

# Privacy as secondary rule, or the intrinsic limits of legal orders in the age of Big Data

## 1. Introduction

Mark Twain, in his short story ‘My debut as a literary person’, recounts the tale of a boat crew stranded on a desolate spot of land. After a few days, the men become desperate as proper food is lacking and the captain and the two passengers start scraping boot-leather and wood, and make a pulp of the scrapings by moistening them with water. The sailors, however, did not make pulp, but started to eat strips of leather from old boots, with chips from the butter cask. When one of the mates was asked afterwards about the affair, he remembered that the boots were old and full of holes and, he added thoughtfully, that it were the holes that digested the best.<sup>2</sup> It is to such stories that legal positivists jokingly refer to indicate the positions natural law scholars: they always prefer the gaps over the legal order itself.<sup>3</sup>

Legal positivists, at their turn, have always struggled with intrinsic limits of legal orders. They refer to these limits as ‘gaps’, as the silence of the law (*silentium legis*) or simply deny the possibility of legal ‘gaps’ by holding that everything that is not prescribed by law, must be deemed legal. Still, most, if not all, legal positivists are concerned with upholding the rule of law and protecting citizens from overarching legal orders. Hart’s position on legality, for example, is very complex and ambiguous<sup>4</sup> and the proper limit of laws and legal orders is a recurrent topic in much of his texts. This chapter will explore Hart’s ambiguous position mainly on the basis of his discussions with Devlin and it will compare his stance with the approach he adopted in other texts, such as in *The Concept of Law*, and in his arguments with Lon Fuller.

In the Hart-Fuller debate and *The Concept of Law*, Hart defended the view that legal orders are not limited by a pre-legal ‘outer morality’, imposed by nature or some divine being, or by what Fuller called an ‘inner morality’, the principles of the rule of law. Although Hart thought moral considerations to be important and held the principles of legality high, he argued that legal orders could be called legal orders even if they did not respect these principles. In other writings, such as in the famous Devlin-Hart debate, Hart defended the view that the law should be bound by limits and respect citizen’s privacy. He adopted the classic liberal position that the state had no business to regulate conduct in private, except where harm was done. Especially, Hart argued against Devlin, immorality as such, as in the case homosexual conduct, could not be a reason for criminal prosecution.

These two strands in Hart’s work, which are both infused by utilitarianism, have mostly been reconciled by referring to the fact that Hart defended on the one hand that law and morals *could* be separated, the position of legal positivists, and on the other hand that law

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<sup>2</sup> M. Twain, ‘My debut as a literary person’. <[http://www.public-domain-content.com/books/Mark\\_Twains\\_Short\\_Stories\\_2/C6P7.shtml](http://www.public-domain-content.com/books/Mark_Twains_Short_Stories_2/C6P7.shtml)>.

<sup>3</sup> See for example: F. Somló, ‘Juristische Grundlehre’, Leipzig, Felix Meiner, 1917, p. 410.

<sup>4</sup> One of the most insightful accounts on this point can be found in: J. Waldron, ‘Positivism and Legality: Hart’s Equivocal Response to Fuller’, 83 N.Y.U. L. Rev. 1135 (2008).

and morals *should* be separated, the liberal position that harm should be regarded as the only legitimate basis for state interference. Not in the last place, this is due to the fact that Hart himself framed his dispute with Devlin in terms of the question: ‘Ought immorality as such to be a crime?’<sup>5</sup> Although there are many arguments to support this distinction, there are others that suggest that these two positions sometimes overlap. Already Fuller complained that he often found it difficult to determine whether Hart thought that ‘the distinction between law and morality simply “is,” or is something that “ought to be”.’<sup>6</sup> Indeed, there are some instances in which liberalism infused Hart’s position as a legal positivist and vice versa. Many disagreements with Lord Devlin, for example, were not so much about what law ought to do, on what grounds legal orders should criminalize actions and about the question whether states ought to respect the privacy of its citizens, but about positivist presumptions.

This chapter will explore the overlaps between Hart’s attack on Devlin and his writings as a positivist and argue that there are reasons to believe that the protection of the private sphere, for Hart, is not only something that governments ought to do, but that legal orders must do. This is important because the current privacy paradigm is focused on the individual in multiple ways. In short, it grants natural persons a subjective right to invoke their right before court when they feel that their private interests have been infringed. This is problematic because in the age of Big Data, there are simply so many data collection processes going on, that it becomes impossible for an individual to assess each and every time whether a data processing initiative contains his data, if so, whether the data processing is correct and if not, go to court. And even if an individual goes to court, it is increasingly difficult to specify how a Big Data initiative has harmed the specific interests of that individual. For example, what concrete negative effect did the mass data collection by the NSA have on the ordinary American or European citizen? The point is that what is at stake with these types of processes is often not the individual interest of particular citizens, but rather the abuse of power by the state as such.

Seeing privacy as an intrinsic limit on governmental policies could provide a theoretical foundation for such an alternative approach to privacy regulation, in which privacy protection is aligned in part to the principles of the rule of law, which the state needs to respect as a minimum condition for exercising power, even if there are no concrete individual interests at stake. This might ameliorate privacy protection, because right now, it is often difficult to address more systematic and systemic privacy infringements. These infringements do not directly affect a personal interest or undermine an individual right by a specific person. That is why the rights-based approach to privacy often is unable to provide satisfying answers to modern privacy questions. Consequently, many authors have tried to find alternatives for the rights-based approach to privacy, in which the focus is not on the individual, his rights and his interests, but on the actor, the one engaging in a privacy infringement. The problem is, however, finding a suitable ground and theoretical basis for such an approach. This chapter will argue that such a basis may be found in the legal positivist writing of H.L.A. Hart.

This chapter will argue, in short, that such a theoretical foundation can be found in the work of H.L.A. Hart. First, this chapter will elaborate a bit further on why this discussion is of relevance for the current privacy debate (section 2). After that, the chapter will proceed with the first main argument (section 3) which runs as follows: Hart’s attack on Devlin was based partially on the suggestion that law and morals could be separated (section 3.1); Devlin’s position conflicted with Hart’s rules of changes, spelled out in *The Concept of Law* as one of the minimum conditions of legal orders (section 3.2); and with Hart’s positivist account on the proper position of the judiciary (section 3.3); followed by a small conclusion (section 3.4). Then, this chapter will proceed with the second main argument (section 4), which is that that

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<sup>5</sup> H. L. A. Hart, ‘Law, liberty and morality’, Stanford University Press, Stanford, 1963, p. 4.

<sup>6</sup> L. L. Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’, 71 Harv. L. Rev. 630, 1957, p. 631.

there are intrinsic limits on legal orders in Hart's writings and that they relate to elements of the right to privacy, such as physical privacy (section 4.1); informational privacy (section 4.2); and decisional privacy (section 4.3); followed by a small conclusion (section 4.4). Finally, the wrap-up will argue that the minimum conditions of legal orders could ameliorate the current protection of privacy (section 5).

## 2. Privacy, Big Data and the need for intrinsic limits on legal orders

It is impossible to give an exhaustive overview of the current privacy regulation in Europe.<sup>7</sup> Instead, this section will focus on the protection of the right to privacy in the most dominant discourse, namely that of the European Convention on Human Rights, Article 8, which contains the right to privacy. This description is focusses on the approach of the European Court of Human Rights when dealing with cases under this article, but the general point, namely that the right to privacy is interpreted as a subjective right of natural persons to protect their individual interests, holds true for most privacy doctrines in Europe. Under the European Convention, the right to privacy is focused on the individual in many ways. To successfully submit an application, a complainant must of course have exhausted all domestic remedies, the application should be submitted within the set time frame and it must fall under the competence of the Court. But more importantly, the applicant needs to demonstrate a personal interest, i.e. individual harm following from the violation complained of. This is linked to the notion of *ratione personae*, the question whether the claimant has individually and substantially suffered from a privacy violation, and in part to that of *ratione materiae*, the question whether the interest said to be interfered falls under the protective scope of the right to privacy. This focus on individual harm and individual interests brings with it that certain types of complaints are declared inadmissible by the European Court of Human Rights, which means that the cases will not be dealt with in substance.<sup>8</sup>

So called *in abstracto* claims are in principle declared inadmissible. These are claims that regard the mere existence of a law or a policy, without them having any concrete or practical effect on the claimant. 'Insofar as the applicant complains in general of the legislative situation, the Commission recalls that it must confine itself to an examination of the concrete case before it and may not review the aforesaid law *in abstracto*. The Commission therefore may only examine the applicant's complaints insofar as the system of which he complains has been applied against him.'<sup>9</sup> A priori claims are rejected as well, as the Court will usually only receive complaints about injury which has already materialized. A-contrario, claims about future damage will in principle not be considered. 'It can be observed from the terms "victim" and "violation" and from the philosophy underlying the obligation to exhaust domestic remedies provided for in Article 26 that in the system for the protection of human rights conceived by the authors of the Convention, the exercise of the right of individual petition cannot be used to prevent a potential violation of the Convention: in theory, the organs designated by Article 19 to ensure the observance of the engagements undertaken by the Contracting Parties in the Convention cannot examine—or, if applicable, find—a violation other than a posteriori, once that violation has occurred. Similarly, the award of just satisfaction, i.e. compensation, under Article 50 of the Convention is limited to

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<sup>7</sup> This section is partly based on B. van der Sloot, 'Is the Human Rights Framework Still Fit for the Big Data Era? A Discussion of the ECtHR's Case Law on Privacy Violations Arising from Surveillance Activities', IN: S. Gutwirth, R. Leenes & P. De Hert (eds.), 'Data Protection on the Move', Springer, Dordrecht, 2016. B. van der Sloot, 'The Individual in the Big Data Era: Moving towards an Agent-Based Privacy Paradigm', IN: B. van der Sloot & D. Broeders & E. Schrijvers (eds.), 'Exploring the boundaries of Big Data', Amsterdam University Press, Amsterdam 2016, pp. 177-203.

<sup>8</sup> <[http://www.echr.coe.int/Documents/Admissibility\\_guide\\_ENG.pdf](http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf)>

<sup>9</sup> ECmHR, *Lawlor v. the United Kingdom*, application no. 12763/87, 14 July 1988.

cases in which the internal law allows only partial reparation to be made, not for the violation itself, but for the consequences of the decision or measure in question which has been held to breach the obligations laid down in the Convention.’<sup>10</sup>

Hypothetical claims regard damage which might have materialized, but about which the claimant is unsure. The Court usually rejects such claims because it is unwilling to provide a ruling on the basis of presumed facts. The applicant must be able to substantiate his claim with concrete facts, not with beliefs and suppositions. The ECtHR will also not receive an *actio popularis*, a case brought up by a claimant or a group of claimants, not to protect their own interests, but to protect those of others or society as a whole. These types of cases are better known as class actions. ‘The Court reiterates in that connection that the Convention does not allow an *actio popularis* but requires as a condition for exercise of the right of individual petition that an applicant must be able to claim on arguable grounds that he himself has been a direct or indirect victim of a violation of the Convention resulting from an act or omission which can be attributed to a Contracting State.’<sup>11</sup>

Furthermore, the Court has held that applications are rejected if the injury claimed following from a specific privacy violation is not sufficiently serious, even although it does fall under the scope of Article 8 ECHR. This can also be linked to the more recent introduction of the so called *de minimis* rule in the Convention, which provides that a claim will be declared inadmissible if ‘the applicant has not suffered a significant disadvantage’.<sup>12</sup> With environmental issues, for example, it has been ruled that if the level of noise is not sufficiently high, it will not be considered an infringement on a person’s private life or home.<sup>13</sup> Similarly, although data protection partially falls under the scope of Article 8 ECHR, if only the name, address and other ordinary data are recorded about an applicant, the case will be declared inadmissible, because such ‘data retention is an acceptable and normal practice in modern society. In these circumstances the Commission finds that this aspect of the case does not disclose any appearance of an interference with the applicants’ right to respect for private life ensured by Article 8 of the Convention.’<sup>14</sup> Moreover, an interference might have existed which can be substantiated by the applicant and which was sufficiently serious to fall under the scope of Article 8 ECHR. Still, if the national authorities have acknowledged their wrongdoing and provided the victim with sufficient relief and/or retracted the law or policy on which the violation was based, the person can no longer claim to be a victim under the scope of the Convention.<sup>15</sup>

Then there is the material scope of the right to privacy, Article 8 ECHR. In principle, it only provides protection to a person’s private life, family life, correspondence and home. However, the Court has been willing to give a broader interpretation. As discussed in the introduction, it has held, *inter alia*, that the right to privacy also protects the personal development of an individual, it includes protection from environmental pollution and may extend to data protection issues.<sup>16</sup> Still, what distinguishes the right to privacy from other

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<sup>10</sup> ECmHR, *Tauira and others v. France*, application no. 28204/95, 04 December 1995.

<sup>11</sup> ECtHR, *Asselbourg and 78 others and Greenpeace Association-Luxembourg v. Luxembourg*, application no. 29121/95, 29 June 1999.

<sup>12</sup> Article 35 paragraph 3 (b) ECHR.

<sup>13</sup> ECmHR, *Trouche v. France*, application no. 19867/92, 01 September 1993. ECmHR, *Glass v. the United Kingdom*, application no. 28485/95, 16 October 1996.

<sup>14</sup> ECmHR, *Murray v. the United Kingdom*, application no. 14310/88, 10 December 1991.

<sup>15</sup> D. Spielmann, ‘Bringing a case to the European Court of Human Rights: a practical guide on admissibility criteria’, Oisterwijk, Wolf Legal Publishers, 2014. T. A. Christou & J. P. Raymon, ‘European Court of Human Rights: remedies and execution of judgments’, London, BIICL, British Institute of International and Comparative Law cop., 2005.

<sup>16</sup> See among others: ECtHR, *Leander v. Sweden*, application no. 9248/81, 26 March 1987. ECtHR, *Amann v. Switzerland*, application no. 27798/95, 16 February 2000. ECtHR, *Rotaru v. Roemenia*, application no. 28341/95, 04 May 2000. See also: <[http://www.echr.coe.int/Documents/FS\\_Data\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Data_ENG.pdf)>

rights under the Convention, such as the freedom of expression, is that it only provides protection to individual interests. While the freedom of expression is linked to personal expression and development, it is also connected to societal interests, such as the search for truth through the market place of ideas and the well-functioning of the press, a precondition for a liberal democracy. By contrast, Article 8 ECHR, in the dominant interpretation of the ECtHR, only protects individual interests, such as autonomy, dignity and personal development (in literature, scholars increasingly emphasize a public dimension of privacy). Cases that do not regard such matters are rejected by the Court.<sup>17</sup>

This focus on individual interests has also had an important effect on the types of applicants that are able to submit a complaint about the right to privacy. The Convention, in principle, allows natural persons, groups of persons and legal persons to complain about an interference with their rights under the Convention. Indeed, the Court has accepted that, under certain circumstances, churches may invoke the freedom of religion (Article 9 ECHR), that press organisations may rely on the freedom of expression (Article 10 ECHR) and that trade unions are admissible if they claim the freedom of assembly and association (Article 11 ECHR). However, because Article 8 ECHR only protects individual interests, the Court has said that in principle, only natural persons can invoke a right to privacy. For example, when a church complained about a violation of its privacy by the police in relation to criminal proceedings, the Commission found that ‘[t]he extent to which a non-governmental organization can invoke such a right must be determined in the light of the specific nature of this right. It is true that under Article 9 of the Convention a church is capable of possessing and exercising the right to freedom of religion in its own capacity as a representative of its members and the entire functioning of churches depends on respect for this right. However, unlike Article 9, Article 8 of the Convention has more an individual than a collective character [.]’<sup>18</sup> This led the Commission to declare the complaint inadmissible, a line which has been confirmed in the subsequent case law of the Court and which it is willing to leave only in exceptional cases.<sup>19</sup> Groups of natural persons claiming a Convention right are also principally rejected by the Court and the possibility of inter-state complaints (Article 33 ECHR) is seldom practiced.<sup>20</sup> This leaves only the individual to submit a complaint about a breach of the right to privacy.

Consequently, the current privacy paradigm focuses largely on the individual, his interests and his subjective right to protect those individual interests. In the field of privacy, the notion of harm has always been problematic as it is often difficult to substantiate what harm has been caused by a particular violation; what harm, for example, follows from entering a home or eavesdropping on a telephone conversation when neither objects have been stolen nor private information has been disclosed to third parties? Even so, the traditional privacy violations (house searches, telephone taps, etc.) are clearly demarcated in time, place and person, and the effects are, therefore, relatively easy to define. In the current technological environment, with developments such as Big Data, however, the notion of harm is becoming increasingly problematic. An individual is often simply unaware that his or her personal data are gathered by either fellow citizens (e.g., through the use of smart phones), by companies (e.g., by tracking cookies) or by governments (e.g., through covert surveillance).

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<sup>17</sup> See for one of the earliest examples of the broadening scope of Article 8 ECHR: ECmHR, *X. v. Iceland*, application no. 6825/74, 18 May 1976.

<sup>18</sup> ECmHR, *Church of Scientology of Paris v. France*, application no. 19509/92, 09 January 1995.

<sup>19</sup> See among others: ECtHR, *Stes Colas Est and others v. France*, application no. 37971/97, 16 April 2002. See in more detail: B. van der Sloot, “Do privacy and data protection rules apply to legal persons and should they? A proposal for a two-tiered system”, *Computer Law & Security Review* 31 (2015): 1

<sup>20</sup> See further B. van der Sloot, “Privacy in the Post-NSA Era: Time for a Fundamental Revision?”, *Journal of intellectual property, information technology and electronic commerce law*, 5 (2014a): 1

Obviously, people who are unaware of their data being gathered will not invoke their right to privacy in court.

Even if people were aware of these data collections, given the fact that data gathering and processing is currently so widespread and omnipresent and will become even more so in the future, it will quite likely be impossible for them to keep track of every data processing which includes (or might include) their data, to assess whether the data controller abides by the legal standards applicable, and if not, to file a legal complaint. And if individuals go to court to defend their rights, they have to demonstrate a personal interest, i.e. personal harm, which is a particularly problematic notion in Big Data processes: what concrete harm has data gathering by the NSA done to ordinary American or European citizens? This also shows the fundamental tension between the traditional legal and philosophical discourse and the new technological reality: while the traditional discourse focuses on individual rights and individual interests, data processing often affects a structural and societal interest and, in many ways, transcends the individual.

Finally, under the current privacy and data protection regimes, the balancing of interests is the most common way in which to resolve cases. In a concrete matter, the societal interests served with the data gathering, for example, wire-tapping someone's telephone because they are suspected of committing a murder, is weighed against the harm the wire-tapping does to their personal autonomy, freedom or dignity. However, the balancing of interests becomes increasingly difficult in the age of Big Data, not only because the individual interest involved in a particular case is hard to substantiate, but also because the societal interest at the other end is increasingly difficult to specify. It is mostly unclear, for example, in how far the large data collections by intelligence services have actually prevented concrete terrorist attacks. This balance is even more difficult if executed on an individual level, that is, how the collection of the personal data of this individual (as a non-suspected person) has ameliorated national security. The same holds true for CCTV cameras hanging on the corners of almost every street in some cities; the problem here is not that one specific person is being recorded and that data about this identified individual is gathered, but rather that everyone in that city is being monitored and controlled. Perhaps more important is the fact that, with some of the large-scale data collections, what appears to be at stake is not a relative interest, which can be weighed against other interests, but an absolute interest. For example, the NSA data collection is so large, has been conducted over such a long time span and includes data about so many people that it may be said to simply qualify as abuse of power. Abuse of power is not something that can be legitimated by its instrumentality towards a specific societal interest; it is an absolute minimum condition of having power.

Consequently, the current rights based approach to privacy protection is inadequate when applied to Big Data processes. Interestingly, in recent cases, the European Court of Human Rights seems to have acknowledged this fact and seems to be willing to adjust its own approach to privacy protection. In some exceptional cases, mostly regarding mass surveillance, the ECtHR has been willing to accept *in abstracto* claims. Although the Court has done so for years without explicitly acknowledging the fact that, in exceptional cases, it is prepared to relax its individualized approach to privacy, it has finally made this unequivocally clear in two recent cases, namely *Szabó & Vissy*<sup>21</sup> and especially *Zakharov*.<sup>22</sup> In *Zakharov*, the ECtHR argued as follows: '[T]he Court accepts that an applicant can claim to be the victim of a violation occasioned by the mere existence of secret surveillance measures, or legislation permitting secret surveillance measures, if the following conditions are satisfied. Firstly, the Court will take into account the scope of the legislation permitting secret surveillance measures by examining whether the applicant can possibly be affected by it,

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<sup>21</sup> ECtHR, *Szabó and Vissy v. Hungary*, application no. 37138/14, 12 January 2016.

<sup>22</sup> ECtHR, *Roman Zakharov v. Russia*, application no. 47143/06, 04 December 2015.

either because he or she belongs to a group of persons targeted by the contested legislation or because the legislation directly affects all users of communication services by instituting a system where any person can have his or her communications intercepted. Secondly, the Court will take into account the availability of remedies at the national level and will adjust the degree of scrutiny depending on the effectiveness of such remedies. As the Court underlined in *Kennedy*, where the domestic system does not afford an effective remedy to the person who suspects that he or she was subjected to secret surveillance, widespread suspicion and concern among the general public that secret surveillance powers are being abused cannot be said to be unjustified. In such circumstances the menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8. There is therefore a greater need for scrutiny by the Court and an exception to the rule, which denies individuals the right to challenge a law *in abstracto*, is justified. In such cases the individual does not need to demonstrate the existence of any risk that secret surveillance measures were applied to her. By contrast, if the national system provides for effective remedies, a widespread suspicion of abuse is more difficult to justify. In such cases, the individual may claim to be a victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures only if he is able to show that, due to his personal situation, he is potentially at risk of being subjected to such measures.<sup>23</sup>

Although this development seems laudable in terms of concrete protection, the question is how this approach relates to the dominant approach to privacy cases, as discussed earlier. What is left for the Court to assess in *in abstracto* cases is the mere quality of laws and policies as such and the question is whether this narrow assessment is still properly addressed under a human rights framework. The normal assessment of the Court revolves around, roughly, three questions: (1) has there been an infringement of the right to privacy of the claimant, (2) is the infringement prescribed by law and (3) is the infringement necessary in a democratic society in terms of, *inter alia*, national security – that is, does the societal interest in this particular case outweigh the individual interest (balancing test). Obviously, the first question does not apply to *in abstracto* claims because there has been no infringement with the right of the claimant. The third question is also left untouched by the Court, because it is impossible, in the absence of an individual interest, to weigh the different interests involved. This means of course that another of the Court's principles, namely that it only decides on the particular case before it, is also overturned.

Even the second question – whether the infringement is prescribed by law – is not applicable as such since there is no infringement that is or is not prescribed by law. Although the Court regularly determines in cases, *inter alia*, whether the laws are accessible, whether sanctions are foreseeable and whether the infringement at stake is based on a legal provision, this does not apply to *in abstracto* claims. There is often a law permitting mass surveillance (that is exactly the problem) and these laws are accessible and the consequences are foreseeable (in the sense that everyone will be affected by it). Rather, it is the mere quality of the law as such that is assessed; the content of the law, the use of power as such, may be deemed inappropriate. The question of abuse of power can of course be addressed by the Court, though not under Article 8 ECHR, but under Article 18 of the Convention, which specifies: 'The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.' But, as the Court has stressed, this provision can only be invoked if one of the other Convention rights are at stake. Reprehensible as the abuse of power may be, there are

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<sup>23</sup> Zakharov, § 171.

arguments for saying that it is only proper to address this question under a human rights framework if one of the human rights contained therein will be or has been violated by the abuse. The Court cannot assess the abuse of power as such (a doctrine which it also applies to, inter alia, Article 14 ECHR, the prohibition of discrimination).

However, what is assessed in cases in which *in abstracto* claims regarding surveillance activities have been accepted is precisely the use of power by the government as such, without a specific individual interest being at stake. Accepting *in abstracto* claims and assessing the legality and legitimacy of laws as such seems to diverge in essence from the approach the ECtHR has taken to the right to privacy for a long time. Not individual interests of natural persons are the core of these types of cases, but general interests in relation to the legitimacy and legality of laws. The cases are not about individual rights, but more on the intrinsic limits on legal orders, with respect to, inter alia, the abuse of power. The problem is that the theoretical foundation for such an approach is lacking.

This chapter develops such a theoretical basis by turning to legal positivism. The reason for this choice is that legal positivism, in contrast to natural rights defenders, have traditionally opposed intrinsic limits of laws and legal orders. While natural rights theories have stressed that laws and legal order that violate inalienable human rights may be deemed illegitimate or invalid, legal positivist usually claim that a law is a law, even if its content is immoral or undesirable. Consequently, if it can be shown that even for legal positivists, there are certain absolute and inviolable principles which can never be infringed, such as with respect to the safeguards against the abuse of power and for the respect of individual autonomy, the case for intrinsic limits on legal orders is far stronger then when reference is only made to natural law philosophies. It is impossible to give a general account of legal positivism, that is why this chapter will focus on one of the most prominent defenders of this branch of legal philosophy, namely H.L.A. Hart.

### **3. Hart's positivist and liberal position**

This section will discuss Hart's approach to the right to privacy, individual autonomy and the respect for the private sphere. The defense of these aspects is common to liberal politicians and philosophers alike. Hart's position has consequently often been interpreted as sprouting primarily from his political opinions. This would mean that that his defense of these aspect would rely on his personal opinion about what the legal order should prohibited or not, how far it should go or not in enforcing the rules in the private sphere, etc. This section will argue, however, that Hart's position and his defense of the different aspects of the right to privacy is based to a considerable extent not on his views as a liberal, but on his position as a legal positivist. Many of his arguments rely on the description of what laws and legal orders are, not on what they should be.

#### **3.1 Law and morality**

This section will briefly touch upon the debate between Hart and Fuller on the separability of law and morality and show that this debate was revived when Devlin and Hart discussed the Wolfenden report, which proposed to ban the criminalization of homosexual conduct.<sup>24</sup> (1) Hart's classic argument as a legal positivist will be indicated by briefly recounting the position he took in *The Concept of Law* and *Positivism and the Separation of Law and Morals*. (2) Fuller's response on this matter will be discussed by reference to his reply to the latter article in *Positivism and Fidelity to Law* and his book *The Morality of Law*.

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<sup>24</sup> Committee on Homosexual Offences and Prostitution, 1957. Report of the Committee on Homosexual Offences and Prostitution. London: Her Majesty's Stationery Office.



(3) It will be argued that Devlin, in his defense for a prohibition on homosexual conduct in *The Enforcement of Morals*, relied in part on the thesis that law and morals were inseparable. (4) Hart, in *Law, Liberty, and Morality*, rejected the criminalization of homosexual conduct between consenting adults in private in part on the basis of a reformulation of his positivist position.

(1) It is not necessary to discuss in depth Hart's position as a legal positivist, as its general assumptions are well known. Hart, building on the utilitarian doctrine of Bentham and Austin, suggested that laws and morals are separable. It is important to note that Hart did not suggest that legal orders and morality, as a matter of fact, are detached or that they should be separated.<sup>25</sup> Hart's position could be best described as a separability thesis, which is the claim 'that there exists at least one conceivable rule of recognition (and therefore on possible legal system) that does not specify truth as a moral principle among the truth conditions for any proposition of law.'<sup>26</sup> The thesis that law and morals are separable, at least in theory, is mainly targeted at defenders of the natural law doctrine, who suppose that there is a pre-legal morality, either installed by nature or by God, to which the legal order must commit itself. Hart contended for example that bad laws, such as those of the nazi-regime, were in fact laws, though they may be immoral.<sup>27</sup>

(2) Fuller, against Hart, argued that there are minimum qualities which laws must abide by. These were not pre-legal moral norms, such as natural law philosophers would suggest, but what he called standards of the 'inner morality' of law. These were in fact elements of the rule of law, such as the requirement that laws must be clear, general, non-contradictory, followable, publicized, stable and non-retroactive.<sup>28</sup> Fuller argued that legal orders must not be merely approached as factual objects, but as purposive enterprises. Legal orders are made by men for a purpose and they aim at certain general, societal goals. Furthermore, legal orders, as such, are installed to ensure order. As an end in itself and as an instrument to reach these societal goals, laws must abide to the minimum standards of the rule of law. Without respecting this 'inner morality', among others, citizens cannot take into account the norms the laws provide, because they do not know them and cannot follow them. Consequently, neither can law bring order nor can the societal goals be reached.<sup>29</sup> Hart's opposition to this suggestion, namely that these principle are not moral principles but principles of efficient legal orders, will be analyzed in a later section.

(3) As opening statement to his argument that society had a right to criminalize homosexual conduct, Devlin argued that in fact, many of the legal doctrines in law reflected some sort of morality. The penalization of rape, he argued, could be legitimately seen as a reformulation of the Millian harm-principle, as this was conducted against the will of the victim and caused harm.<sup>30</sup> With the prohibition of murder or euthanasia however, a different aspect played a role. Even if a person consented to being murdered, the murderer would commit a crime. 'Euthanasia or the killing of another at his own request, suicide, attempted suicide and suicide pacts, dueling, abortion, incest between brother and sister, are all acts which can be done in private and without offence to others and need not involve the

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<sup>25</sup> H. L. A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review*, Vol. 71, No. 4, p. 601.

<sup>26</sup> J. L. Coleman, 'Negative and Positive Positivism', *The Journal of Legal Studies*, Vol. 11, No. 1 (Jan., 1982), p. 141.

<sup>27</sup> See also: L. Green, 'Positivism and the inseparability of law and morals', *New York University Law Review*, vol 83, 1000, 2008.

<sup>28</sup> L. L. Fuller, 'The Morality of Law', Yale University Press, London, 1969.

<sup>29</sup> See further: L. L. Fuller, 'Means and Ends'. In: L. L. Fuller, 'The Principles of Social Order', Duke University Press, Durham, 1981.

<sup>30</sup> "That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."

corruption or exploitation of others.<sup>31</sup> Similarly, Devlin argued, there are many concepts in family law which are based on moral sentiments, such as the protected status of marriage and the prohibition of polygamy. He argued that in many instances, the function of the law is 'simply to enforce a moral principle and mothering else'.<sup>32</sup>

(4) Hart reclaimed his positivist position on this point and argued that it was possible to separate laws and morals. First, he denied that the only explanation for the examples cited by Devlin was the enforcement of morals. With reference to Mill, Hart distinguished policies that were inspired by the concern to make the subject happier (paternalism) and policies that were inspired simply by the fact that in the opinion of others certain conduct would be right (the enforcement of morals). Hart argued that the examples suggested by Devlin could also be seen as a matter of paternalism. 'The rules excluding the victim's consent as a defence to charges of murder or assault may perfectly well be explained as a piece of paternalism, designed to protect individuals against themselves.'<sup>33</sup>

Secondly, Hart argued that even if these examples were based on moral sentiments, this proves nothing. 'The importance of this feature of the question is that it would plainly be no sufficient answer to show that in fact in some society – our own or others – it was widely regarded as morally quite right and proper to enforce, by legal punishment, compliance with the accepted morality. No one', Hart continues, 'who seriously debates this question would regard Mill as refuted by the simple demonstration that there are some societies in which the generally shared morality endorses its own enforcement by law, and does so even in those cases where the immorality was thought harmless to others.'<sup>34</sup> Hart argued that even if Devlin was right in suggesting that the examples he gave regarded in fact the enforcement of morality and even if Devlin could show that most or even all societies enforced morality, this does not prove a necessary connection.<sup>35</sup>

### 3.2 The rules of change

The last section showed that part of Hart's attack on Devlin was based on a reformulation of his positivist suggestion that law and morality are separable, at least in principle. This section will build on that position and argue that Hart not only defended the separability thesis in his debate with Devlin, but also the so called rules of change. (1) Devlin's argument in *The Enforcement of Morals* is that societies can be defined by the shared morality at a given moment in time. (2) Hart's reply in *Law, Liberty and Morality* is that it does not follow from this fact that this particular morality must be maintained in absolute form. (3) It will be argued that this reply can be understood as a restatement of one of his three secondary rules, namely the rules of change which he defended in *The Concept of Law*.

(1) Devlin suggested not only that societies have always based legislation on morality, but also that there is a theoretical connection between law and morality, both because a society means, by definition, the commonality of moral sentiments, and because societies would dissolve without the enforcement of popular morality for 'society is not something that

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<sup>31</sup> P. Devlin, 'The Enforcement of Morals', Liberty Fund Indianapolis, India, 2009, p. 7. See also: G. Dworkin, 'Devlin Was Right: Law and the Enforcement of Morality', William and Mary Law Review, Volume 40, issue, 3, 1999.

<sup>32</sup> P. Devlin, 'The Enforcement of Morals', Liberty Fund Indianapolis, India, 2009, p. 7.

<sup>33</sup> H. L. A. Hart, 'Law, liberty and morality', Stanford University Press, Stanford, 1963, p. 31.

<sup>34</sup> H. L. A. Hart, 'Law, liberty and morality', Stanford University Press, Stanford, 1963, p. 17-18.

<sup>35</sup> Hart also attacked Stephen, who he felt had already put forward much of the arguments proposed by Devlin. J. F. Stephen, 'Liberty, Equality, Fraternity', Liberty Fund, Indianapolis, 1993. Hart's attack on this point is also often based on a reformulation of his positivist stance. See among others: H. L. A. Hart, 'Law, liberty and morality', Stanford University Press, Stanford, 1963, p. 34 and further.

is kept together physically; it is held by the invisible bonds of common thought.’<sup>36</sup> Devlin argued that the morality that law enforces must be popular morality, which he understood as the reasonable beliefs of the larger part of society, excluding totally irrational beliefs such as that homosexuality caused earthquakes,<sup>37</sup> but including the belief that homosexuality is a moral perversion.<sup>38</sup>

(2) Hart denied his claim on three accounts. First, he argued that popular morality could survive even without it being enforced. He argued on the one hand, that even if laws did not codify a certain commonly shared belief or feeling, this common opinion was perfectly well capable of surviving. If homosexual conduct was not criminalized and punished, for example, society at large could still retain the idea that it was a morally corrupted act. The other way around, Hart argued that although a prohibition could lead to the abstention of certain conduct, this ‘contributes nothing to the general sense that these practices are morally wrong.’<sup>39</sup> Thus even if the connection between society and upholding popular morality is a necessary one, the connection to law (enforcement) is not. Second, he argued that there is no empirical evidence to suggest that societies who do not enforce popular morality dissolve. Hart attacked Devlin, who had compared actions against popular morality to treason, by holding that there is no evidence ‘to show that deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of society.’<sup>40</sup>

Finally, Hart defended the need for change, instead of preservation of popular morality, as society cannot only survive individual divergences from its prevalent morality, but profit from them.<sup>41</sup> Hart referred to Devlin’s position in which he ‘appears to move from the acceptable proposition that *some* shared morality is essential to the existence of any society to the unacceptable proposition that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society.’ Hart agreed with the first statement, as society could quite plausibly be seen as ‘a body of men who hold certain moral views in common. But the latter proposition is absurd. Taken strictly, it would prevent us saying that the morality of a given society had changed, and would compel us instead to say that one society had disappeared and another one taken its place. But it is only on this absurd criterion of what it is for the same society to continue to exist that it could be asserted without evidence that any deviation from a society’s shared morality threatens its existence.’<sup>42</sup>

(3) Why it is absurd to Hart to hold such views as Devlin did, he never made explicit. The most plausible suggestion is that it would conflict with one of his secondary rules. In *The Concept of Law*, Hart distinguished between primary and secondary rules. Primary rules are the laws and legal regulations as every society has them, which are different from state to state. Secondary rules are the necessary (non-legal) preconditions of every legal order. Hart specified three of these secondary rules: the rule of recognition, the rules of change and the rules of adjudication. The simplest form of a rule of change ‘is that which empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules.’<sup>43</sup> The rules of changes are necessary, Hart believed, to prevent societies from becoming ‘static’, that is, from merely

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<sup>36</sup> P. Devlin, ‘The Enforcement of Morals’, Liberty Fund Indianapolis, India, 2009, p. 10.

<sup>37</sup> P. Devlin, ‘The Enforcement of Morals’, Liberty Fund Indianapolis, India, 2009, p. VIII-X.

<sup>38</sup> Devlin also believed that it is rational for humans to live in communities. P. Devlin, ‘The Enforcement of Morals’, Liberty Fund Indianapolis, India, 2009, p. 25.

<sup>39</sup> H. L. A. Hart, ‘Law, liberty and morality’, Stanford University Press, Stanford, 1963, p. 68.

<sup>40</sup> H. L. A. Hart, ‘Law, liberty and morality’, Stanford University Press, Stanford, 1963, p. 50.

<sup>41</sup> H. L. A. Hart, ‘Law, liberty and morality’, Stanford University Press, Stanford, 1963, p. 71.

<sup>42</sup> H. L. A. Hart, ‘Law, liberty and morality’, Stanford University Press, Stanford, 1963, p. 51-52.

<sup>43</sup> H. L. A. Hart, ‘The Concept of Law’, Oxford University Press, New York, 1997, p. 95.

enforcing one set of primary rules without changing the laws over time.<sup>44</sup> This would be catastrophic to society, he argued, because changes in sentiments could not be reflected in the primary rules and laws could not adapt to new circumstances. From this perspective, it is clear why the suggestion that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society, would be absurd to Hart. This would lead to a static society and would make the rules of change redundant. Part of what Hart found ‘absurd’ in Devlin’s suggestions is that it would conflict with the very minimum principles for legal orders he spelled out as a positivist. It seems clear that Hart’s attack on Devlin was not merely inspired by the fact that societies *ought* not to remain static, but that this would be in violation of one of the pre-conditions of legal orders.

### 3.3 The rule of adjudication

This section will argue that another secondary rule, that of adjudication and the position of the judge in Hart’s positivist account of legal orders, was at stake in his disagreement with Devlin. Consequently, his views as a positivist again infused his liberal arguments. (1) Hart’s view on the judiciary in *The Concept of Law* and *Positivism and the Separation of Law and Morals* and (2) Fuller’s reaction in the *Positivism and Fidelity to Law* will be highlighted briefly. (3) Devlin suggestion that although laws might prohibit homosexual conduct, even in private, it should be left to the discretion of the jury to decide whether in specific cases, the rules should be enforced, will be contrasted with (4) Hart’s position in *Law, Liberty, and Morality*.

(1) In *The Concept of Law*, Hart regarded as one of the three secondary rules, the rule of adjudication. This rule was necessary to tackle the defect of ‘the *inefficiency* of the diffuse social pressure by which the rules are maintained. [] It is obvious that the waste of time involved in the group’s unorganized efforts to catch and punish offenders, and the smouldering vendettas which may result from self-help in the absence of an official monopoly of ‘sanctions’, may be serious.’<sup>45</sup> The rule of adjudication ensures that it is clear to all who has the power to decide over disputes, on what grounds, within which limits and to what extent. It is thus closely connected to the rule of recognition, which specifies that there must be an authoritative way to determine the outcome and application of rules in specific cases.<sup>46</sup>

In *Positivism and the Separation of Law and Morals*, Hart discussed at length the position of the judge. Two examples have become quite well known: that of the grudge informer and of a rule prohibiting vehicles into a public park. The latter example was used to discuss the matter of legal interpretation: what is a vehicle and what falls under its definition? Hart argued that in general, words, like vehicle, have some standard instances in which no doubt exists about their application.<sup>47</sup> ‘There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.’<sup>48</sup> Obviously, in these matters, judges need to interpret the rules, their aims, purposes and meaning and there can be discussion and indeed legitimate differences in the way rules are applied. But Hart suggests that this is only a discussion about the ‘correct’ way to interpret the rules, which he regards as inevitable; this is something different from

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<sup>44</sup> H. L. A. Hart, ‘The Concept of Law’, Oxford University Press, New York, 1997, p. 92.

<sup>45</sup> H. L. A. Hart, ‘The Concept of Law’, Oxford University Press, New York, 1997, p. 93.

<sup>46</sup> H. L. A. Hart, ‘The Concept of Law’, Oxford University Press, New York, 1997, p. 97.

<sup>47</sup> See also: F. Schauer, ‘A Critical Guide to vehicles in the park,’ *New York University Law Review*, vol 83, 1000, 2008.

<sup>48</sup> H. L. A. Hart, ‘Positivism and the Separation of Law and Morals’, *Harvard Law Review*, Vol. 71, No. 4, p. 607.

saying that judges have to take recourse to their private moral opinion to determine the right outcome of the case. Legal positivists have always argued for a closed legal order, in which judges cannot rely on extra-legal morality, such as their private opinion, to interpret laws.

The case of the grudge informer built on a famous example used by Gustav Radbruch,<sup>49</sup> which regarded a German woman during the Nazi period who had notified the local authorities about the anti-Nazi remarks her husband had made to her when returned home from the battle-front, who was then sentenced by a Nazi court.<sup>50</sup> After the war, the woman was charged with the illegal deprivation of her husband's liberty and she argued that she was obliged to do so under Nazi laws. However, the post-war court rejected her claim and argued that the statute on which she based the legitimacy of her actions 'was contrary to the sound conscience and sense of justice of all decent human beings.'<sup>51</sup> Hart, to the contrary, held that a law might be a law, even though it is a bad law. He did not so much oppose the punishment of the woman for her actions, but thought that it should not be a matter of judicial discretion to decide on the moral quality of laws and argued that such a conviction should have been based on a law. Although a retroactive law to this course was clearly an evil, it could be called the lesser of two evils. 'Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour. It would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems.'<sup>52</sup>

(2) Fuller disagreed with Hart on both points. Regarding the case of the grudge informer, although agreeing with Hart that the best solution might have been to enact a retroactive law, he argued that in truth, it was very dubious whether the Nazi laws could be called laws and be considered binding. He referred to the existence of secret laws, which were not published, were vague, unstable, etc.<sup>53</sup> These laws consequently failed to meet the minimum conditions he set out for legal orders. Consequently, the laws and the legal order as such failed to meet their goal, that is to provide action-guidance to German citizens. That is why Fuller disagreed with Hart's statement that although the provisions may have promoted morally perverted goals, they were still legal provisions. According to Fuller, the fact that the laws violated the 'inner morality' of the law meant that they could not be called laws or only partially so.

Against the suggestion of Hart that judges should settle cases only by deliberating on the true meaning or correct interpretation of a rule in a specific matter, instead of taking recourse to judge-made law, Fuller argued that there are a number of cases in which the distinction between the core and the penumbra is difficult to uphold and others in which there

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<sup>49</sup> G. Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)', *Oxford Journal of Legal Studies*, Vol. 26, No. 1 (2006).

<sup>50</sup> See on this topic amongst others: T. Mertens, 'Radbruch and Hart on the Grudge Informer: A Reconsideration', 15 *Ratio Juris* 186, 186 (2002). D. Dyzenhaus, 'The grudge informer case revisited', *New York University Law Review*, vol. 83, 1000, 2008.

<sup>51</sup> H. L. A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review*, Vol. 71, No. 4, p. 619.

<sup>52</sup> H. L. A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review*, Vol. 71, No. 4, p. 619.

<sup>53</sup> Fuller also thought the law in the case of the grudge informer had been incorrectly applied on the private domain by the Nazi court. 'This question becomes acute when we note that the act applies only to *public* acts or utterances, whereas the husband's remarks were in the privacy of his own home. Now it appears that the Nazi courts (and it should be noted we are dealing with a special military court) quite generally disregarded this limitation and extended the act to all utterances, private or public.' Is Professor Hart prepared to say that the legal meaning of this statute is to be determined in the light of this apparently uniform principle of judicial interpretation? L. L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart', 71 *Harv. L. Rev.* 630, 1957, p. 654.

is no 'right' or objectively justifiable answer. What, he asked, if vehicles were prohibited in the park, but 'local patriots wanted to mount on a pedestal in the park a truck used in World War II, while other citizens, regarding the proposed memorial as an eyesore, support their stand by the "no vehicle" rule?'<sup>54</sup> Would this fall within the core or the penumbra? What if, he continues, a rule made it a misdemeanor to sleep in any railway station and two persons were brought to a judge, a tramp who had brought his blanket and pillow to the station but had been arrested before he could catch sleep, and another person who, waiting for a delayed train, had dozed off?<sup>55</sup> Fuller's critique on Hart's envisaged proper role of the judiciary and the possibility to abstain from judge-made law, based on extra-legal morality, are of course explored more elaborately in Dworkin's work on hard cases.<sup>56</sup>

(3) Devlin denied principally that 'there is a private realm of morality into which the law cannot enter',<sup>57</sup> as the Millian harm-principle could not provide an adequate rule for separating the private from the public domain because it was impossible 'to settle in advance exceptions to the general rule or to define inflexibly areas of morality into which the law is in no circumstances to be allowed to enter.'<sup>58</sup> Devlin denied that there were places, such as the home, which could be principally excluded from the reach of laws. This, Devlin combined with the suggestion that there are no theoretical limits on the legislation against immorality and concluded that there were no necessary limits on legal orders.<sup>59</sup>

But Devlin did not believe that laws should be enforced at all times at the cost of anything. Devlin argued for the criminalization of homosexual conduct, because he felt that 'homosexuality is usually a miserable way of life and that it is the duty of society, if it can, to save any youth from being led into it. I think that that duty has to be discharged although it may mean much suffering by incurable perverts who seem unable to resist the corruption of boys. But if there is no danger of corruption,' he added, 'I do not think that there is any good the law can do that outweighs the misery that exposure and imprisonment causes to addicts who cannot find satisfaction in any other way of life. Punishment will not cure and because it is haphazard in its incidence I doubt if it deters.'<sup>60</sup>

Police forces, he suggested, may only restrictively enter the private domain and thus many instances of illegal conduct would pass unnoticed.<sup>61</sup> Neither, Devlin said, must the law always be enforced if illegal conduct was discovered. Rather, he argued, judges and juries are often quite hesitant, and rightly so, to convict people for illegal actions which were conducted in private without causing harm.<sup>62</sup> Consequently, Devlin suggested that although laws, codifying popular morality might criminalize homosexual conduct, juries, also voicing popular morality, might in concrete circumstances choose not to convict perpetrators.

(4) Hart never targets this suggestion of Devlin directly, but does refer to the chilling effect that such a practice might have because people do not know on beforehand whether they will be convicted or not. Moreover, Hart rejects the approach taken by Devlin on the ground that it would lead to legal provisions which are left unenforced most of the time, either because the criminal conduct is not detected or because the law is not applied, which he found

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<sup>54</sup> L. L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart', 71 Harv. L. Rev. 630, 1957, p. 663.

<sup>55</sup> L. L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart', 71 Harv. L. Rev. 630, 1957, p. 664.

<sup>56</sup> R. Dworkin, 'Hard Cases', Harvard Law Review, Vol. 88, No. 6, Apr., 1975.

<sup>57</sup> P. Devlin, 'The Enforcement of Morals', Liberty Fund Indianapolis, India, 2009, p. IX-X.

<sup>58</sup> P. Devlin, 'The Enforcement of Morals', Liberty Fund Indianapolis, India, 2009, p. 13.

<sup>59</sup> P. Devlin, 'The Enforcement of Morals', Liberty Fund Indianapolis, India, 2009, p. 14.

<sup>60</sup> P. Devlin, 'The Enforcement of Morals', Liberty Fund Indianapolis, India, 2009, p. V.

<sup>61</sup> P. Devlin, 'The Enforcement of Morals', Liberty Fund Indianapolis, India, 2009, p. 18.

<sup>62</sup> P. Devlin, 'The Enforcement of Morals', Liberty Fund Indianapolis, India, 2009, p. 21.

undesirable.<sup>63</sup> More importantly, he targets Devlin's suggestion on the basis that it would lead to the situation in which judges or juries would take recourse to their own moral sentiment to determine the outcome of the case, instead of applying the legal regulation. Hart does so by referring to the case of *Shaw v. Director of Public Prosecutions*, which regarded Shaw's publication of nude photographs of prostitutes as advertisement in the *Ladies Directory*, for which he was charged for publishing an obscene article, living on the earnings of prostitutes and for conspiring to corrupt public morals through the publication. Hart cites the following statement of one of the judges in length.

'When Lord Mansfield, speaking long after the Star Chamber had been abolished, said that the Court of King's Bench was the *custos morum* of the people and had the superintendency of offences *contra bonos mores*, he was asserting, as I now assert, that there is in that Court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society. Let me take a single instance to which my noble and learned friend, Lord Tucker, refers. Let it be supposed that at some future, perhaps, early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event, then we should no longer do her reverence. But I say that her hand is still powerful and that it is for Her Majesty's Judges to play the part which Lord Mansfield pointed out to them.'<sup>64</sup>

Hart criticizes this conception of the judges as the *custos morum* of the people, on the basis of which they could act independently of the legal rules enacted by parliament and substitute or supplement parliamentary laws, on the basis of moral considerations, by judge-made laws. 'The particular value which they sacrificed is the principle of legality which requires criminal offences to be as precisely defined as possible, so that it can be known with reasonable certainty beforehand what acts are criminal and what are not. As a result of *Shaw's* case, virtually any cooperative conduct is criminal if a jury consider it *ex post facto* to have been immoral.'<sup>65</sup> Like in *Shaw's* case, Devlin's proposal would result in a wide discretion of judges and juries, marginalize the position of the legislator and facilitate judge-made law, devised on the basis of their private moral sentiments.

### 3.4 Conclusion

So far the following has been shown. (1) That a part of the debate between Hart and Devlin was not so much about whether immoral conduct *ought* to be criminalized, but whether it is necessary to do so. Furthermore, Devlin's suggestions conflict with Hart's positivist writings on the (2) necessity for societies to have rules that allow for change in their set of primary rules and (3) the position of the judge and the rejection of judge-made law. These statements do not prove the point that Hart believed in the intrinsic (necessary) limitations of the law. Argument (1) only proves that Hart believed that it was not necessary

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<sup>63</sup> He seems for example critical about the American practice on 'the inclusion among their statute of much legal lumber in the form of penal provisions no longer enforce'. H. L. A. Hart, 'Law, liberty and morality', Stanford University Press, Stanford, 1963, p. 7.

<sup>64</sup> House of Lords, *Shaw Vs. Director of Public Prosecutions*, 1961.  
<<http://www.legalcrystal.com/judgements/description/945161>>.

<sup>65</sup> H. L. A. Hart, 'Law, liberty and morality', Stanford University Press, Stanford, 1963, p. 12.

to enforce moral sentiments, not that it was necessary to abstain from it. Argument (2) holds that it is impossible for societies to strictly enforce and maintain their moral sentiments at a particular moment in time, but not that it can not (temporarily or partially) enforce popular morality. Argument (3) goes against the specific way in which Devlin thought the prohibition of homosexual conduct should be enforced, but there are many other ways to do so which might be in compliance with Hart's minimum standards of legal orders. The next section will proceed the argument that Hart did in fact accept a number of intrinsic limits on legal orders.

#### **4. Privacy as intrinsic limit on legal orders**

The following three sub-sections will argue that Hart did actually propose a number of necessary, intrinsic limits to legal orders. It will be suggested that these principles would nowadays be approached as matters of privacy. It is important to stress that it is not the goal of this chapter to give an exhaustive overview of different privacy theories, nor to subscribe to one or another approach of privacy protection. Rather, it shows that there are intrinsic limits on laws and legal orders in Hart's work, and that these limits are similar to those proposed by scholars defending the right to privacy. Three examples will be given, in order to illustrate this point.<sup>66</sup> In the three following sections, the following points will be made. (1a) In certain privacy theories, the private domain is described as providing a place for people to discuss, experience or hide the 'necessities of life' and (1b) that the respect for these necessities provides the first intrinsic limit on legal orders in Hart's writings (section 4.1). (2a) Respect for the informational privacy is seen by many as a precondition for the autonomy of citizens and (2b) in Hart's system, the autonomous citizen is a minimum condition for legal orders (section 4.2). (3a) Decisional privacy is often connected to the capacity of humans to pursue their preferred form of positive freedom and (3b) the respect for the decisional capacity of humans is a minimum condition for legal orders in Hart's writings (section 4.3).

##### **4.1 Necessities of life**

(1a) One of the theories that has been historically influential is that the private domain functions as a place where the 'necessities of life' can be hidden. For centuries, man has been regarded as half-god half-animal, with the 'divine' capacities of rationality, speech and moral reflection and the natural necessity to eat, drink, sleep, defecate and, arguably, have sex. While the public domain was dominantly reserved for the former functions of human life, the latter were banned to the private domain. In public, men could be free, while in private, they were unfree, bound by the necessities of their animal descend.<sup>67</sup> Hannah Arendt, among others, has tried to provide a reformulation of this aspect of privacy, in her thoughts on the political action.<sup>68</sup> In this philosophy, the household is regarded as pre-political, as a sphere of bare life, where justice and laws have no meaning as justice is only relevant were man has a choice to do or abstain from certain conduct.<sup>69</sup>

Although the idea of an absolutely separated sphere is no longer feasible, in privacy literature, the principled separation of the private domain from the public, until reasons are provided that legitimate interferences (for example signals to suggest the use of violence),

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<sup>66</sup> These relate to the tripartite division of privacy theories made in: B. Roessler, 'The Value of Privacy', Polity Press, Cambridge, 2005, p. 9.

<sup>67</sup> Among others, such a formulation of the private sphere may be found in Aristotle's *Politica*. Aristotle, 'The Politics and The Constitution of Athens', Cambridge University Press, Cambridge, 1996.

<sup>68</sup> H. Arendt, 'The Human Condition', The University of Chicago press, Chicago, 1998, p. 30

<sup>69</sup> H. Arendt, 'The Human Condition', The University of Chicago press, Chicago, 1998, p. 34



reserves a dominant position.<sup>70</sup> This branch of physical privacy can also be found in most legal orders, in which it is protected as a matter of bodily integrity and the sanctity of the home. For example, the European Convention on Human Rights provides that everyone has the right to respect for his home and that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>71</sup> It should also be recalled that in most if not all legal orders, there are laws that ban bodily activities, such as sleep, defecation and sex, from the public domain.<sup>72</sup>

A private domain, such as the house, separated from the public domain where laws and justice are applied, according to this branch of privacy theory, is essential because it is necessary to retract bodily actions from rules which presuppose choice. It might perhaps be argued that there is no logical connection between the necessities of life and the respect for privacy. Perhaps theoretically, one could envisage a society in which all defecation, eating, drinking and sex were done in public and legally allowed. It is, however, a fact of life and a historical (and perhaps social) datum that such a society has never existed. Even in the most communal societies, sexual activities are often committed in private, in the dark and in silence, and even in societies where communal defecation is accepted, there separated locations reserved for this practice and there are social norms which guarantee at least the suggestion of a personal space, such as pretending to not hear the other while he is having sex or defecating.<sup>73</sup> The public domain is the sphere of solidarity and choice; there are certain natural drifts which are not rational, which humans exercise no control over. These are consequently beyond the reach of law, which presupposes choice and a free will.

(1b) One of Fuller's minimum qualities of legal orders was that laws must be followable. For Hart too, this element played an important role. In his *Concept of Law*, he specified, besides the three secondary rules, a couple of minimum conditions of legal orders, namely that laws must be general, that legal orders must contain restrictions on the free use of violence, theft and deception, 'to which human beings are tempted but which they must, in general, repress, if they are to coexist in close proximity to each other',<sup>74</sup> and that in general, the laws must be obeyed.<sup>75</sup> This latter point is reformulated when Hart argues that there are 'two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials. The first condition is the only one which private citizens *need* satisfy: they may obey each 'for his part only' and from any motive whatever; though in a healthy society they will in fact often accept these rules as common standards of behavior and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution.'<sup>76</sup>

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<sup>70</sup> See for a full oversight of the different privacy theories: D. J. Solove, 'Understanding Privacy', Harvard University Press, Cambridge, 2008.

<sup>71</sup> Article 8 ECHR.

<sup>72</sup> See also Article 2 & 3 ECHR.

<sup>73</sup> See among others: S. Van der Geest, 'Toilets, privacy and perceptions of dirt in Kwahu-Tafo'. In: S. Van der Geest and N. Obirih-Opareh (eds), 'Toilets and Sanitation in Ghana: An urgent matter', Institute of Scientific and Technological Information (INSTI), CSIR, Accra.

<sup>74</sup> H. L. A. Hart, 'The Concept of Law', Oxford University Press, New York, 1997, p. 91.

<sup>75</sup> H. L. A. Hart, 'The Concept of Law', Oxford University Press, New York, 1997, p. 92.

<sup>76</sup> H. L. A. Hart, 'The Concept of Law', Oxford University Press, New York, 1997, p. 116-117.

Devlin, as has already been explained, argued for the criminalization of homosexual conduct, but did not feel that the provisions should be enforced at the cost of anything. Hart had difficulties with this approach, because it would mean that legal regulations would in many instances not be obeyed. This critique relied on the specific way Devlin suggested to enforce such a provision. But on a more abstract level, without a victim and without the state being able to constantly control the private domain, it is unlikely that much of the homosexual 'offenses' would come to the attention of the police. It is very unlikely that if person A and B would conduct illegal homosexual practices in private, one of them would go to the police as he would admit to illegal conduct himself. Moreover, as a matter of proof, in the unlikely circumstance that person A did go to the police, person B could simply deny that such practice had taken place and the police would have insufficient evidence for subsequent actions. As a consequence, laws would remain mostly a dead letter.

There is another reason to believe that such regulations would not be obeyed, namely that it is impossible for people to successfully repress their natural instincts. 'Unlike sexual impulses,' Hart suggests, 'the impulse to steal or to wound or even kill is not, except in a minority of mentally abnormal cases, a recurrent and insistent part of daily life. Resistance to the temptation to commit these crimes is not often, as the suppression of sexual impulses generally is, something which affects the development or balance of the individual's emotional life, happiness, and personality'.<sup>77</sup> On other occasions in *Law, Liberty, and Morality*, Hart distinguishes between the enforcement of morals and the enforcement of sexual morality and made reference to the 'difficulties involved in the repression of sexual impulses'.<sup>78</sup>

Although Hart stressed that internalisation of rules and the coercion of laws through chilling effects are not only a valuable, but an indispensable aspect of law enforcement, with regard to sexual morals, he questioned their beneficial effects.<sup>79</sup> It should be underlined that, for example, a rule only validating monogamous, heterosexual marriages is different for two reasons. One, it does not regard the natural inclination as such, but only the way in which it is publicly recognized. Two, it leaves open one (very common) way of publicly recognizing a sexual relationships. This is of course different for the prohibition of homosexual conduct, which does regard the restriction of sexual instincts as such and does not (realistically) leave open a legitimate way to explore and use sexual freedom.<sup>80</sup>

As a substantive part of the population has homosexual inclinations, and these inclinations cannot be suppressed. This conflicts with Hart's requirement that in a valid legal order, the laws must be followed by most of the people most of the time, as a prohibition of homosexual conduct would lead to significant disobedience. This also holds true for the other 'necessities of life'. A law prohibiting the intake of water and other fluids would surely not be obeyed by the bulk of the people most of the time. People would rather risk punishment than choose a certain death. It would also be clearly absurd, if a society must, as a minimum condition, pose restrictions on violence and murder, but at the same time would be at liberty to effectively kill of its entire population.

The necessities of life may thus safely be called one of the intrinsic limits of legal orders in Hart's philosophy. Again, it should be stressed that there is no absolute connection between this fact and the respect for the private domain. Theoretically, it would be possible to say that the intake of fluids is prohibited everywhere (including the private domain), except for in the central park. Even if this were a feasible way to formulate rules, the fact would

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<sup>77</sup> H. L. A. Hart, 'Law, liberty and morality', Stanford University Press, Stanford, 1963, p. 22.

<sup>78</sup> H. L. A. Hart, 'Law, liberty and morality', Stanford University Press, Stanford, 1963, p. 22.

<sup>79</sup> H. L. A. Hart, 'Law, liberty and morality', Stanford University Press, Stanford, 1963, p. 43.

<sup>80</sup> See for similar remarks: H. L. A. Hart, 'Law, liberty and morality', Stanford University Press, Stanford, 1963, p. 43.

remain that people would surely be inclined to break the law in private areas over which the state has limited control and the state would have to pursue the impossible task of subjecting the private domain in total to public scrutiny to avoid mass disobedience.<sup>81</sup> Also, for sexual activities, it would be dubious whether people would accept the rule to only copulate in the central park. Given the fact that legal positivists determine whether a law is a law not on the basis of moral considerations, such as natural law philosophers propose, but on the basis of the question of whether the law is followed and respected or not, laws can simply not lay down severe restriction with respect to the necessities of life nor fully subsume the private sphere.

## 4.2 Individual autonomy

(2a) One of the constant arguments in privacy theory is the suggestion that the protection of privacy is necessary for the development of autonomous individuals. Already Mill, in the wake of Humboldt, thought the state should respect certain limits in order to allow every individual to develop his personal identity to the fullest. This was not only essential to the personal happiness of the citizens, but the diversity in characters and pluriformity in opinions was considered a necessary precondition for prosperous and thriving societies. Humboldt, for example, suggested, that the true end of man ‘is the highest and most harmonious developments of his powers to a complete and consistent whole. Freedom is the first and indispensable condition which the possibility of such a development presupposes; but there is besides another essential – intimately connected with freedom, it is true – a variety of situations’.<sup>82</sup> Mill, although rephrasing this ideal in utilitarian terms, admitted ‘it must be utility in the largest sense, grounded on the permanent interest of man as a progressive being. Those interests, I contend, authorize the subjection of individual spontaneity to external control, only in respect to those actions of each which concern the interest of other people.’<sup>83</sup>

Theories that link the respect for privacy to the development of autonomous individuals are dominant in the current privacy debate. They are defended predominantly by liberal scholars, who focus on the notion of control and informed consent of the individual. For example, Beate Roessler has built a theory around the argument that respect ‘for a person’s privacy is respect for her as an autonomous subject.’<sup>84</sup> The suggestion in these theories is that without privacy, there is no possibility for the subject to develop his own identity. If a person is constantly subjected to and scrutinized by legal and societal norms, he becomes indoctrinated and follows the rules and laws in a sheep-like manner. Only when the individual is can freely experiment, develop his ideas and engage in self-reflection, unhindered or controlled by third parties, can the individual develop his personal identity and become fully autonomous.<sup>85</sup>

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<sup>81</sup> Even if, with a reference to Hart’s remarks about the nazi laws, one might argue that laws could be called laws if they lead to the mass death of subjects, there are limits to these laws. The rule ‘It is prohibited to drink fluids’, including the private domain, must be monitored and enforced with some rigor. This needs to be done by the public officials, who by necessity, must be alive to enforce the rules. Thus, the rule must be ‘Except for officials, it is prohibited to drink fluids’. Even if such rule would not conflict with Hart’s minimum demand of laws as generally formulated, it would be conflicting with Hart’s conceptualization of legal orders to only have public officials and no citizens.

<sup>82</sup> W. Von Humboldt, *The limits of State Action*, Cambridge University Press, 1969, p.16.

<sup>83</sup> J.S. Mill, ‘On Liberty and other writings’, Cambridge University Press, Cambridge, 2009, p. 14.

<sup>84</sup> B. Roessler, ‘The Value of Privacy’, Polity Press, Cambridge, 2005, p. 117.

<sup>85</sup> Critical about the relationship between autonomy and privacy is among others: E. L. Beardsley, ‘Privacy: Autonomy and selective disclosure. In: J. R. Pennock & J. W. Chapman (eds.) *Privacy*, Atherton Press, New York, 1971.

This focus on control and autonomy has been predominantly, though not exclusively, developed in privacy theories that focus on the processing of and control over personal information. This entails the possibility of ‘controlled self-presentation and self-disclosure’, forms of reputation management and the selection of those persons having access to certain personal details. Such theories take as presumption the right or moral claim of the individual to control, limit and restrict the use of personal data. Alan Westin has for example defined privacy as the claim of individuals ‘to determine for themselves when, how, and to what extent information about them is communicated to others.’<sup>86</sup> This is linked, according to Westin, to the idea that persons should be able to shape, maintain and alter their identity in different groups in different ways.<sup>87</sup> ‘The individual’s sense that it is he who decides when to “go public” is a crucial aspect of his feeling of autonomy. Without such time for incubation and growth, through privacy, many ideas and positions would be launched into the world with dangerous prematurity [].’<sup>88</sup> Consequently, a double correlativity is coined, privacy is necessary for individual autonomy and individual autonomy is necessary for a well-functioning democracy and a flourishing society.

(2b) The same concerns are prominent in the work of Hart. It should be recalled that in his debate with Fuller, Hart did not oppose the principles of the rule of law. He did argue against Fuller that these principles should not be regarded as moral standards, but as instruments to an effective legal order.<sup>89</sup> It is well known that Hart sometimes made bold statements about the necessity of respecting the autonomy or person’s in legal orders. One of the more salient remarks is built on the earlier quoted suggestion of Hart, that legal orders have two minimum conditions, namely that most of the private citizens obey the primary rules most of the time and that the secondary rules must be effectively accepted as common public standards of official behavior by its officials, who appraise critically their own and each other’s deviations as lapses.<sup>90</sup> With regard to the latter aspect, which Hart calls the internal point of view, he adds that in an ‘extreme case the internal point of view with its characteristic normative use of legal language (‘This is a valid rule’) might be confined to the official world. In this more complex system, only officials might accept and use the system’s criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.’<sup>91</sup>

Apart from this rhetoric, Hart did actually accept a number of preconditions safeguarding the autonomy of individuals as intrinsic limits of legal orders. First of all, it must be concluded that as a minimum, state officials must retain some sort of autonomy and reflexive understanding of the primary rules and secondary rules and be able to critically appraise their own and each other’s behavior. It also follows from the rules of change that there must be at least one person or a group that is capable of grasping the essence of the primary rules at a given moment in time, has an understanding of the changes occurring in society and has the capacity to change the rules accordingly. But it seems to follow from his discussion with Devlin, that Hart thought that there should actually be a quite substantial group with a different opinion than the *communis opinio*, in order to be able to prevent the moral community from becoming static. Similarly, it follows from the rule of adjudication

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<sup>86</sup> A. F. Westin, ‘Privacy and freedom’, Lowe & Brydone, London, 1967, p.

<sup>87</sup> Reference is often made to: E. Goffman, *The presentation of self in everyday life*, Penguin Books, London, 1990.

<sup>88</sup> A. F. Westin, ‘Privacy and freedom’, Lowe & Brydone, London, 1967, p.

<sup>89</sup> Famously, he compared it to the art of poisoning, and begged the question whether efficiently murdering a person could be truly called the inner morality of poisoning. H. L. A. Hart, ‘The Morality of Law by Lon L. Fuller’, *Harvard Law Review*, Vol. 78, No. 6 (Apr., 1965).

<sup>90</sup> H. L. A. Hart, ‘The Concept of Law’, Oxford University Press, New York, 1997, p. 116-117.

<sup>91</sup> H. L. A. Hart, ‘The Concept of Law’, Oxford University Press, New York, 1997, p. 117.

that there must be a group of people which understands the meaning and essence of the primary rules and are capable of applying them to specific cases. They cannot merely act in a sheep-like manner by applying rules on cases one on one. Public officials must consequently be able to critically reflect both on the primary and on secondary rules of the legal order.

Second, it must be recalled that Hart suggested in *The Concept of Law* that as another minimum condition, legal orders must contain rules restricting the free use of violence, theft and deception. This, to Hart, is necessary because people living together are tempted to do those things and must repress those temptations if they want to coexist in close proximity to each other. Where Hart bases his suggestion on never becomes clear. Somewhat more elaborate is his remark in *Social Solidarity and the Enforcement of Morality*, in which he revisits Devlin's argument that societies must by necessity enforce morality. Hart here suggests that 'the common morality which is essential to society, and which is to be preserved by legal enforcement, is that part of its social morality which contains only those restraints and prohibitions that are essential to the existence of any society of human beings whatever. Hobbes and Hume have supplied us with general characterizations of this moral minimum essential for social life: they include rules restraining the free use of violence and minimal forms of rules regarding honesty, promise keeping, fair dealing, and property.'<sup>92</sup> Although he feels that Devlin does not refer to this kind of morality, Hart does accept that the respect for such a common morality as a minimum quality of legal orders.

Hart does not elaborate further on this point, but interestingly, in contrast to the remark in *The Concept of Law*, he includes elements of private law, such as property, honesty, fair dealing and especially promise keeping, which needless to say, is the basis of all contract law. It is not the place here to answer the question whether it is absolutely impossible to speak of someone being 'honest' or 'fair' if he is a sheep-like, non-autonomous person, though it seems clear that these terms are difficult to reconcile. The protection of promise keeping, however, seems to ascertain that Hart does require some minimum form of autonomy. To promise one sack of grain in return of 100 dollar requires individual autonomy, the capacity to reflect upon one's desires and to commit to certain terms and conditions of negotiation. The protection of respect for promise keeping presupposes the capacity of individuals to act autonomously, as surely laws cannot go so far as to prescribe in detail what individuals must promise. Enabling private contracts and protecting promise keeping is essentially different from the prohibition of murder and theft. The latter prevents certain actions and restricts the choices of individuals, the former not only facilitates the autonomous dealing of private citizens, it presupposes it.

Third and finally, Hart has written numerous works in the area of criminal law, especially about attribution and responsibility and the requirement of *mens rea*. It should be noted that this issue was also on Hart's mind when attacking Devlin. In *Law, Liberty, and Morality*, he opposed the criminalization of homosexual conduct because it did no harm to others. Hart, as a utilitarian, had in other writings already suggested that he preferred punishment that had regard for the effects and denounced with force retributive criminal theories. In *Law, Liberty, and Morality*, he argued not only against retributive theories but held furthermore that a 'theory which does not attempt to justify punishment by its results, but simply as something called for by the wickedness of a crime, is certainly most plausible, and perhaps only intelligible, where the crime has harmed others and there is both a wrongdoer and a victim.'<sup>93</sup> He continues that even the most faithful adherents of utilitarianism were inclined to feel that the responsables for the Auschwitz and Buchenwald crimes should be punished because what they did was wrong and not merely because of the beneficial future

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<sup>92</sup> H. L. A. Hart, 'Social Solidarity and the Enforcement of Morality', *The University of Chicago Law Review*, Vol. 35, No. 1 (Autumn, 1967), p. 9-10.

<sup>93</sup> H. L. A. Hart, 'Law, liberty and morality', Stanford University Press, Stanford, 1963, p. 59.

consequences of such punishment. 'But,' Hart stresses, 'the strength of this form of retribution is surely dependent on there being a victim as well as an offender; for where this is the case, it is possible to conceive of the punishment as a measure designed to prevent the wrongdoer prospering when his victim suffer or have perished.'<sup>94</sup>

It should be noted that although Hart had on many occasions opposed retributive theories, his argument here is not only about the best possible system of criminal punishment, but about the basic legitimacy of it. Hart argues that in the case of homosexual conduct, retributive theories which propose to punish people merely on the basis of a violation of the common moral sentiment, not on the basis of revenge for some harm inflicted by them, what remains is 'the implausible claim that in morality two blacks make a white: that the evil of suffering added to the evil of immorality as its punishment makes a moral good'.<sup>95</sup> Consequently, Hart's argument is that retributive theory applied on sexual morals is not only objectionable, but is totally without foundation and indeed unintelligible. This is not yet to say that Hart would argue that legal orders cannot, as a matter of fact, apply such a system of punishment in their criminal law, but the argument does transcend the debate about the most appropriate foundation for criminal law and punishment. In his works on criminal law, there are many arguments to be found which suggest that Hart attached great weight to the victim-requirement, the concept of responsibility and *mens rea* in criminal systems. These concepts are of course linked to 'a group of other protections (e.g. against retroactive, secret, and vague laws) that are afforded by the ideal known as the rule of law. It is through this ideal that the mental element in crime is connected with individual freedom.'<sup>96</sup>

Hart, in writings on criminal law, proposed as a minimum for criminal punishment, that there must be some element of responsibility, accountability or guilt for the harm inflicted. The autonomous person, capable of choice and responsible for his own actions, presupposes that law must not only see humans as mere Cartesian automata, who may be directed through stimuli and incentives, but as responsible agents capable of and accountable for their own choices. Hart, to this course, suggests that we 'must cease to regard the law simply as a system of stimuli goading the individual by its threats into conformity. [] Consider the law not as a system of stimuli but as what might be termed a *choosing* system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways. [T]he conception of the law simply as goading individuals into desired courses of behavior is inadequate and misleading; what a legal system that makes liability generally depend on excusing conditions [such as ignorance or insanity] does is to guide individuals' choices as to behavior by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose.'<sup>97</sup>

Consequently, criminal law and punishment must not only be seen as giving stimuli or incentives for individuals, they must as a minimum enable and respect the choice of individuals, although it might still try to influence that choice. Individuals must retain a form of autonomy and some control over their own lives to possibly be responsible for a criminal act of have a 'guilty mind'. This point is stressed again when, in his essay *Problems of Philosophy of Law* for the Encyclopedia of Philosophy, Hart writes about the rule of law and emphasizes that these 'requirements and the specific value which conformity with them imparts to laws may be regarded from two different points of view. On the one hand, they maximize the probability that the conduct required by the law will be forthcoming, and on the

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<sup>94</sup> H. L. A. Hart, 'Law, liberty and morality', Stanford University Press, Stanford, 1963, p. 59-60.

<sup>95</sup> H. L. A. Hart, 'Law, liberty and morality', Stanford University Press, Stanford, 1963, p. 60.

<sup>96</sup> J. Gardner, 'Introduction', p. xxxvi. In: H. L. A. Hart, 'Punishment and responsibility: essays in the philosophy of law', Oxford University Press, Oxford, 2008.

<sup>97</sup> H. L. A. Hart, 'Legal responsibility and excuses', p. 44. H. L. A. Hart, 'Punishment and responsibility: essays in the philosophy of law', Oxford University Press, Oxford, 2008.

other hand, they provide individuals whose freedom is limited by the law with certain information and assurances which assist them in planning their lives within the coercive framework of the law. This combination of values may be easily seen in the case of the requirements of generality, clarity, publicity and perspective operation. For the alternative to control by general rules of law is orders addressed by officials to particular individuals to do or to abstain from particular actions; and although in all legal systems there are occasions for such particular official orders, no society could efficiently provide the number of officials required to make them a main form of social control.<sup>98</sup>

Hart thus argues that such rules of law are not only instrumental to efficient law enforcement and coercion, they are also a minimum quality for legal orders because without any understanding on the part of its citizens about the purpose and essence of the rules, it would be undoable to enforce the law. Moreover, respecting a minimum form of autonomy is essential to the legal order seen as a *choosing* system, in which individuals can find out, in general terms at least, the rules that apply to them and their conduct and incorporate these matters in their decisions. Consequently, Hart did not only believe that the respect for the private sphere and the private opinions of individuals is essential for citizens to be or become autonomous and independent, as discussed in the previous section, he also makes clear that the autonomy of citizens is a precondition for a legal order.

### 4.3 Positive freedom

(3a) A third and final example of approaches to privacy might be found in theories that focus on what is commonly called 'decisional privacy'. It relates to the freedom not so much to control certain aspects of one's life, but to engage in acts, to exert a form of positive freedom. This form of privacy may be found in many legal orders and different branches of law. The classic example is the case of *Roe v. Wade*, in which the United States Supreme Court decided that the right to abortion was protected as a part of the right to privacy under the American constitution. Judge Blackmun, on behalf of the Court, held that although the constitution did not explicitly mention any right of privacy, in previous cases the Court had been prepared to recognize a right of personal privacy by reference to the first, fourth, fifth, ninth and tenth amendment. 'These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage; procreation; contraception; family relationships; and childrearing and education. This right of privacy [] is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.'<sup>99</sup>

Decisional privacy is not only reflected in many legal traditions, it is also well established in privacy literature, although there, it is not so much linked to specific acts, such as abortion, procreation and childrearing, but to the positive freedom of human agents as such. Already Warren and Brandeis formulated 'the right to privacy, as a part of the more general right to the immunity of the person, - the right to one's personality.'<sup>100</sup> This has spurred the question what privacy protects, separate from other commonly accepted rights, as it can be argued that it is through freedom of speech, control over property and right to vote, amongst others, that a person experiences his individuality and develops his personality. The

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<sup>98</sup> H. L. A. Hart, 'Problems of Philosophy of Law', p. 274. In: P. Edwards (ed), 'The encyclopedia of philosophy, Vol. 5-6 Logic to psychologism', Macmillan, New York, 1972.

<sup>99</sup> Case references have been excluded from the citation. Supreme Court of the United States, 410 U.S. 113, *Roe v. Wade*, No. 70-18 Argued: December 13, 1971 --- Decided: January 22, 1973.

<[http://www.law.cornell.edu/supct/html/historics/USSC\\_CR\\_0410\\_0113\\_ZO.html](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0410_0113_ZO.html)>.

<sup>100</sup> S. D. Warren & L. D. Brandeis, 'The right to privacy', *Harvard Law Review*, Vol. 4, No. 5, p. 207.

suggestion in this respect is that the right to privacy is linked to the right of a person as a person. Stanley I. Benn has for example argued ‘that a general principle of privacy might be grounded on the more general principle of respect for persons. By a *person* I understand a subject with a consciousness of himself as agent, one who is capable of having projects, and assessing his achievements in relation to them. To *conceive* someone as a person is to see him as actually or potentially a chooser, as one attempting to steer his own course through the world, adjusting his behavior as his apperception of the world changes, and correcting course as he perceives his errors.’<sup>101</sup>

The damage suffered from a privacy violation lies both in ignoring the wishes of a person as rational chooser and in undermining his capacity to be a rational chooser, as the world around him changes without his knowledge or consent. Benn refers extensively to the dangers of surveillance, as this both violates a person’s wish to keep matters private, annuls zones of unfettered creation and experiment and alters the world around the person without his knowledge. For example, Benn suggests, covert observation or spying is ‘objectionable because it deliberately deceives a person about his world, thwarting, for reasons that *cannot* be his reasons, his attempts to make a rational choice.’<sup>102</sup> It is important to note that the right to privacy in this sense is not so much seen in terms of the effective control and autonomy that a person can assert, as is prominent in informational privacy. The respect for decisional privacy is respecting as person as a person, as an agent engaging in certain activities and pursuing forms of positive freedom.<sup>103</sup>

(3b) Hart, like Fuller and Devlin for that matter, did not reserve a special position for the protection of individual, subjective rights. Hart believed that utilitarianism and fundamental rights were principally at odds.<sup>104</sup> In his essay *Utilitarianism and Natural Rights*, for example, he referred to the difference between Bentham, who argued fervently against the existence of pre-legal rights, and Mill, who thought they could be compatible with utilitarianism. Hart believed the latter ‘was mistaken, for in the last resort there is an unbridgeable gap between pure Unitarianism, for which the maximization of the total aggregate general welfare or happiness is the ultimate criterion of value, and a philosophy of basic human rights, which insists on the priority of principles protecting, in the case of each man, certain aspects of individual welfare and recognizing these as constraints on the maximizing aggregative principle of Utilitarianism.’<sup>105</sup>

Although Hart objected to pre-legal rights, Hart did believe societies have to respect citizens’ rational capacity and ability to pursue forms of decisional freedom. In his debate with Devlin, Hart made two important statements. (1) Societies ought not to legislate on the basis of morality. (2) The private domain has a separate position from the public domain. Upon this latter point, Devlin had referred to Mill’s own struggle with the question of defining harm. Mill suggested that societies might have a legitimate interest to regulate certain public indecencies, private actions such as suicide and actions conducted in private, such as heavy drinking, as this might have effects on public behavior, such as with alcohol infused violence. In similar vein, Devlin suggested that it is not theoretically possible to distinguish the private from the public, not only because private actions might have effects on other persons, but also because it might influence society as a whole. ‘You may argue that if a man’s sins affect only himself it cannot be the concern of society. If he chooses to get drunk

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<sup>101</sup> S. I. Benn, *Privacy, Freedom, and Respect for Persons*, p. 8-9. In: J. R. Pennock & J. W. Chapman (eds.) *Privacy*, Atherton Press, New York, 1971

<sup>102</sup> S. I. Benn, *Privacy, Freedom, and Respect for Persons*, p. 10. In: J. R. Pennock & J. W. Chapman (eds.) *Privacy*, Atherton Press, New York, 1971.

<sup>103</sup> See further on this point: S. I. Benn, ‘A theory of freedom’, Cambridge University Press, Cambridge, 1988.

<sup>104</sup> H. L. A. Hart, ‘Between Utility and Rights’, *Columbia Law Review*, Vol. 79, No. 5 (Jun., 1979).

<sup>105</sup> H. L. A. Hart, ‘Shell Foundation Lectures, 1978-1979 Utilitarianism and Natural Rights’, 53 *Tul. L. Rev.* 663, p. 670.



every night in the privacy of his own home, is any one except himself the worse for it? But suppose a quarter or a half of the population got drunk every night, what sort of society would it be? You cannot set a theoretical limit to the number of people who can get drunk before society is entitled to legislate drunkenness.’<sup>106</sup>

Hart, in *Law, Liberty, and Morality*, held that the recognition of individual liberty as a value involves, ‘as a minimum, acceptance of the principle that the individual may do what he wants, even if others are distressed when they learn what it is that he does – unless, of course, there are other good grounds for forbidding it. No social order which accords to individual liberty any value could also accord the right to be protected from distress thus occasioned.’<sup>107</sup> He added that the regulation of public indecencies must not be confused with moral-based legislation. ‘Sexual intercourse between husband and wife is not immoral, but if it takes place in public it is an affront to public decency. Homosexual intercourse between consenting adults in private is immoral according to conventional morality, but not an affront to public decency, though it would be both if it took place in public. But the fact that the same act, if done in public, could be regarded both as immoral and as an affront to public decency must not blind us to the difference between these two aspects of conduct and to the different principles on which the justification of their punishment must rest.’<sup>108</sup> Sexual conduct may be banned from the public domain, irrespective of it being heterosexual or homosexual, as societies need rules to ensure an orderly collective sphere, but society should not prohibit conduct in private merely upon the prevailing moral sentiment of the majority.

More importantly, however, Hart attacked Devlin’s claim that society has a *right* to pass judgments on matters of morals and has a *right* to use the weapon of law to enforce it, even if it regards private conduct.<sup>109</sup> Hart comes back to this claim a number of times in *Law, Liberty, and Morality*, for example when he contends that Devlin’s arguments are related to morality in a dual way: they question whether the enforcement of morality is itself morally justified.<sup>110</sup> What is important here, Hart argues, is that ‘Lord Devlin’s principle that a society may take the steps required to preserve its organized existence is not itself tendered as an item of English popular morality, deriving its cogency from its status as part of our institutions. He puts it forwards as a principle, rationally acceptable, to be used in the evaluation or criticism of social institutions generally. And it is surely clear that anyone who holds the question whether a society has the “right” to enforce morality, or whether it is morally permissible for any society to enforce its morality by law, to be discussable at all, must be prepared to deploy some such general principles of critical morality.’<sup>111</sup>

The moral right of a society to legislate on the basis of morality is thus posed itself by Devlin as an objectively or rationally determinable principle, not something which follows itself from the popular morality of the community. But Hart strongly opposes this view. When, at the end of his book, he regards the principle of democracy he states for example that it is ‘fatally easy to believe that loyalty to democratic principles entails acceptance of what may be termed moral populism: the view that the majority have a moral right to dictate how all should live. This is a misunderstanding of democracy which still menaces individual liberty’.<sup>112</sup> Although Hart believes that the rule of the majority is the best governmental principle, it should not be posed as a right of society to impose moral based legislation that is ‘beyond criticism and must never be resisted’.<sup>113</sup>

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<sup>106</sup> P. Devlin, ‘The Enforcement of Morals’, Liberty Fund Indianapolis, India, 2009, p. 14.

<sup>107</sup> H. L. A. Hart, ‘Law, liberty and morality’, Stanford University Press, Stanford, 1963, p. 47.

<sup>108</sup> H. L. A. Hart, ‘Law, liberty and morality’, Stanford University Press, Stanford, 1963, p. 45.

<sup>109</sup> See also: P. Devlin, ‘The Enforcement of Morals’, Liberty Fund Indianapolis, India, 2009, p. 7-8.

<sup>110</sup> H. L. A. Hart, ‘Law, liberty and morality’, Stanford University Press, Stanford, 1963, p. 17.

<sup>111</sup> H. L. A. Hart, ‘Law, liberty and morality’, Stanford University Press, Stanford, 1963, p. 19-20.

<sup>112</sup> H. L. A. Hart, ‘Law, liberty and morality’, Stanford University Press, Stanford, 1963, p. 79.

<sup>113</sup> H. L. A. Hart, ‘Law, liberty and morality’, Stanford University Press, Stanford, 1963, p. 79.

Hart made the exact same argument, that society cannot claim a right to enforce (popular) morality, some ten years earlier in his essay *Are there any natural rights?*, where he famously proposed that there might be one natural right, namely the right of equal freedom, which ‘all men have if they are capable of choice; they have it *qua* men and not only if they are members of some society or stand in some special relation to each other.’<sup>114</sup> To begin with his conclusion in this paper, he argued that this right does not protect an individual from, for example, discrimination. ‘It would, for example, be possible to adopt the principle and then assert that some characteristic or behavior of some human beings (that they are improvident, or atheists, or Jews, or Negroes) constitutes a moral justification for interfering with their freedom []. It is, on the other hand, clear to me that the moral justification for interference which is to constitute a *right* to interfere (as distinct from merely making it morally good or desirable to interfere) is restricted to certain special conditions and that this is inherent in the meaning of “a right” []. Claims to interfere with another’s freedom based on the general character of the activities interfered with (e.g., the folly or cruelty of “native” practices) or the general character of the parties (“We are Germans; they are Jews”) even when well founded are not matters of moral right or obligation.’<sup>115</sup>

Both in this essay and in his debate with Devlin, Hart thus stressed that society does not have a *right* to legislate on the basis of moral sentiments and restrict the rights of Jews, Negroes or homosexuals. To understand this conclusion, it must be stressed that Hart, in *Are there any natural rights?*, differentiated between two types of rights: special rights, which are directed at a specific person or group of people, and general rights, which can be invoked against everyone. Special rights are typically associated with private and contract law, such as when persons A and B agree that if A fixes B’s roof he will get 100 dollar. General rights are typically associated with constitutional rights, in which there exists no special relationship between the rights holder and those who are bound to respect the rights holder’s rights.

With regard to the latter rights, Hart argues that they have two important characteristics, namely that to have them is to have a moral justification for determining how another shall act, namely that he shall not interfere with his right. Secondly, this moral justification does not arise from the character of the particular action to the performance of which the claimant has a right. What ‘justifies the claim is simply – there being no special relation between him and those who are threatening to interfere to justify that interference – that this is a particular exemplification of the equal right to be free.’<sup>116</sup> A rights holder has a moral justification for interfering with the freedom of others, and vice versa, other moral agents must thus justify and provide grounds for why, for example, the right to freedom of expression or the right to privacy needs to be restricted.

With regard to the special rights, Hart suggests that the most obvious examples are those that arise out of promises. ‘By promising to do or not to do something, we voluntarily incur obligations and create or confer rights on those to whom we promise; we alter the existing moral independence of the parties’ freedom of choice in relation to some action and create a new moral relationship between them, so that it becomes morally legitimate for the person to whom the promise is given to determine how the promisor shall act.’<sup>117</sup> Hart stresses that with regard to special rights, the identity of the parties concerned is vital to the existence of rights and that the right and obligation do not arise because the promised action

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<sup>114</sup> H. L. A. Hart, ‘Are there any natural rights?’, *The philosophical Review*, vo. 64, no. 2, p. 175. See further: H. Steiner, ‘The Natural Right to Equal Freedom’, *Mind*, New Series, Vol. 83, No. 330 (Apr., 1974). E. Mack, ‘Hart on Natural and Contractual Rights’, *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 29, No. 4 (Apr., 1976).

<sup>115</sup> H. L. A. Hart, ‘Are there any natural rights?’, *The philosophical Review*, vo. 64, no. 2, p. 189-190.

<sup>116</sup> H. L. A. Hart, ‘Are there any natural rights?’, *The philosophical Review*, vo. 64, no. 2, p. 188.

<sup>117</sup> H. L. A. Hart, ‘Are there any natural rights?’, *The philosophical Review*, vo. 64, no. 2, p. 183.

has itself any particular moral quality, but because of the voluntary transaction between the parties has.<sup>118</sup>

Hart sees rights in terms of a moral justification for limiting the freedom of another person and for determining how that person should act, e.g. 'you should not interfere with my right to freedom of expression', or, 'you should pay me 100 dollar'. Having a right also means that others must provide a moral justification for interfering with it. From this perspective, it becomes clear why Hart opposes Devlin's thesis about the *right* of a society to criminalize homosexual conduct. A society might think it is morally good, efficient or desirable to do so, and this would not conflict with the natural right of all to be free as it has given a moral justification for interfering. But it cannot itself be regarded as a *right* to interfere. Hart suggest that this would simply be a wrong term for moral statements about the desirability of the interference with other's rights.<sup>119</sup> Moreover, a right to restrict the freedom of specific persons or groups in society would require a special relationship that legitimizes and justifies the interference, though in fact, there was no promise made or other private behavior conducted from which such a special right might be inferred.

Thus, Hart suggests that Devlin is mistaken in his suggestion that society has a right to criminalize homosexual conduct. There is, however, another point which follows from Hart's argument, namely that legal orders cannot deny rational choosing agents their status as rational choosing agents. It is important to note that Hart connects the possibility of rights and corresponding obligations to the capacity of human beings as a rational agent. He argues that the very idea of general rights is that, in principle, one person has the same freedom as any other person, though it may be restricted on the basis moral considerations. This not only protects the person claiming the right as a human agent, through the respect for his freedom and the guarantee that interferences may only be conducted on the basis of a moral justification. It also means that everyone else, who needs to respect this right, is a moral agent who must (1) take into account the rights of others when making decisions and (2) make a reasoned statement for legitimate interference with the rights of others. So too, with regard to the existence of special rights, the existence is dependent on the capacity of choice of both (or all) agents. A's right to, for example, have his roof fixed or to park his car on the land of B on the basis of an agreement, implies not only that B must be capable of choice but also that a-priori, A does not have a right to park his car on B's land and that B is thus an agent in the possession of equal freedom.

If a legal system or a moral code of conduct wants to incorporate any rights or obligations at all, it must thus presuppose the decisional capacity of humans to pursue their preferred forms of freedom.<sup>120</sup> The point is that even general laws restricting the rights of Jews or Eskimo's on the grounds that, for example, the latter group is more prone to violence and must thus be restricted in the use of freedom, presuppose that they have an equal right to freedom which can only be restricted on the basis of a moral justification. Even in this case the dialectic relationship between human agents and rights remains; to have a right presupposes the capacity of rational choice and to have this capacity means that a person has a natural right.<sup>121</sup> But now, consider a fascist government which considers only men of Aryan blood to be moral agents with rights and duties toward one another and leaves Aryans free to treat non-Aryans as though they were animals, that is, without any special moral status.<sup>122</sup>

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<sup>118</sup> H. L. A. Hart, 'Are there any natural rights?', *The philosophical Review*, vo. 64, no. 2, p. 184.

<sup>119</sup> H. L. A. Hart, 'Are there any natural rights?', *The philosophical Review*, vo. 64, no. 2, p. 188.

<sup>120</sup> Hart thinks that in theory, it would be possible to create a legal system without any rights or obligations, though this suggestion has been challenged by many.

<sup>121</sup> See also: B. Chao, 'Hart on Natural Rights', *Civilitas*, p. 9.

<<http://www2.cuhk.edu.hk/gpa/civilitas/Volume%203/5.%20Chao-%20Hart%20on%20natural%20rights.pdf>>.

<sup>122</sup> This example is taken from: N. G. E. Harris, 'Hart on Natural Rights', *British Journal of Political Science*, Vol. 2, No. 1 (Jan., 1972), p. 126.

Such a regime would deny the claim of a group of moral agents as moral agents, which would conflict with Hart's natural right because such a moral code does not presuppose that all men have the equal right to be free. Thus, as a minimum condition in Hart's legal order, humans as moral agents (excluding those incapable of exerting choice due to mental defects) must at least be treated as moral agents, having decisional capacities to pursue forms of positive freedom they desire.

#### **4.4 Conclusion**

This essay has argued for the close similarities between Hart's position as a positivist and as a liberal. It showed that his debate with Devlin was based not only on the question of whether governments ought to punish immoral conduct, but also about the possibility of separating law and morals, about the respect for the rules of change and the proper position of the judge in legal orders. Subsequently, it has been argued that there are minimum principles of legal orders implicit in Hart's writings, namely the respect for the 'necessities of life', the autonomy of private individuals and their decisional capacity to pursue their preferred forms of life. Finally, these minimum principles relate to various aspects of the right to privacy, namely physical, informational and decisional privacy.

A couple of important points follow from these findings. First, that Hart's position as a liberal and as a positivist have influenced each other. Second, ever since his debate with Fuller, scholars have wondered what place the principles of the rule of law have in Hart's positivist account of legal orders. This essay has shown that there are at least a few minimum principles legal orders must respect; they are more than merely principles of effective legal orders, such as Hart suggested in his reply to Fuller. These principles can be regarded as 'secondary rules'. Third, from the stance of privacy protection, it is important to see that not only defenders of the natural rights doctrine or a Fullerian middle position reserve a central position in their theories for the right to privacy and the principles of the rule of law that are connected to them, but that even a seasoned positivist such as Hart must admit these as intrinsic limits on legal orders.

#### **5. Wrap-up: privacy as secondary rule**

Framing privacy as an intrinsic limit of legal orders might have an additional benefit over the current privacy framework. As has been discussed in section 2 of this chapter, the current privacy paradigm is dominantly focused on the individual, his subjective rights and the protection of his individual interests. This approach is adequate for the more conventional privacy violations, such as house searches, telephone taps, body cavity searches, etc. In these instances, the privacy infringement is targeted at an individual or a small group of natural persons. The harm or the consequences of the infringement are relatively easy to define and specify, also because the infringements are usually limited in time and location. Moreover, the individual being subjected to the privacy infringement will be mostly aware of the fact that his house is searched or his body subjected to cavity searches. As the infringements are quite limited in number, it is doable for the individual to assess whether the infringement is, according to his opinion, legal, and if not, to go to court in order to get a rectification or financial compensation.

In the modern world, what is often called the Big Data era, these aspects have changed dramatically. Privacy infringements are not limited to specific moments or specific groups, they affect large groups or the population as a whole and continue for long periods in time. Examples are the NSA data collection, the CCTV camera's that, in cities like London, monitor everyone walking on the streets almost constantly and the internet monitoring that

takes place through cookies, device finger printing and other means. Moreover, most people are simply unaware when, why and to what extent they are being monitored by the NSA, through CCTV-camera's or through internet monitoring. Also, there are simply so many data collections affecting a specific data subject that it becomes almost impossible for the individual to assess, with respect to each of them, whether personal data is gathered, whether this is done legitimately and if not, to go to court. And if he would be aware of this fact, and if he did go to court, it would be very difficult to specify individual harm. The point, for example, with CCTV-camera's is not that they film this or that person specifically, but rather that everyone is filmed constantly. It is not a specific individual interest that is at stake here, but a common or societal interest.

Consequently, the current privacy paradigm is well-suited for addressing the more traditional privacy violations, but inadequate to tackle the infringements that follow from Big Data processes. An additional problem is that in the current paradigm, the individual interests is balanced against the interests served with the privacy infringement, such as national security, and it is often outweighed because the individual interest is so vague and abstract. What seems really to be at stake in, for example, the mass surveillance cases is not a relative interests, such as an individual interest in dignity or freedom, but an absolute, minimum interest for states to respect, namely not to abuse their powers and to lay down safeguards against the abuse of power. These are preconditions for every state to respect. It seems that in the most recent case law, the European Court of Human Rights has acknowledged this fact and has finally made explicit that, in exceptional circumstances, it will allow *in abstracto claims*.

What is assessed in cases in which *in abstracto* claims regarding surveillance activities is precisely the use of power by the government as such, without a specific individual interest being at stake. This is a test of legality and legitimacy, which is well known to countries that have a constitutional court or body, such as France and Germany. These courts can assess the 'constitutionality' of national laws in abstract terms. Not surprisingly, the term 'conventionality' (or '*conventionnalité*' in French) has been introduced in the cases discussed.<sup>123</sup> For example, in *Michaud*, the government argued that with a previous *in abstracto* decision, the Court had 'issued the Community human rights protection system with a "certificate of conventionality", in terms of both its substantive and its procedural guarantees.'<sup>124</sup> Referring to the *Michaud* judgment, among other cases, in his partly concurring, partly dissenting opinion in *Vallianatos and others v. Greece*, justice Pinto De Albuquerque explained: 'The abstract review of "conventionality" is the review of the compatibility of a national law with the Convention independently of a specific case where this law has been applied.'<sup>125</sup>

He argued that the case of *Vallianatos and others*, which revolved around the fact that the civil unions introduced by a specific law were designed only for couples composed of different-sex adults, is particularly interesting in that the Grand Chamber performs an abstract review of the "conventionality" of a Greek law, while acting as a court of first instance: 'The Grand Chamber not only reviews the Convention compliance of a law which has not been applied to the applicants, but furthermore does it without the benefit of prior scrutiny of that same legislation by the national courts. In other words, the Grand Chamber invests itself with the power to examine *in abstracto* the Convention compliance of laws without any prior

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<sup>123</sup> See for the use of the word also: ECtHR, *Py v. France*, application no. 66289/01, 11 January 2005. ECtHR, *Kart v. Turkey*, application no. 8917/05, 08 July 2008. ECtHR, *Duda v. France*, application no. 37387/05, 17 March 2009. ECtHR, *Kanagaratnam and others v. Belgium*, application no. 15297/09, 13 December 2011. ECtHR, *M.N. and F.Z. v. France and Greece*, application nos. 59677/09 and 1453/10, 08 January 2013.

<sup>124</sup> *Michaud*, § 73. See also: ECtHR, *Vassis and others v. France*, application no. 62736/09, 27 June 2013.

<sup>125</sup> ECtHR, *Vallianatos and others v. Greece*, application nos. 29381/09 and 32684, 07 November 2013.

national judicial review.’<sup>126</sup> When discussing *Leney v. Bulgaria*, the Court is likewise willing to pass over the domestic legal system and act as court of first instance in cases revolving around mass surveillance. Subsequent to *Michaud* and *Vallianatos*, the term ‘conventionality’ has been used more often,<sup>127</sup> as well as the term ‘Convention-compatibility’, for example in the case of *Kennedy v. the UK* discussed earlier,<sup>128</sup> and most likely will only gain in dominance as the Court opens up the Convention for abstract reviews of laws and policies. What is left in these types of cases is thus the abstract assessment of laws and policies as such, without a Convention right necessarily being at stake. Furthermore, the Court is willing to assess the ‘conventionality’ of these laws as court of first instance.

The reason for this seems clear. For the ECtHR, what is at stake in the cases revolving around covert operations and mass surveillance is not so much the individual interests, but the minimum conditions of legal orders, related to the principles of legality, legitimacy and the rule of law. These are principles that are not relative, they are absolute; they must always be respected by governments, even if no individual harm can be demonstrated, even if the national remedies have not been exhausted, even if the different interests cannot be balanced, even if the case transcends the mere circumstances of that particular case, etc. This is laudable in terms of privacy protection, because the Court extends its scope of protection to cases in which no individual interests have been harmed, and thus moves beyond the currently dominant right-based approach. Yet it is unclear how this approach can be theoretically grounded. Obviously, the protection of individual rights and the prevention of harm is deeply engrained in liberal discourse and liberal philosophies; but for the protection of the legitimacy and legality of the law, in connection to the principles of the rule of law, this is more difficult.

The easy road would have been to show that for natural law philosophers, there are outer limits to the legal order. If laws go beyond that or violate the minimum requirements of the rule of law, the laws cannot be seen as laws or are deemed invalid. This argument would rely on a form of extra-legal morality the law and the legal order have to adhere to. Somewhat more challenging would have been to argue that for people taking a middle position between natural rights theorists and legal positivists, such as Lon L. Fuller, there are minimum conditions for laws and legal orders, such as those related to the right to privacy. The hardest road, but also the strongest way forward, is to suggest that even for legal positivists, who reject the contention that extra-legal morality can limit legal orders and the legality of laws, there are a number of intrinsic limits which legal orders need to respect and that these limits relate to aspects of the right to privacy.

This chapter has developed such an argument by discussing the work of one of the most prominent legal positivists, namely H.L.A. Hart. In a number of his writings, Hart defended the respect for the private choices of people, their privacy and the private sphere. Mostly, this work has been discussed as separated from his work as a legal positivist. This chapter has suggested that his liberal stance was, however, inspired by his thoughts on legal positivism. Many of the arguments are not about what the law should be or what the legal order should do, but about what laws can do and what legal orders are. Furthermore, this

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<sup>126</sup> Ibid.

<sup>127</sup> See among others: ECtHR, *S.A.S. v. France*, application no. 43835/11, 01 July 2014. ECtHR, *Avotins v. Latvia*, application no. 17502/07, 25 February 2014. ECtHR, *Matelly v. France*, application no. 10609/10, 02 October 2014. ECtHR, *Delta Pekarny A.S. v. Czech Republic*, application no. 97/11, 02 October 2014.

<sup>128</sup> See among others: ECtHR, *Animal Defenders International v. the United Kingdom*, application no. 48876/08, 22 April 2013. ECtHR, *Emars v. Latvia*, application no. 22412/08, 18 November 2014. ECtHR, *Kennedy v. the United Kingdom*, application no. 26839/05, 18 May 2010. ECtHR, *Mikalauskas v. Malta*, application no. 4458/10, 23 July 2013. ECtHR, *Sorensen and Rasmussen v. Denmark*, application nos. 52562/99 and 52620/99, 11 January 2006. ECtHR, *Bosphorushava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, application no. 45036/98, 30 June 2005. ECtHR, *Lunch and Whelan v. Ireland*, application nos. 70495/10 and 74565/10, 18 June 2013. ECtHR, *Interdnestrcom v. Moldova*, application no. 48814/06, 13 March 2012.

chapter has suggested that the liberal principles he put forward are not only related to his views as a legal positivist, but moreover, that they relate to the secondary rules he spelled out. These are the rules that form the minimum conditions for the legal order, which even a legal positivist as Hart felt that a legal order must respect in order to be called a legal order proper.<sup>129</sup> Finally, it has suggested that these minimum conditions relate to the protection of privacy. Doing so, this chapter has shown that it is possible to provide a theoretical foundation for seeing the rule of law principles related to the right to privacy as minimum conditions for legal orders, without turning to extra-legal morality.

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<sup>129</sup> These are in part factual, descriptive elements, such as 'is the law followed by most of the people most of the time, but sometimes also normative, such as that the legal order should not be static. Also, the requirement that individuals should retain a form of autonomy transcend the pure factual and descriptive approach often attributed to legal positivists.