ *A. Reich*, in: Magdeburger Kommentar zum Grundgesetz, Art. 1 GG, p. 74 with reference to BVerfGE 5, 85 (204 – 205) [KPD-Verbot]; similar: *C. Enders*, in: Stern/Becker (ed), Grundrechte-Kommentar, Art. 1 GG, marginal note 5; *P. Unruh*, Der Verfassungsbegriff des Grundgesetzes, p. 354; *H. Hofmann*, in: Hofmann, Verfassungsrechtliche Perspektiven, p. 105,

²¹⁴ *C. Starck*, in: von Mangoldt/Klein/Starck, GG I, Art. 1 Abs. 1 GG, marginal number 10.

²¹⁵ *M. Antoni*, in: Hömig (ed), Grundgesetz, Art. 1 GG, marginal number 5.

²¹⁶ *E. Eisner*, Das europäische Konzept von Franz Josef Strauß, p. 43 with further references.

your people are everything"²¹⁷ was applied, the draft of the Constitutional Convention contained in Article A the diametrically opposed formulation "The state is for the sake of citizens, not the citizens for the sake of state."²¹⁸ In this respect, the state fulfils only "a subservient, instrumental function".²¹⁹ Thus, the invulnerable human dignity is seen in the German Constitution as the "root of all fundamental rights"²²⁰ and encompasses the "most important fundamental constitutional decision".²²¹

In the South African law, an intimate sphere can't be explained with reference to either the text of section 14 itself or the text of section 36 of the constitution. An absolute protected intimate sphere is against the express wording of the limitation clause which allows to limit *all* basic rights, even the human dignity. Thus, adapting the German jurisdiction is in this case not only wrong, but also dangerous, since this case can be taken as a basis for another case. Constitutional jurisprudence and the wording of the constitution are then drifting further and further apart from each other. Moreover, it has to be questioned, how the South African Constitution can ever be seen as a structural unit when the Constitutional Court just overtakes the jurisprudence from other countries blindly without even trying to justify why this result applies also for the South African Constitution. Furthermore, it can't be argued that this jurisprudence has the advantage that it provides more privacy for the holders of this fundamental right. Thus, a victim of a crime has a precarious legal position, when the authorities don't take certain criminal investigations in order not to violate the intimate sphere of an alleged offender, even though a balancing under proportionality test would allow these measures. However, it can be argued that it is to be welcomed that the South African Constitutional Court has created an area in which encroachments are never tolerated since the mere existence of this possibility raises the awareness

²¹⁷ See: *G. Radbruch/W. Hassemer/A. Kaufmann*, Rechtsphilosophie III, p. 110; *C. Hilger*, Rechtsstaatsbegriffe im Dritten Reich, p. 141 – 142.

²¹⁸ See: *R. Schick/H.-J. Stelzl/K. G. Wernicke*, Der Parlamentarische Rat, p. 217; *H. Brenneisen*, in: Brenneisen, Rechtsprechung des BVerfG, p. 9; similar: *H. Maurer*, Staatsrecht I, marginal number 4.

²¹⁹ *H.-H. v. Arnim*, Staatslehre der Bundesrepublik Deutschland, p. 129.

²²⁰ BVerfGE 93, 266 (293) [„Soldaten sind Mörder“]; see also: *P. Häberle*, in: Isensee/Kirchhof, Handbuch des Staatsrechts der Bundesrepublik Deutschland, Vol. II, § 20, marginal number 58.

²²¹ *H. Maurer*, Staatsrecht I, § 6, marginal number 4.

for state organizations in dealing with measures, which deeply affect the right to privacy.

d) Criticism

The South African Constitutional court points out that “privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly”.²²² The German *Bundesverfassungsgericht* uses a similar criterion.²²³ However, it has to be questioned if that is a suitable reason for differentiation.²²⁴ This becomes particularly evident in the example of sexuality. Here, the irony exists that sexuality requires the contact with the sexual partner, which makes it – according to this definition – no longer a part of the intimate sphere, since the holder of the fundamental right leaves his/her inner sanctum and connects to somebody else.²²⁵ But sexuality especially belongs traditionally to the most intimate human relationships.²²⁶

Moreover, the argument used by Judge Langa and Judge Madala that the intimate sphere can't protect the possession of pornography because otherwise child pornography would be absolutely protected must be structurally criticized. It must be asked whether the possession of pornography concerns the inner sanctum of the right of privacy. If that was the case (which may be doubted), this would inevitably lead to an absolute protection of this right. The intimate sphere must be explained by the proximity to the human dignity and not by to possibility for justification of encroachments. Thus, Judge's Langa's and Judge's Madala's argumentation is not only structurally wrong since it mixes up the question whether an act belongs to the inner circle of life with the question of its

²²² *Bernstein v Bester NO* 1996 (2) SA 751 (CC) at para 67.

²²³ „Sozialbezug“, see: BVerfGE 6, 389 (433) [Homosexualität I].

²²⁴ P. Kunig, in: Jura 1993, p. 602.

²²⁵ E. Benda, in: Leibholz/Faller/Geiger, Menschenwürde und freiheitliche Rechtsordnung, p. 30; A. Podlech, in: Denninger/Hoffmann-Riem/Schneider/Stein (ed), AK-GG, Art. 2 Abs. 1 GG, § 38.

²²⁶ A. Podlech, in: Denninger/Hoffmann-Riem/Schneider/Stein (ed), AK-GG, Art. 2 Abs. 1 GG, § 38.

possibilities of limitations, but also dangerous because this argumentation enables to declare the most intimate actions as justifiable. A protection of the intimate sphere would in this case in fact no longer exist.

2. Private sphere and social sphere?

In the case of *Bernstein v Bester*, the Constitutional Court listed only the intimate sphere as a category in the proportionality test for infringements of the right to privacy. In contrast to the German jurisprudence, no other categories are mentioned. Here, the German jurisprudence differentiates between the private sphere as a second category and the social sphere as a third. To find out if these categories are also compulsory for the South African law, these spheres have firstly to be defined (1., 2.) and secondly it must be examined if this result has to be transferred into the South African Constitutional law (3.).

a) The private sphere

The German jurisprudence sees around the restrictively handled area of intimate sphere the principally limitable²²⁷ private sphere.²²⁸ However, the factor of proportionality forces the authorities to overcome high barriers to justify infringements of the private sphere.²²⁹ A justification is usually only possible if important interests of the common welfare must be protected.²³⁰ Although a precise definition for the private sphere is also non-existent, sharper contours can be drawn. The *Bundesverfassungsgericht* divides the private sphere into a thematic and spatial component. The thematic element encompasses "matters that are typically classified for its content as 'private', because a public discussion or display is considered unseemly, the disclosure is perceived as embarrassing or

²²⁷ C. Degenhart, in: JuS 1992, p. 363.

²²⁸ U. Di Fabio, in: Maunz/Dürig, GG, Art. 2 Abs. 1 GG, marginal number 159.

²²⁹ H.-D. Horn, in: Stern/Becker (eds), Grundrechte-Kommentar, Art. 2 GG, marginal number 103.

²³⁰ Anstatt vieler: BVerfGE 32, 373 (379) [Ärztliche Schweigepflicht].

triggers adverse reactions in the surrounding world,²³¹ as for example disputes with oneself in diaries²³², confidential communication between spouses²³³, the area of sexuality²³⁴, socially deviant behaviour²³⁵ or illnesses²³⁶.

More important than thematic protection, however, is the spatial component,²³⁷ which covers a space "where individuals come to relax or can let go."²³⁸ This area is not only to be understood strictly in the literal sense of physically-local, but it also includes the mental and spiritual inner life - such as the thoughts and feelings - of human beings.²³⁹ The private sphere also provides an opportunity for a person to behave in a way that is not intended for the public, because the observation by outsiders would be embarrassing or harmful for the person in question. Thus, the private sphere creates a room in which a person has the opportunity to be free from public observation and doesn't need to control himself or herself.²⁴⁰ The *Bundesverfassungsgericht* understands the existence of a protected private sphere as a prerequisite for the preservation of liberty rights.

"If such areas were no longer available, a person could be mentally overwhelmed, because he/she would incessantly have to be careful how he/she affects others and if he/she behaves appropriately. He/she would lack phases of aloneness and compensation, which are necessary for the development of personality, and without which he/she would be significantly impaired."²⁴¹

The legal literature has demanded early a sheltered area offering privacy. As early as 1956 it was mentioned that it is "a necessary condition of personal development that a man has the ability to talk without inhibition or obligation and without being set to each word and not to be sounded out and spied on in his

²³¹ BVerfGE 101, 361 (382) [Caroline von Monaco II].

²³² BVerfGE 80, 367 [Tagebuch].

²³³ BVerfGE 27, 344 [Ehescheidungsakten].

²³⁴ BVerfGE 47, 46 [Sexualkundeunterricht]; BVerfGE 49, 286 [Transsexuelle I].

²³⁵ BVerfGE 44, 353 [Durchsuchung einer Drogenberatungsstelle].

²³⁶ BVerfGE 32, 373 [Ärztliche Schweigepflicht].

²³⁷ K. Stern, in: Bröhmer (ed), Internationale Gemeinschaft und Menschenrechte, p. 1264.

²³⁸ BVerfGE 101, 361 (382 et seq.) [Caroline von Monaco II] with reference to BVerfGE 27, 1 (6) [Mikrozensus].

²³⁹ K. Stern, in: Bröhmer (ed), Internationale Gemeinschaft und Menschenrechte, p. 1264.

²⁴⁰ BVerfGE 101, 361 (383) [Caroline von Monaco II].

²⁴¹ BVerfGE 101, 361 (383) [Caroline von Monaco II].

private life." Thus, celebrities also have the right to the protection of their privacy, even if they tend to share every detail of their lives with the public.²⁴²

b) The social sphere

The least protected area is the social sphere.²⁴³ Nevertheless, the importance of this field gains relevance with the growth of so-called "review portals" for e.g., professors, teachers, doctors, lawyers, craftsmen or judges.²⁴⁴ The social sphere encompasses those life activities which can easily be perceived by others without the affected person turning actively towards the public.²⁴⁵ Thus, the social sphere is an area in which the individual acts in public, but does not specifically address the public.²⁴⁶ It protects the personality of a human in his/her relation to the surrounding world, his/her public, professional and economic appearance, as for example at work, in traffic, in a political or commercial²⁴⁷ convention, or even while shopping, in pubs and on the beach.²⁴⁸

The protection of privacy in the social sphere is much lower than the intimate or private sphere.²⁴⁹ Intrusions of this area are generally allowed, when no false factual assertion, defamatory comment, nor abusive criticism is committed.²⁵⁰ Thus, journalists are generally permitted to report about the social sphere of a person's life, if this has no serious impact on his/her general right of personality, so for example, if a stigma, social rejection, exclusion or pillory effect must be feared.²⁵¹ The *Bundesverfassungsgericht* did not use the term "social sphere" until

²⁴² K. Stern, in: Bröhmer (ed), Internationale Gemeinschaft und Menschenrechte, p. 1265; A. Heldrich, in: Heinrichs/Heldrich/Schlechtriem et al., Recht im Spannungsfeld von Theorie und Praxis, p. 332; BVerfGE 101, 361 (383) [Caroline von Monaco II].

²⁴³ U. Di Fabio, in: Maunz/Dürig, GG, Art. 2 Abs. 1 GG, marginal number 160.

²⁴⁴ T. Feldmann, in: Heidrich/Forgó/Feldmann, Heise Online-Recht, B II, marginal number 105.

²⁴⁵ U. Branahl, Medienrecht, p. 139.

²⁴⁶ C. Ohrmann, Der Schutz der Persönlichkeit in Online-Medien, p. 83.

²⁴⁷ N. Fechner, Wahrung der Intimität?, p. 33.

²⁴⁸ C. Ohrmann, Der Schutz der Persönlichkeit in Online-Medien, p. 83.

²⁴⁹ BGH NJW 2005, 592.

²⁵⁰ R. Scholz/Konrad Karlheinz, in: AöR 1998, p. 64.

²⁵¹ BGH NJW-RR 2007, 619 [Berichterstattung über Abberufung eines Klinik-Geschäftsführers].

recently,²⁵² but the greatly prevailing opinion in the legal literature has always assumed that this area must exist. It was referred to as a "logical consequence of the development of the intimate and the private sphere" that there has to be a "non-protected social sphere".²⁵³ However, the *Bundesverfassungsgericht* has used the term "social sphere" in recent cases. For example, it has ruled that the expression of true facts, especially when they come from the area of the social sphere, must be generally accepted.²⁵⁴

The concept of the social sphere is controversial. Parts of the legal literature assume that this sphere is redundant, since the transition between "very private issues and issues that are not private anymore" is so smooth that it is impossible to form two areas.²⁵⁵ In addition, it is criticised that it can't be tolerated that persons who suffer a reputational damage in public are largely without legal protection, although this defamation can even lead to one's suicide, precisely because it took place in public.²⁵⁶ Furthermore, it is criticised that it is inconsistent that the *Bundesverfassungsgericht* continuously strengthens the protection of the right to informational self-determination on the one hand, but on the other it leaves a completely unprotected sphere.²⁵⁷

c) **Application in the South African Constitutional law?**

The Constitutional Court paraphrases in the above cited paragraph of the case *Bernstein v Bester* the basics of the private sphere, even if it does not name it expressly. Since the right to privacy can't be absolute in the majority of cases the private sphere is logically compulsory. Thus, a private sphere must also consist in the South African Constitutional law. However, it is questionable whether the

²⁵² See: *A. v. Arnauld*, in: ZUM 1996, p. 289.

²⁵³ *K. Vogelgesang*, Grundrecht auf informationelle Selbstbestimmung?, p. 44 et seq.

²⁵⁴ See BVerfG NJW 2010, 1587 (1588).

²⁵⁵ *R. Alexy*, Theorie der Grundrechte, p. 329.

²⁵⁶ *H. Kube*, in: Isensee/Kirchhof (eds), Handbuch des Staatsrechts der Bundesrepublik Germany, 3rd edition, Vol. VII, § 148, marginal number 87.

²⁵⁷ *R. Störmer*, in: Jura 1991, p. 19.

social sphere, which is generally open for interventions, is also necessary for South African law.

In parts of the German legal literature the social sphere is considered redundant. Since the transition between "most private aspects and those issues which are not private at all" was so smooth that it was impossible to form two classes, the intensity of an infringement and the degree of privacy must be differentiated for each single case (without categorizations) in order to achieve a just result.²⁵⁸ In this respect one cannot speak about a "spheres theory", but rather about a "core thesis", in which it only matters if an encroachment is so intense that it can't be justified because it affects the absolutely protected core area or if it is accessible to the proportionality test.²⁵⁹ In addition, there is criticism that it is unacceptable that people with damage to reputation, which - precisely because they take place just in public - even lead to suicide, are more or less defenceless.²⁶⁰

The fact that the social sphere is not or only slightly protected leads to dogmatically unacceptable results. This construction sends not only the wrong signal to the population, but it is also a gateway for the erosion of the right to human dignity, because a central legal interest that is connected to human dignity is (mostly) unprotected. These negative consequences can be impeded because of the flexibility of the proportionality. When the intimate sphere is not affected - and thus an intervention can be justified - it must be drawn to the principles of the proportionality test: A strong intervention requires a substantial justification, a weak encroachment can be accordingly justified more easily.

Thus, a third sphere, which is principally open for interventions, is not necessary. Moreover, the proportionality test that is laid down in section 36 of the 1996 constitution gives a better instrument to rate the specific case. This allows that all objective and subjective elements can be considered in a step-less weighing of interests. This interpretation is also consistent with the above-cited passage of S

²⁵⁸ R. Alexy, *Theorie der Grundrechte*, p. 329.

²⁵⁹ A. v. Arnould, in: ZUM 1996, p. 289.

²⁶⁰ H. Kube, in: Isensee/Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, 2nd edition, Volume VII, § 148, marginal note 87.

v Makwanyane, in which the Constitutional Court has pointed that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis.

3. Individual cases

a) Cases that South African judges have to consider

Since the South African constitution is relatively new there are except from *Bernstein v Bester* there are not many important individual cases in this area that have to be considered when making a new judgment. In the case *Bernstein v. Bester* the Constitutional Court has ruled that sections 417(3) and 418(2) of the Companies Act, which compel production of private possessions or private communications during the winding-up of a company, are constitutional.²⁶¹ The court stated that “the right against seizure must therefore be interpreted in the light of the general right to personal privacy. [...] The public’s interest in ascertaining the truth surrounding the collapse of the company, the liquidator’s interest in a speedy and effective liquidation of the company and the creditors’ and contributors’ financial interests in the recovery of company assets must be weighed against this, peripheral, infringement of the right not to be subjected to seizure of private possessions.”²⁶²

b) Cases that German judges have to consider

Whereas the German *Bundesverfassungsgericht* sees the constitution as a unit and usually works out an “integrated system” in which new cases can fit (like the

²⁶¹ *D. McQuid-Mason*, in: Constitutional law of South Africa, Chapter 38.5 (b).

²⁶² *Bernstein v Bester NO* 1996 (2) SA 751 (CC) at para 121.

spheres theory),²⁶³ the European Court of Human Rights concentrates more on the actual case which it has to decide. Since these cases have to be considered by German judges²⁶⁴ they have to be analysed.

According to that, the right to self-determination pertaining to one's body normally allows for medical procedures - even if they have no medical necessity - to gather evidence for penal proceedings.²⁶⁵ Thus, the taking of blood or saliva samples against a suspect's will in order to investigate an offence regularly outweighs the suspect's right to personality in the proportionality test.²⁶⁶ The European Court of Human Rights points out, however, that "any recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case and the manner in which a person is subjected to a forcible medical procedure must not exceed the minimum level of severity prescribed by the Court's case-law under Section 3 of the Convention".²⁶⁷

Since these medical procedures are drastic measures, the European Court on Human Rights emphasises that all circumstances have to be taken into account.²⁶⁸ In this respect it must be determined whether the treatment caused substantial mental or physical suffering.²⁶⁹ Thus, it is important if a doctor has arranged and executed the medical intervention and whether the person was under constant medical supervision.²⁷⁰ In addition, the severity of the offense must be appropriately taken into account and the authorities have to state that they have considered alternative methods of investigation.²⁷¹ Furthermore, the frequency of this regulatory action is set in the balance. Thus, it may constitute a

²⁶³ Similar: *J. Detjen*, Die Werteordnung des Grundgesetzes, p. 35 et seq.

²⁶⁴ BVerfGE 111, 307 (317 – 318) [EGMR-Entscheidungen];

²⁶⁵ *Juhnke v. Turkey*, no. 52414/99, 13. May 2008, ECHR, § 72.

²⁶⁶ See: *Jalloh v. Germany*, no. 54810/00, 11. July 2006, ECHR, § 70; also: *X v. the Netherlands*, no. 8239/78, Commission decision of 4 December 1978, Decisions and Reports (DR) 16, pp. 187-89; *Schmidt v. Germany* (dec.), no. 32352/02, 5 January 2006, ECHR.

²⁶⁷ *Juhnke v. Turkey*, no. 52515/99, 13. May 2008, ECHR, § 72.

²⁶⁸ *Jalloh v. Germany*, no. 54810/00 11. July 2006, ECHR, § 71.

²⁶⁹ *Nevmertzhiisky v. Ukraine*, no. 54825/00, 05. April 2005, ECHR, § 98.

²⁷⁰ *Jalloh v. Germany*, no. 54810/00, 11. July 2006, ECHR, § 73.

²⁷¹ *Jalloh v. Germany*, no. 54810/00, 11. July 2006, ECHR, § 71.

disproportionate interference with the right to private life, when a person has to undergo several tests in a short time.²⁷²

The court points out that it has to be primarily the responsibility of States to assess “the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created”.²⁷³ Moreover, “it does not appear to be arbitrary to the Court for the law to reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence.”²⁷⁴

Infringements on sensitive areas of the right of privacy can only be justified by strong grounds.²⁷⁵ Thus, the margin of appreciation tends to “be narrower where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights”.²⁷⁶ In particular, that is the case where an important facet of an individual’s existence or identity is at stake.²⁷⁷ Accordingly, the European Court of Human Rights pointed out that the convention states have only a narrow margin of appreciation when it comes to the intimate area of a person’s sexuality.²⁷⁸ Thus, the Court decided in the case *Lustig-Prean and Beckett v. United Kingdom* that their dismissal from the Royal Navy after their homosexuality was discovered together with the intrusive nature of the investigations conducted by the Military Police into their sexuality infringed their right to privacy under Section 8 ECHR and could not be justified.²⁷⁹

²⁷² *Worwa v. Polonia*, no. 26624/95, 27. November 2003, ECHR, § 81 et seq.

²⁷³ *Pretty v. the United Kingdom*, no. 2346/02, 29. April 2002, ECHR, § 74.

²⁷⁴ *Pretty v. the United Kingdom*, no. 2346/02, 29. April 2002, ECHR, § 76.

²⁷⁵ *J. Meyer-Ladewig*, Art. 8 EMRK, § 109; *J. A. Frowein*, in: *Vorb. zu Art. 8 - 11 EMRK*, marginal number 16.

²⁷⁶ *Connors v. the United Kingdom*, no. 66746/01, 27. May 2004, ECHR, § 82.

²⁷⁷ *Evans v. the United Kingdom*, no. 6339/05, 10. April 2007, ECHR, § 77; *X and Y v. the Netherlands*, 26. March 1985, §§ 24, 27, Series A no. 91; *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *Christine Goodwin v. the United Kingdom*, no. 28957/95, § 90, ECHR 2002-VI; *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III, § 71.

²⁷⁸ *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45, p. 21, § 53.

²⁷⁹ *Lustig-Prean v. the United Kingdom*, no. 32377/96, 27. September 1999, ECHR, § 82.

II. Governmental surveillance

The specificity of government surveillance was discussed early in the German legal literature.²⁸⁰ The risk of collecting data – even when they are considered useless – was described in the late 1960's as the concept of a "mosaic theory".²⁸¹ This explains the problems caused by the compilation and linking of data. Even though some information about a person may be useless, a complete personality profile can be created by combining the data (the assembly of the mosaic).²⁸² Moreover, the fundamental right to informational self-determination and right to confidentiality and integrity of IT systems supports the exercise of other fundamental rights:

„Those who must be unsure if deviant behaviour cannot be noticed at any time and persistently stored, used or passed on will try not to expose themselves by such ways of behaviour. Who expects that the attending of a meeting or a citizens' initiative is officially registered and that it thereby causing a risk, will forego a potentially exercise its corresponding fundamental rights (Section 8, 9 GG²⁸³). This would not only affect the development opportunities of an individual, but also the public welfare, because the right to self-determination is an elementary requirement for the functionality of a free democratic basic order which is founded on the legal capacity and the citizen's ability of participation“.²⁸⁴

This potential chilling effect applies equally for the South African Constitution since these are not structural issues, but rather describe the general problem of data collection. Thus, comparisons to the German legal situation can be drawn.

²⁸⁰ See *D. Jesch*, *Gesetz und Verwaltung*, p. 132; *H.-J. Papier*, *Die finanzrechtlichen Gesetzesvorbehalte und das grundgesetzliche Demokratieprinzip*, p. 16 et seq.; *E. Schwan*, in: *VerwArch* 1975, p. 126 et seq.

²⁸¹ *W. Schmidt*, in: *JZ* 1974, p. 242; *P. Simitis*, in: *DVR* 1972, p. 161; *U. Seidel*, *Datenbanken und Persönlichkeitsrecht*, p. 66 et seq.; *E. Schwan*, in: *VerwArch* 1975, p. 133.

²⁸² *C. Kulwicki*, *Verfassungswandel*, p. 215 et seq.

²⁸³ Section 8 GG is the freedom of assembly, section 9 GG the freedom of association.

²⁸⁴ BVerfGE 65, 1 (43) [Volkszählung].

1. Factors for the proportionality test

a) The case of *Mistry v Interim National Medical and Dental Council of South Africa*

Mistry v Interim National Medical and Dental Council of South Africa sets a list of considerations to determine whether a limitation of the right to privacy is justifiable. The proportionality test requires a stronger justification if any of the following factors are present: When an information has been obtained in an intrusive manner (this is for example not the case if it had been volunteered by a member of the public), when the information is about intimate aspects of a person's life, when it involves data which is provided by applicant himself/herself for one purpose and used for another, when an information led to the measure and is not derived from a measure and when an information is disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld or is only communicated to a person with statutory responsibilities and is subject to requirements of confidentiality.²⁸⁵

The European Court of Human rights takes a similar approach. In the case of *S. and Marper v. the United Kingdom* the European Court of Human Rights ruled that "the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Section 8 of the Convention. Domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Section. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. Domestic law should ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those

²⁸⁵ *Mistry v Interim National Medical and Dental Council of South Africa*, 1998 (7) BCLR 880 (CC), 1998 (4) SA 1127 (CC) at para 51.

data are stored. Domestic law must also afford adequate guarantees that retained personal data was efficiently protected from misuse and abuse.”²⁸⁶ This is according to the European Court of Human Rights especially “valid as regards the protection of special categories of more sensitive data and more particularly of DNA information, which contains the person's genetic make-up of great importance to both the person concerned and his or her family”.²⁸⁷ The “transmission of data to and their use by other authorities, which enlarges the group of persons with knowledge of the personal data intercepted and can lead to investigations being instituted against the persons concerned, constitutes a further separate interference with the applicants’ rights under Section 8” ECHR.²⁸⁸

b) Measures carried out to access, observe or record communication and other non-official information without a person’s consent or awareness

The *Bundesverfassungsgericht* regards measures that are carried out to access, observe or record communication and other non-official information without a person’s consent or awareness as particularly serious.²⁸⁹ An infringement on the fundamental right to “confidentiality and integrity of IT systems” increases in severity when encryption technologies are used, since a “frustration of informational self-protection” takes place.²⁹⁰ This jurisprudence is justified by the fact that the holder of the fundamental right has, due to the nondisclosure, only a limited number of possibilities to take legal action against the activity. Since the affected person knows nothing about the measure, he/she is not able

²⁸⁶ *S. and Marper v. United Kingdom*, no. 30562/04 and 30566/04, 04. December 2008, ECHR, § 103.

²⁸⁷ *S. and Marper v. United Kingdom*, no. 30562/04 and 30566/04, 04. December 2008, ECHR, § 103.

²⁸⁸ *Weber and Saravia v. Germany*, no. 54934/00, 29. June 2006, ECHR, § 79.

²⁸⁹ See: BVerfGE 107, 299 (321) [Telefonverbindungsdaten]; BVerfGE 115, 320 (353) [Rasterfahndung II]; BVerfGE 118, 168 (197 et seq.) [Kontostammdaten]; BVerfGE 120, 378 (402 et seq.) [Automatisierte Kennzeichenerfassung]; BVerfG NJW 2006, 976 (981); *D. Lorenz*, in: Dolzer/Kahl/Waldhoff/Graßhof (eds), Bonner Kommentar, Art. 2 Abs. 1 GG, marginal number 409; *H. D. Jarass*, in: Jarass/Pieroth, Grundgesetz, Art. 2 GG, marginal number 60a.

²⁹⁰ BVerfGE 120, 274 (324) [Online-Durchsuchungen].

to take preventive legal action.²⁹¹ Moreover, there is the danger that the fundamental right holder can't take subsequent legal action, as this requires that he/she be informed about the measure.²⁹² Consequently, he/she can neither work towards reducing the intensity of intervention nor eliminate it for the future by taking a successfully legal action.²⁹³ In contrast, an open measure gives the person in question not only the possibility to adapt his/her behaviour, but also the chance to take action against it, or at least the opportunity to make sure that the measure stays within the legal framework; if necessary with the assistance of a lawyer.²⁹⁴ Thus, a secret measure also infringes the guarantee of effective legal protection [section 19(4) GG].²⁹⁵ As a result, a secret measure has to be the exception in a state which is governed under the rule of law and forces the authorities according to the principle of proportionality to a special justification.²⁹⁶

The European Court of Human Rights points out, "that when balancing the interest of the respondent state in protecting its national security through secret surveillance measures against the seriousness of the interference with an applicant's right to respect for his or her private life, it has consistently recognised that the executive enjoy a fairly wide margin of appreciation in choosing the means for achieving the legitimate aim of protecting national security".²⁹⁷ However, the European Court of Human Rights indicates that "a system of secret surveillance for the protection of national security may undermine or even destroy democracy under the cloak of defending it".²⁹⁸ Thus,

²⁹¹ BVerfGE 113, 348 (383 et seq.) [Vorbeugende Telekommunikationsüberwachung]; BVerfGE 118, 168 (197 et seq.) [Kontostammdaten]; BVerfGE 120, 274 (325) [Online-Durchsuchungen].

²⁹² BVerfGE 120, 378 (403) [Automatisierte Kennzeichenerfassung]; similar: BVerfGE 113, 348 (383 et seq.); [Vorbeugende Telekommunikationsüberwachung]; BVerfGE 118, 168 (197 et seq.) [Kontostammdaten].

²⁹³ BVerfGE 120, 378 (403) [Automatisierte Kennzeichenerfassung].

²⁹⁴ BVerfG NJW 2006, 976 (981).

²⁹⁵ BVerfGE 113, 348 (384) [Vorbeugende Telekommunikationsüberwachung].

²⁹⁶ BVerfGE 118, 168 (197) [Kontostammdaten].

²⁹⁷ *Weber and Saravia v. Germany*, no. 54934/00, 29. June 2006, ECHR, § 106; *Klass v. Germany*, no. 5029/71, 06. September 1978, ECHR, § 49; *Leander v. Sweden*, no. 9248/81 26. March 1987, ECHR, § 59.

²⁹⁸ *Weber u. Saravia v. Germany*, no. 54934/00, 29. June 2006, ECHR, § 106 with further references; similar: *Klass v. Germany*, Series A no. 28, pp. 23-24, §§ 49-50; *Camenzind v. Switzerland*, 16. December 1997, Reports 1997-VIII, pp. 2893-94, § 45.

it has to be made sure that there are adequate and effective guarantees against abuse.²⁹⁹ Here, the “assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law”³⁰⁰

c) Scope of the intrusion

Secondly, the number of fundamental rights affected by the infringement must be considered, how intense the infringement is and under what premise it occurs; particularly whether the affected person gave an occasion for it.³⁰¹ The *Bundesverfassungsgericht* focuses specific attention on the potential use of personal data.³⁰² An informational measure could be seen as a serious infringement simply because the information could have a high relevance for the personality of the affected person. Additionally, an information can be gained in a way that affects the personality significantly, or there are possibilities for further processing and linking this information and use it for a variety of purposes.³⁰³

Thus, secret online searches of information technology systems are always seen as severe, since it “provides the acting state agency with access to a stock of data which may far exceed traditional sources of information in terms of its scope and diversity. This is a result of the many different possibilities for use offered by

²⁹⁹ *Weber u. Saravia v. Germany*, no. 54934/00, 29. June 2006, ECHR, § 106 with further references; similar: *Klass v. Germany*, Series A no. 28, pp. 23-24, §§ 49-50; *Camenzind v. Switzerland*, 16. December 1997, Reports 1997-VIII, pp. 2893-94, § 45.

³⁰⁰ *Weber and Saravia v. Germany*, no. 54934/00, 29. June 2006, ECHR, § 106; *Klass v. Germany*, Series A no. 28, pp. 23-24, § 50.

³⁰¹ BVerfGE 115, 320 (347) [Rasterfahndung II] with reference to BVerfGE 100, 313 (376) [Telekommunikationsüberwachung I]; BVerfGE 107, 299 (318 et seq.) [Telefonverbindungsdaten]; BVerfGE 109, 279 (353) [Großer Lauschangriff].

³⁰² BVerfGE 100, 313 (376) [Telekommunikationsüberwachung I]; BVerfGE 109, 279 (353) [Großer Lauschangriff]; BVerfGE 113, 348 (382) [Vorbeugende Telekommunikationsüberwachung]; BVerfGE 115, 320 (347) [Rasterfahndung II]; BVerfGE 118, 168 (196 et seq.) [Kontostammdaten].

³⁰³ BVerfGE 118, 168 (179) [Kontostammdaten] with reference to BVerfGE 65, 1 (45 et seq.) [Volkszählung]; BVerfGE 107, 299 (319 et seq.) [Telefonverbindungsdaten]; BVerfGE 109, 279 (353) [Großer Lauschangriff]; BVerfGE 115, 320 (348) [Rasterfahndung II].

complex information technology systems which are associated with the creation, processing and storage of personal data. In particular, according to the current habits of use, such appliances are typically used deliberately to also store personal data of increased sensitivity, for example private text, pictorial or sound files. The available data stock may include detailed information on personal circumstances and on the life of the person concerned, the private and business correspondence made via various communication channels, or diary-like personal records.”³⁰⁴

2. Increased requirements for justification

If an infringement is severe according to these criteria, the requirement of proportionality forces the intervening authority to meet higher criteria to justify them. Thus, the intrusive act must be authorized by an independent authority, which must be persuaded by evidence on oath that there are reasonable grounds that the infringement is necessary.³⁰⁵

“[I]rrespective of legitimate expectations of privacy which may be intruded upon in the process, and without any predetermined safeguards to minimise the extent of such intrusions where the nature of the investigations makes some invasion of privacy necessary, section 28(1) gives the inspectors carte blanche to enter any place, including private dwellings, where they reasonably suspect medicines to be, and then to inspect documents which may be of the most intimate kind.”³⁰⁶

The legal literature mentions further factors for the field of searches and seizures: First, the authorising law must properly define the scope of the power of infringement. Second, prior authorisation by an independent authority is required.³⁰⁷ These measures can generally be used to weaken intense encroachments of the right to informational self-determination. This can be

³⁰⁴ BVerfG, 1 BvR 370/07, 27.2.2008, marginal number 165.

³⁰⁵ *I. Currie/J. de Waal*, *The Bill of Rights Handbook*, p. 325.

³⁰⁶ *Mistry v Interim National Medical and Dental Council of South Africa & others*, 1998 (7) BCLR 880 (CC), 1998 (4) SA 1127 (CC) at para 30.

³⁰⁷ See: *I. Currie/J. de Waal*, *The Bill of Rights Handbook*, p. 325.

deduced from the principle of proportionality itself. Searches and seizures are particularly severe interventions of the right to informational self-determination. The goal of this intervention is to figure out data or objects that a person is not willing to submit to the authorities by himself/herself. In this respect, e.g. secret online-searches and secret wire-tapings have to be seen as virtual searches as seizures. Therefore, high hurdles must be applied in these cases. Here, the German *Bundesverfassungsgericht* and the German legal literature have elaborated on these issues and gave further aspects that help to weaken the infringement. To find out if these criteria can be applied in the South African Constitutional law, they first have to be delineated (a, b) and then it has to be found out if they can be transferred to the South African Constitutional law (c).

a) Restrictive interpretation of the concept of risk

In the German Constitutional law, a governmental surveillance cannot only be based on a suspected criminal activity.³⁰⁸ The factor of proportionality compels the authorities to establish facts as a basis for the prediction of danger.³⁰⁹ Thus, a secret online search can only be allowed when there is actual evidence of a specific threat to a very important legally protected good.³¹⁰ Here, the constitutional judges have developed a new concept of risk in the context of the fundamental right to confidentiality and integrity of IT systems.³¹¹ According to this, "a secret access to an information technology system in the context of a preventive goal only satisfies the principle of appropriateness if certain facts indicate a danger posed to a very important legal interest in the individual case".³¹² These "very important interests" are life, limb and freedom of the individual or "such interests of the public a threat to which affects the basis or

³⁰⁸ BVerfGE 110, 33 (61) [Zollkriminalamt]; BVerfGE 113, 348 (378) [Vorbeugende Telekommunikationsüberwachung]; BVerfGE 120, 274 (328) [Online-Durchsuchungen].

³⁰⁹ BVerfGE 113, 348 (378) [Vorbeugende Telekommunikationsüberwachung]; BVerfGE 110, 33 (61) [Zollkriminalamt]; BVerfGE 120, 274 (328) [Online-Durchsuchungen].

³¹⁰ BVerfGE 120, 274 (328) [Online-Durchsuchungen].

³¹¹ L. Drallé, *Das Grundrecht auf Gewährleistung der Vertraulichkeit und Integrität informationstechnischer Systeme*, p. 118 et seq.

³¹² BVerfGE 120, 274 (328) [Online-Durchsuchungen].

the continued existence of the state or the basis of human existence”.³¹³ This includes the functionality of essential parts of existence-ensuring public supply facilities,³¹⁴ like power plants, dams, or central communication facilities.³¹⁵

A concrete danger is a factual situation in which sufficient probability exists in an individual case that damage will be caused by specific persons to the interests protected by the provision in the foreseeable future without action being taken on the part of the state.³¹⁶ The *Bundesverfassungsgericht* has three factors to determine if a danger is concrete: the individual case, the immanent risk that a danger will become actual damage and the question if it is the suspected person who caused the danger. However, information technology system can already be accessed if it cannot yet be ascertained with sufficient probability that the danger will arise in the near future, if certain facts indicate a danger posed to a very important legal interest in the individual case.³¹⁷ Here, the facts must first permit a conclusion concerning events which at least by their nature are concrete and predictable in time, and second allow the conclusion that specific individuals will be involved about whose identity it is at least known that the surveillance measures can be deployed against them in a targeted manner and largely restricted to them.³¹⁸

b) Procedural compensation

aa) Duty to inform, duty of disclosure and duty of deleting the data

According to the *Bundesverfassungsgericht*, severe government surveillance must be based on suitable statutory precautions in order to secure the interests

³¹³ BVerfGE 120, 274 (328) [Online-Durchsuchungen].

³¹⁴ BVerfGE 120, 274 (328) [Online-Durchsuchungen].

³¹⁵ See C. Herrmann, *Das Grundrecht auf Gewährleistung der Vertraulichkeit und Integrität informationstechnischer Systeme*, p. 73 at footnote 227 with further references.

³¹⁶ BVerfGE 120, 274 (328 et seq.) [Online-Durchsuchungen].

³¹⁷ BVerfGE 120, 274 (328 et seq.) [Online-Durchsuchungen].

³¹⁸ BVerfGE 120, 274 (328 et seq.) [Online-Durchsuchungen].

of the person concerned under procedural law³¹⁹ Here, for instance, a duty to delete the data after the measure or a duty to disclose the measure to the affected person after the encroachment are suitable ways to compensate severe infringements.³²⁰ Thus, pre-existing laws such as the claim "for information or submission of files are to be read and interpreted in the context of the importance of the right to informational self-determination."³²¹

In the case of secret online searches, there must be an independent and neutral preventive control,³²² as they are very intense encroachments of the right to privacy. This could "guarantee that the decision on a secret investigation measure takes sufficient account of the interests of the person concerned if the person concerned himself or herself is unable to take measures in advance to defend his or her interests because of the secret nature of the measure. In this respect, the control serves the purpose of the 'compensatory representation' of the interests of the person concerned in the administrative procedure".³²³ Judges could most effectively defend the rights of the affected, since they are personally and factually independent, and because the law exclusively binds them, judges are the best and safest option to defend the rights of the person concerned in an individual case.³²⁴

bb) Protection of the core area of a person's private life

The core area of a person's private life has to be protected.³²⁵ Unconstitutionally obtained data from this core area may not be used; particularly in judicial

³¹⁹ BVerfGE 65, 1 (46) [Volkszählung]; BVerfGE 113, 29 (57 et seq.) [Anwaltsdaten]; BVerfGE 120, 351 (361) [Anspruch auf Auskunft über eine behördliche Datensammlung].

³²⁰ BVerfGE 65, 1 (46) [Volkszählung]; BVerfGE 120, 351 (361) [Anspruch auf Auskunft über eine behördliche Datensammlung]; BVerfGE 113, 29 (57 et seq.) [Anwaltsdaten].

³²¹ *U. Di Fabio*, in: Maunz/Dürig, GG, Art. 2 Abs. 1 GG, marginal number 177. Examples are: § 19(1) No. 1 or § 18 BDSG(1) No. 1 LDSG Rh.-Pf.

³²² BVerfGE 112, 305 (319) [Global Positioning System].

³²³ BVerfGE 120, 274 (332 et seq.) [Online-Durchsuchungen].

³²⁴ BVerfGE 120, 274 (332 et seq.) [Online-Durchsuchungen].

³²⁵ BVerfGE 44, 353 (383 et seq.) [Durchsuchung Drogenberatungsstelle]; BVerfGE 109, 279 (311 et seq.) [Großer Lauschangriff]; BVerfGE 113, 348 (390) [Vorbeugende Telefonüberwachung]; BVerfGE 120, 274 (335 et seq.) [Online-Durchsuchungen].

proceedings.³²⁶ This core area has to be protected in all statutes which allow surveillance measures.³²⁷ If this law does not have such a provision it might lead to the result that is not proportional.³²⁸ Given the increasing use of information technology systems (internet telephony, e-mail, chat, etc.) for the regulation of personal matters, there is “an increased danger of data being collected which have highly personal contents”.³²⁹ Thus, the *Bundesverfassungsgericht* considers special statutory precautions protecting the core area of private life in the event of secret access to the information technology system of the person concerned as indispensable.³³⁰

The protection of the core area is to be guaranteed in a two-tier protection concept.³³¹ On the first step, a statutory provision must endeavour to ensure that collection of data relevant to the core area is avoided as much as possible in terms of information technology and investigation technique.³³² However, in many cases the relevance of the collected data to the core area cannot be ascertained prior to or during data collection.³³³ Thus, the legislature must ensure by means of suitable procedural provisions on the second step that data which has been collected relates to the core area of private life, the intensity of the violation of the core area and its impact on the personality and development of the person concerned remain as low as possible.³³⁴

³²⁶ H. D. Jarass, in: Jarass/Pieroth, Grundgesetz, Art. 2 GG, marginal number 63 with reference to BVerfGE 44, 353 (383 et seq.) [Durchsuchung Drogenberatungsstelle]; BVerfGE 120, 274 (339) [Online-Durchsuchungen]; BGH NJW 2003, 1729.

³²⁷ BVerfGE 113, 348 (390 et seq.) [Vorbeugende Telefonüberwachung].

³²⁸ BVerfGE 113, 348 (390 et seq.) [Vorbeugende Telefonüberwachung].

³²⁹ BVerfGE 120, 274 (336) [Online-Durchsuchungen].

³³⁰ BVerfG, 1 BvR 370/07, 27.2.2008, marginal number 207.

³³¹ BVerfG, 1 BvR 370/07, 27.2.2008, marginal number 214.

³³² BVerfGE 120, 274 (338) [Online-Durchsuchungen]; BVerfGE 113, 348 (391-392) [Vorbeugende Telekommunikationsüberwachung]; BVerfGE 109, 279 (318, 324) [Großer Lauschangriff].

³³³ BVerfGE 120, 274 (337) [Online-Durchsuchungen].

³³⁴ BVerfGE 120, 274 (338) [Online-Durchsuchungen].

cc) Application to South African Constitutional law

The mentioned categories (duty of disclosure and duty of deleting data, protection of the core area of a person's private life, restrictive interpretation of the concept of risk and procedural compensation with the duty to inform) could be transferred into the South African constitutional law for secret infringements. These could dilute the effect of intrusions into privacy. In this respect, the problem is not structural, but factual: Also in the South African law the holder of the fundamental right has due to the nondisclosure of the measure only a limited number of possibilities to take legal action against it. Since the affected person knows nothing about the measure, he/she is also in South African law not able to take preventive legal action. Moreover, there is also in South African cases the danger that the fundamental right holder cannot take subsequent legal action, since this requires as well that he/she be informed about the measure. This means that, he/she can neither work towards reducing the intensity of intervention nor eliminate it for the future by taking a successfully legal action. Moreover, the problem of government surveillance can no longer be considered regionally, but must be seen in a global context because of the possibility of global access to computers.

3. Individual cases

a) In South African law

In the context of crime prevention the South African courts and legal literature the reporting requirements concerning information about child abuse³³⁵ and mental patients who are dangerous to others³³⁶ usually outweigh the interests of a potential offender to his/her right to informational self-determination.³³⁷ In tax law, South African authorities are usually permitted to gather information about

³³⁵ Child Care Act 74 of 1983 s 42; Prevention of Family Violence Act 133 of 1993, s 4.

³³⁶ Mental Health Act 18 of 1973, s 13.

³³⁷ *D. McQuid-Mason*, in: Constitutional law of South Africa, Chapter 38.3 (a) (i) (bb).

a citizen which are necessary for the collection of income tax.³³⁸ The gathering of information reasonably required for official statistical and census purposes³³⁹ is generally consistent with the fundamental right to informational self-determination.³⁴⁰

b) In the European Convention on Human Rights

According to case law of the European Court of Human Rights every person has “a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development”.³⁴¹ This right doesn’t only exist in the character-forming stage of a human. Thus, the European Court of Human Rights decided that even a 67-year-old applicant has the right to know his parentage.³⁴² The court found that even if this person has been able to develop his “personality in the absence of certainty as to the identity of his biological father, it must be admitted that an individual’s interest in discovering his parentage does not disappear with age, quite the reverse.”³⁴³

On the contrary, “it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Section 8, taking into account the State’s margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with

³³⁸ Income Tax Act 58 of 1962.

³³⁹ Statistics Act 66 of 1976.

³⁴⁰ *D. McQuid-Mason*, in: Constitutional law of South Africa, Chapter 38.3 (a) (i) (bb).

³⁴¹ *Odièvre v. France*, no. 42326/98, 13. February 2003, ECHR, § 47.

³⁴² *Jäggi v. Switzerland*, no. 58757/00, 13. July 2006, ECHR, § 40.

³⁴³ *Jäggi v. Switzerland*, no. 58757/00, 13. July 2006, ECHR, § 40.

the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent.”³⁴⁴

³⁴⁴ *Gaskin v. the United Kingdom*, no. 10454/83, 07. July 1989, ECHR, § 49.

CONCLUSION

It has been shown that proportionality plays a major role in the South African Constitution and the German *Grundgesetz*. A full comparison is not possible, as the problem of proportionality on justifications for infringements of the right to privacy is largely shaped by case law, and decided cases in the various jurisprudences are not absolutely identical. Nonetheless, strong similarities can be ascertained. In both jurisprudences the proportionality test is categorized into government surveillance and other encroachments to better determine the intensity of interventions and the consequential justification criteria.

In the area of informational self-determination, a comparison between the Federal Republic of Germany and the Republic of South Africa has shown that while the jurisprudence of the German *allgemeines Persönlichkeitsrecht* is slightly more sophisticated, both countries are moving in the same direction. In this respect, it is likely both rights will become increasingly equal in the years to come. Here, secret measures are to be regarded as particularly serious, especially because a person has no opportunity to make use of legal remedies. Thus, the categories which the German *Bundesverfassungsgericht* has worked out (duty of disclosure and duty of deleting the data and protection of the core area of a person's private life restrictive interpretation of the concept of risk, procedural compensation with the duty to inform) to reduce the intensity of the encroachments of the fundamental rights could also be used in the South African constitutional law, since there are no structural differences and those measures would also reduce the severity of a secret infringement of section 14 of the 1996 constitution.

Within the context of other measures both the German *Bundesverfassungsgericht* and the South African Constitutional Court take the view that every person must remain an absolutely protected area of privacy. The state must never and under no circumstances infringe this sphere. Neither constitutional court defines these

spheres exhaustively, but list certain areas that receive absolute protection. It has been shown that a conclusive definition cannot be established, mostly due the breadth of the concept of a "protected personal sphere of life" and the rapidly changing social and moral value system. In the other cases, the factor of proportionality forces the authorities in both jurisdictions to overcome high barriers to justify infringements.

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