

Respect for privacy from the Strasbourg perspective

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Abstract

Following a general overview of the ECHR case of law and some of its distinctive features, this article focuses on explaining the meaning of 'privacy', and guaranteed as a fundamental right in light of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, using as illustrations the verdicts of some cases judged by the institutions of Strasbourg. Certain paragraphs of the article address a series of issues, which according to the Court-referring to the images created by the Convention-cover a range , within which any individual may freely follow the development of their personality. The article also raises some questions, which the ECHR has often fully answered, or at least, indirectly implied. The author elaborates also on limits of privacy as foreseen by paragraph 2 of Article 8, as well as on some obligations that the Convention assigns to its contracting State-Parties.

Keywords: ECHR, international law, human rights, right for privacy, European Court of Strasbourg, the right to respect, personal information, personal identity, integrity.

A General overview

Article 1 of the European Convention for the Fundamental Human Rights and Freedoms states that: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*". The liability is provided for each state, therefore it is not limited in protecting only the rights of the citizens of one Party or citizens of the other contracting Party, regardless of their legal status and their continuance of residence in a given country. In the meantime, the jurisdiction of the Strasbourg Court is expanded with all the cases that dealt or deal with the interpretation or implementation of the Convention . But, this jurisdiction is not automatic; it exists only for the member states that have made a general declaration, accepting it according to the Article 46 or *ad hoc* for certain cases provided by the Article 48. Eventually, all European Council member states have made general declarations years ago , thus, practically , the referring element in the jurisdiction that reflects the collective basis of the international judgment, does not present any important limitation of the Strasbourg activity.

Naturally, most of the reviewed cases do not include all the sorts of cases initiated by different Articles, but are submitted to the interest for interpretation and implementation in convenient circumstances (*ECHR publications, Series A, No 18*). In this way, they have demonstrated the possibility of expanding the Convention area with the imaginary interpretation of its provisions. However, although many rights have found sufficient expression in the Court jurisprudence (*ECHR publications, Series A, No 32*), still, it is affirmed that the further due approach toward this regard might stimulate controversies, as the peculiarities of many of its award have not passed unnoticed, which shows that this Court has assigned itself to interpret the Convention under the lights of the actual proceedings against illegitimacy, not the ideas that have overruled at the time this obligatory Document and its Added Protocols was completed.

Also, Strasbourg, after making clear that the Convention does not deal only with the definition of the combinations and correlations with and within the rights, has asked Governments in certain circumstances to take positive steps for their promotion. These principles, same as the rights concept, which is implied and sometimes it is presented as very necessary, reflect an approach for interpretation with creative potentials. From this point of view, the Strasbourg institutions are increasingly more prepared to interpret the Convention as an alive and changing instrument. Thus, since the Court has accepted that it can go this far, often it has used the above principles to extend its jurisdiction area (refer to: Merrills, J.G., *"The Development of International Law by the European Court of Human Rights"* Edition II. Manchester University Press, 1993, pg.93-124).

Simultaneously, the evaluation margins presented in many cases remain a useful concept, which is generated even by the formulations of the second and continuous paragraphs of many Articles of the Convention. However, their importance and implementation depends from the point of view of the Court for different cases, because the imposing halts of the Convention, especially towards discrimination, become the fulfillment of other provisions that can be applied only when the fact falls under the domain of one or more Articles. For instance, in the *'Marckx'* case (decision of 13 June 1979, *ECHR publications, Series A, No 31*), the Strasbourg Court declared that, some provisions of the Belgian legislation, that deal with the illegitimate children, especially in patrimony rights, set these children in a non favorable situation compared to those legitimate, violating therefore the Convention. The change of approach could be used, even if the inclusion of some provisions term is fulfilled, proving the existence of an *"objective and convincing reasoning"*. Even this functional version, as many respective others in this field (*Klass and Others vs. Federal Republic of Germany*-6 September 1978; *Gillou vs. Federal Republic of Germany* -24 November 1986), that deal with monitoring of phone calls and correspondence, or opposing the refusal of the public authorities to

allow the applicant to get his house in *Guernsey*, have been surprising, testifying that the Convention can be considered in some cases in unexpected ways.

In the expanded framework that the Strasburg optics presents, even reviewing cases of protecting the right that anybody's private and family life, his residence and his correspondence is respected; the right that man and woman grow up, get married and create family, according to the domestic laws that adjust the implementation of this right; of the equality of the rights and responsibilities between spouses and in relationship with their children, regarding marriage, during the marriage, and in case of its dissolution; for quietly enjoying private property, so all those areas, they should not only be adopted case by case, according to the specific situations that each single case presents, but also should refer to several provisions in a harmonically manner and not desolately or disengaged, that Articles 8 and 12 of the original text of the Convention, as well as Article 1 or Article 5 of its Protocol 7 provide. But, the technical-literal limitations that are imposed by the format of these paragraphs oblige us to mainly focus at the phrase 'private life', its respecting and guaranteeing under the light of Article 8.

The right to respect

It has been noted that the Convention institutions have interpreted the right to respect stated in the Article 8/2, according to which "*The Public authority can not interfere in exercising this right...*" (Gomien, D., "*Short Guide to the European Convention on Human Rights*", May 2005). Thus, at first view, seems that the State, if it would not act, it would surely fulfill the obligation set forth by the Article 8. But the Convention institutions have also reached the conclusion that it is not enough only an abstention of the State, because from the principles that the Article 8 lays, another task derives: to act to secure respecting some rights in certain circumstances.

The right to respect according to the Article 8 also includes the ability for the individuals, thus they can undertake legal steps against the violation of their right to quietly enjoy private life. For instance, in *Airey vs. Ireland* case-1979, ECHR held responsible the Government of the country, which had refused to put at disposal legal assistance to a woman that wanted to divorce her violent husband. Because, according to the reasoning of the Strasburg Court, the right for private life is closely connected with the notion of personal integrity, and any physical harm to a person, requests necessarily to be provided by the law, as well as the approval of the person himself; without excluding the one who is in vulnerable circumstances, for instance, a detained person by the police that arbitrarily has his legal guarantees deprived (*Y.F. vs. Turkey*-1979).

Private life

Its concept has a wide range, within which it is implied the right to enjoy life, as well as to spend the energies it offers in a democratic and reasonable manner, without harming the freedoms and rights of other citizens. At the same time, within this range, the Article 8 covers a number of subjects and problems, that according to the Court-referring to the images created by the Convention – cover an area, within which any individual follows by free will the development of his/her personality. But, it is almost impossible to define these problems in detail. However, in defining private life, the ECHR jurisprudence clearly established, during and after reviewing different cases, helps us to group some of them, for as much as possible specific clarity effects, but also for comparative reasons.

Body integrity, the Article 8 of Convention exercises its power in some aspects. For instance, it is worth mentioning the case *X and Y vs. Netherlands-1985*, according to which it was pretended that an individual had sexually assaulted a minor, who did not have sufficient mental capacities to contradict in her name. In the same way, the case *Y.F. vs. Turkey* regarding the obligatory gynecological checkups of the spouse of the applicant, when she had gone in the premises where the husband was suffering his punishment. Some other files contain this type of reviewing plan, through which a stressed opposition is raised towards the obligation by force of some individuals to medicate from different diseases.

Personal information, in many Party States of the Convention the individuals should present identification documents in the daily life and in their contact with the public authorities. Thus, the Court found violations in the case *Smirnova vs. Russia-2003*, when the State refused to give back the papers to an individual that was released from prison on parole, because in their daily life the Russian citizens often have to show their identification documents for verification, in some important contexts, such as money exchange centres, when buying tickets, applying for new jobs or health care institutions.

Personal identity, there are cases when the Convention is violated. This is, for instance, how the Strasbourg Court defined in 2002, the failure of the British law for recognizing the gender of the people that have voluntarily performed a surgical intervention for changing the sex organs and creating a fuller access for the replacement of the previous gender. In *Van Kuck vs. Germany-2003* case, the Court noticed the violation of the Article 8, when the State refused to order an insurance company to reimburse the treatment costs of a transsexual.

Sexuality, the Court has reviewed some cases where it was alleged violations by the State to the right for privacy, declaring as criminal offences the actions of the homosexuals. For instance, in *Modinos vs. Cyprus-1993* case, the Court has declared

that the disallowance by the State of homosexual acts with consent among adults constitutes unjustifiable intervention to the right to respect private life, according to the Article 8. The Court has also noticed violation of the Article 8 when an individual was punished for consuming a criminal offence, regarding his filming of homosexual acts, films that probably would never be shown in public (*A.D. T. vs. United Kingdom-2000*).

The family grief, for which, the judgment proceeding in Strasbourg does not lack, notices violations of the Article 8, when the government authorities fail to act with the right sensitivity towards the people that suffer the loss of their close relatives. The Court found violation of this Article in the case *Pannullo and Forte vs. France-2001*, when it was not made possible that for a period of seven months to return to the parents the body of a child who had died in a hospital. It also noticed violation, when the authorities refused to allow a confined person waiting for trial to attend the funerals of his parents (*Ploski vs. Poland-2002*).

Environment conditions, in some cases it is pretended the violation of the Article 8 from the disability of the public authority to protect in the right way the individuals against the risks that threaten the health or life because of environmental conditions, for instance, after performing dangerous and pollution activities from the Government or businesses. The Court has found violation of the Article 8 in some reviewed cases, according to which there were clear risks towards the health of the persons that lived near sites where such activities were performed and the Government had not taken the necessary steps (*Lopez Ostra vs. Spain-1994*). While, although the Court restrains to the principle that the environmental damages may affect over the rights guaranteed by the Article 8, during the reviewing of a case considered as a key to this group, it noticed that the connection between the complained activities and the impact over the rights was insufficient to support the established claim (*Kyrtados vs. Greece-2003*).

Let's not dwell on with other groupings, any of them like the one that related to the environmental conditions is also harmonized with the rights as the summarized so-called 'third generation'. Because, as ECHR has stated, the definitions of 'private life' remain inexhaustible. Meanwhile it has stressed that: " *it would be unfair to limit the notion of the private life, as a 'inner circle', inside of which the person can live his personal life as he decides himself, and exclude the rest of the world that is not included in this circle. Respectin the private life, in a way should include also the right to decide and to develop relationships with other individuals*". During the establishment of the concepts of the Article 8 some questions have come forward, which are being answered, sometimes fully and sometimes in an implied way. Anyhow, maybe it is worth to shortly focus in some of them.

Up to that rate the social activity is included within the purpose of the private life? According to the jurisprudence of the Court there are a lot of personal relationships

that are protected by the concept taken into consideration. Some judges have stated that the private life has close connection with the real enjoyment of the person's social life, including the creation of the cultural, linguistic, etc. relationships. The limitation of these relationships from different teachers that did not allow the teenage students to learn foreign language but the domestic one, according to the Court is considered intrusion in the freedom of the individual to follow up and fulfill his interests, " *to contract, to carry out the profession that he wants, to acquaint knowledge, to get married, to create family and raise children, to worship God according to his wish and, in general, to enjoy all these privileges which are known from long time ago as essential towards the pursuance of happiness, as a free man*".

Is there any connection between business relationships and private life? ECHR stresses out that some personal relationships in the business context fall within the area of the Article 8, for the purpose of private life. According to it, there is no reason why the concept of 'private life' should not also include the professional or business activity, since the majority of persons, in the environments that deal with such activities, have many possibilities or greater ones, to establish relationships with the outer world (from the file case *Niemetz vs. Germany, Alistair Mowbray- 'Cases and Materials on ECHR'* , pg. 485,487,499,516,544). The point of view here is also supported by the fact that it is not always possible to clearly distinguish which activities of the person constitute part of his professional life and which don't , especially in the case of the person who work as freelance.

Which measures belong or violate the private life? For instance, how much does the interception of the phone calls interfere in the purpose of the private life? According to the Court the usage of the technological appliances for intercepting the personal communications falls under the area of the Article 8. Often, in Strasburg's jurisprudence, it is stressed out that the interception of the phone calls is included within the domain of the Article 8, guaranteeing private life as well as the correspondence. Regardless of the motives for using the information profited from the interception, that is, voice identification, revealing an attempt to perform criminal actions, etc,etc, the Court considered such an action as violation of the first paragraph of the Article 8 of the Convention (*P.G. and J.H. vs. United Kingdom, Alistar Mowbray- 'Cases and Materials on ECHR'*, pg.505, 506).

Is the gathering of the information considered by the State that deals with private life? Gathering of the information by the public authorities over a person, without his consent, in any case deals with the private life of the person, which is within the area of the Article 8/1. Therefore, gathering and maintenance of the information for the private lives of the people and their businesses by the public officials (*Laskey, Jagard and Brown vs. United Kingdom- Alistar Mowbray, ' Cases and Matewrials on ECHR'* , pg.495-497), gathering of medical information and their registration, the established

by the tax collectors giving details regarding expenses, etc, certainly directly take part in the people's private life. Simultaneously, failure to deliver information or documents by the government authorities, subject to the nature of the information they contain, also deals with private life. In the case *Gaskin vs. United Kingdom*, the Strasbourg Court stressed out the fact according that the documents that the applicant wanted too have access to dealt with his private life, because contained information about his childhood, growing up and his history, constituting so " a primary information source" for the past of this person. Thus the refusal done to this applicant in this case was considered violation of the Article 8.

Does changing of the first name correlate with private life? The court states that, although the Article 8 does not clearly define such a relationship, the name of the person relates with his private life, serving as a mean for personal identification. The same thing, according to the Court's reasoning, can be said for changing the last name, which does not affect the family unity (*Unal Tekeli vs. Turkey – 2004*).

Do the materials that are published in the media relate with private life? The lack of defense towards the intervention of the media in the private life of the person, the publication of confidential materials and gossiping have not yet become clearly determinative in the Strasbourg Court. But, if the raised problems do not come out of the private life framework, they are evaluated by some criteria: nature and extent of the intrusion in the private life, the capability of the State to take effective measures against these interventions, etc. According to ECHR, the determinative factor in leveling the private life with the freedom of speech that the media exercises consists in the contribution that the photos/films/articles offer in a debate of general interest (*Van Hovver vs. Germany*).

The limitation of exercising the right of privacy

As we have noticed above, the Article 8 offers general protection of the private life of any person from the arbitrary intervention of the state. ECHR has spread its protection offered by the content of the Article 8 not only within the area covered by the personal residence, but also in the territories where the person performs his personal or business activity, restraining to the explanation of the term 'privacy': right to be left alone (" *Oxford Dictionary of Law*", 5-th Edition, and pg. 381). Such reasoning has greatly influenced, such as lately the normal jurisdiction court in England or Wales accept through their decisions, that this right can not be denied or violated to persons, as well as to companies. So , before the public authorities undertake measures to sensibly tighten the right of the people, provided and guaranteed by the content of the Article 8/1, to justify any intervention, they should, at first weight, compare and balance the interest that lead to take such steps.

This does not mean that there aren't any special circumstances, specific ones, which influence in making necessary the executions of limitation actions, whose effects do not aim the violation and invasion of the right of the privacy, and as such, its justification constitutes a sufficient defense. Such circumstances are sanctioned in the second paragraph of the Article 8, according to which "*There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and in necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*". Therefore, there are some standards in the form of concentric circles beyond which the Convention Party States can not navigate; on the contrary, the criteria are considered as definite, such as:

The intrusion should be in accordance with the law, which means that at first for each case it should be provided and supported by the law, where it should be explicitly stated not evasively. So, in many reviewed cases, the ECHR has come to the conclusion and decided that the intrusions, which are not in accordance to this term remain punishable civilly, as well as criminally, etc. Meanwhile, the law or any other legal act in this regard should necessarily not only to be published, but also it should be clear, detailed and understandable by the individual, so the latter to be able to determine the consequences of his behavior, as well as those of the legal intrusions of the government authorities.

The intrusion should be in the interest of the legal purpose. The legal purposes defined in the second paragraph of the Article 8 obliges the public authority to justify the intrusion based on these definitions, because, the concept 'legitimate purpose', having a wide expansion, may favor the Government to give different arguments regarding the need for intrusion, except when it is clearly arbitrary. That is why it is important to carefully examine, besides the others, the distinctions between the legal intrusion in the private life of a person, an organization of civil society or a business company, from an extraordinary one that can be done if it interests the community aspirations.

To be necessary in a democratic society. Thus, only when there is a strong reason for intrusion in private life, it can be justified. Therefore, if there is other ways through which the intrusion can be avoided to reach 'the legal purpose', then alternative means and methods are called into force. Also, during the implementation of this term, the ECHR has stressed out the need to take steps of the proportionality, which in general means that the nature and the extent of the intrusion should be judged as most legally appropriate and less violating, towards the fulfillment of the desired purpose.

In reality, there are still cases when there continues to be mistrust at definitions, if the measures taken or the intrusions afflicted by the States are in accordance with

the Article 8. This dilemma, that in the activity of ECHR has taken the forms of a technique of review proceeding, under the denomination of 'the evaluation area', for the first time it was materialized during the judgment in 1976 in Strasburg of the case "*Handyside vs. United Kingdom*". This technique is used and continues to pay off for the balances and evaluations among personal complaints and defenses by the states regarding different facts that lay down the dilemma, if the public authorities should really cause intrusion in the private life and if these intrusion constitute or not deviation from the obligations that the Convention sets forth to its High Contracting Parties.

In these circumstances, there are two main reasons that stimulate and oblige ECHR to review this 'evaluation area'. First, to create the reasonable conviction that the intrusion to the right, protected by the Article 8, is justifiable for public interests, according to the definitions of the paragraph 2 of this Article. Second, to prove if the State has taken or not all the alternative measures and if it has done or not all the actions imposed by proportionality, to fully fulfill its obligations that derive from this provision. In the meantime the Court has agreed that since the cases are complex and sensitive at international level, the public authorities of each State should evaluate in a selective manner the situations that have caused each special case, to determine the efficient means to be used and the relevant measures to be taken, because the reality has agreed with what ECHR has noticed: the impossibility to come across, through the laws of the member States of the Convention, to a common conception on the moral, which, from country to country and from time to time, responds to the fast rhythms that define our era, but also to the relative changes of the developments in the continental range.

Conclusion

The extras of the content of the cases mentioned above, as well as many others that life has dictated during the past 60 years in Europe, in no case could fully present the full view of the prosperous jurisprudence of Strasburg institutions. But, as it is often mentioned from many researchers of this field, it can be achieved through them a basis to determine which interventions can be done from the experience of the European Convention, which are included in the system of the values for the protection of the human rights and are in accordance with the terms that make them possible.

Sometimes, in the case of the subject we are discussing, it is taken into consideration an evident and advantaging feature found among the jurisprudence of the United States of America and that of ECHR, that notices the fact that for the first, the approach of the cases widely spreads the extent under the term 'the right for privacy', while the second with the definition 'the right to respect for private, family life, residence and

correspondence', gives the impression that in a way, the usage of this right is limited. But, regardless of these literal and semantic shades, it can never be denied the wide range of the interpretation that are done and are being made to it by the European Convention institutions.

It is well known that any evaluation starts by accepting the essential importance of the cooperation by the Convention State Parties, which has been and remains an important instrument for an efficient activity in the European system. Meanwhile, the right supported in the cases so far shows that no state can be immune towards the supervisory measures, with all the obligations that it had taken with it, by ratifying it with all provisions, treaties for the protection of human rights. Thus, it isn't any surprise that every State that has agreed to the right for personal complaint, hasn't been left without being sued at the ECHR. Because, the public authorities can commit mistakes even in those countries that undoubtedly have a rich and compact history in protecting the civil rights. This reality suggests two conclusions:

First, the international supervision system, such as the one of the European Convention institutions, continues to be needed and longed even for the states that have a tradition in law enforcement and possess enough constitutional guarantees for the protection of essential rights and freedoms. The necessity of this system is not discussed at all in post-communist countries of Eastern and Central Europe, where the rights to respect private life is included in the general provisions. For instance, typical provisions of the right in these countries are: "*It is guaranteed the inviolability and independence of the person*" (Czech Paper, Article 7/1), or "*The State will respect and protect private and family life*" (Constitution of Moldavia, Article 28) etc.etc. However, the Constitution of the Republic of Albania does not provide any particular provision for the right to respect for private life, but reaches to somehow realize its guarantees through some Articles, such as Article 35 for the protection of the personal data, Article 36 for the freedom and secrecy of correspondence, etc.

Second, although the European Convention is considered as the most efficient international system in this field, it can not be stressed that, even the secured guarantees and not even the supervisory arrangements can not be evaluated as perfect; they periodically undertake continuous, ulterior changes. However, it is a fact that everything presented until now from the Strasbourg's point of view seems that the Convention has a promising future.

Bibliography

1. Robertson, A.H., and J.G. Merrills, "*The Development of International Law by the European Court of Human Rights*", Edition II, Manchester University Press, 1993

2. *ECHR publications – Series A*
3. Gomien, D., *“Short Guide the European Convention on Human Rights”, 2005*
4. *Cases and Materials on the European Convention oh Human Rights, Edition II – Alastair Mowbray, Oxford University Press*
5. *Oxford Dictionary of Law, Fifth Edition, Oxford University Press*
6. Sadurski, Wojciech, *“A study of Constitutional Court in Post communist States of Central and Eastern Europe”*
7. Bianku, L., *Jurisprudenca e Gjykates se Strasburgut*