

SOME NATIONAL SECURITY ISSUES UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTSCASE-LAW

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Abstract: *This article explores some national security issues within the European Convention on Human Rights (ECHR) case-law. At this juncture, there have been numerous challenges facing national security, especially whether it should contradict or guarantee individual rights. The paper mainly scrutinizes Article 6 and 8 ECHR focusing on two significant cases of the European Court of Human Rights: Rotaru v. Romania and Leander v. Sweden. The first case deals with the violation of the right to a fair trial and an effective remedy as well as breaching the right to privacy. The second case concerns the storage of data regarding the private life of an individual and if this collection might be used for employment research aims for grounds of national security. The study shows that states have a wide margin of discretion when choosing the manners in which they make decisions to protect their national security. The few indications identified in the jurisprudence of a number of states in connection with the right to privateness covered by the paper feasibly fail to meet the criteria of legal certainty necessary to guarantee the proper functioning of the rule of law.*

Keywords: European Convention on Human Rights, European Court of Human Rights, national and public security issues, right to respect for private life

1. Introduction

Since human rights are inalienable ones that are possessed by each person, Europe has created a system within the Council of Europe for protection of human rights in which the European Convention on Human Rights and the Court of Human Rights in Strasbourg are the most significant ones.

The European Convention on Human Rights (ECHR) performs a principal role in the European legal scope nowadays [11]. This is due in part to the capacity of its short text, but above all to the Court in Strasbourg, which has masterly adapted the norms of the Convention to any significant changes that might occur in the respective field. Being accepted by each member state of the Council of Europe and a must for their membership, the Convention provides

civil and political rights, including national security issues (although providing some exemptions including national security considerations) [10].

2. The concept of national security under ECHR

While the restrictions of the term “national security” are hard to determine, the European Convention on Human Rights case-law has made it possible to give some more substance to the notion of national security, which involves the protection of state security from terrorism, separatism, etc.[12]. However, national security is mentioned in Article 6 and 8 (also 10, 11, 13) of ECHR in connection with the right to an honest trial (exceptions to the principle of publicity are permissible where there is a

danger to national security, morals, the interests of minors or protecting the privacy of the parties but the secrecy of an entire case and its hearing behind closed doors due to a separate document representing classified information does not meet the standards of Art. 6) and the right to respect for private life (exception to Art. 8 is related to national security defense being available to states in connection to the right to respect for private, family life, home as well as correspondence).

3. National security and human rights

At this juncture, there have been numerous challenges facing national security, especially whether it should contradict or guarantee individual rights. Security and stability of every state institution are the major guarantees for the safety of citizens, human security and respecting individual rights of the relative citizens [5]. Thus, human security is inevitably and inseparably about the state [2], since protecting human rights may at best be granted “by democratic states with the ruling and possessing force to maintain such norms” [6]. Where the state lacks the capacity of protecting its citizens, the international community may scarcely lay out long-term solutions beyond aiding to reorganize or improve its institutions [6]. This is the case as, up till this moment, the state’s function as a security provider is impossible to be changed.

Several cases where national security defense is pleaded are utterly significant ones and have involved violations of the right to respect for privacy, secret surveillance, right to an equal trial, etc.

4. Right to private life

The concept of private life mentioned earlier is understood as the internal circle where a person might live and the outside world is excluded from this very circle. The respect for confidentiality should also include a specific set of rights to establish and develop relations with other persons. Such

relationships may be, for example, the relationship between adoptive parents and children [7]; relationships between people who have not yet entered into marriage [7]; relationships between homosexuals and their partners with or without children [7].

Private life does not concern for instance relationships between the owner and their pets [7].

The collection of information by official representatives of the state regarding an individual person without their consent always concerns the private life of this person and, thus, falls under the protection of Part 1 of Art. 8.

The following examples can be cited:

- official census [7], which includes mandatory issues related to gender, family, place of birth and other personal information;
- taking and storing fingerprints, photos and more information about the identity of the police [13] even the archives that are secret (*Leander v Sweden*, judgment of 26 Mar. 1987, Series A no 116);
- collection of medical information and documentation of medical character [7].

The Court accepted the fact that in order to protect citizens’ security, the state can and must have laws, allowing the competent public authorities to produce collection and subsequent storage of information in registers not available for public information (*Leander v. Sweden*, judgment of 26 Mar. 1987, para. 59). In addition, it is recognized that the authorities must be able to make use of the data when assessing how much job candidates are suitable for posts important for national security. In such cases, however, the Court says this action by the state must comply with social needs and also be proportionate. In this respect, there must be met satisfactory and efficient safeguards against abuse. It claims it is necessary with regard to the risk that “a system of secret surveillance for the protection of national security poses of

undermining or even destroying democracy on the ground of defending it” (*Leander v. Sweden*, judgment of 26 Mar. 1987, para. 60).

In the aforementioned case *Leander v. Sweden* [3] the applicant is a Swedish citizen and is applying for a high position in the national policy. There were used secret police files which contain details about the applicant's personal life for the purpose of estimating a person's suitability for work. The applicant's request for access to those files was then denied. The applicant alleged a violation of his right to privacy that is guaranteed by Art. 8 of the European Convention.

The ECHR has not found a breach of Art. 8 or using confidential information in files of the government is not a hindrance to the access to information.

There has been a violation of Article 8, para 1 as the usage of the secret police files, combined with Leander's refusal to grant him access to the data, constituted an interference with the applicant's right to privacy. However, the infringement of Article 8, para 1 was justified via the legal aim according to Article 8, para 2 (assuring national security). Even though the Court agreed with the fact that the existence of a system of personal control represents interference in the personal life of the candidate, but together with this, it found that it was needful in a democratic society. The Court considered a set of legal, political and administrative guarantees against arbitrary execution of the governmental interference in the applicant's privateness and concluded that the State has the right to consider that in this case, the interests of national security prevail over the applicant's personal interests. Therefore, there has been no breach of Article 8.

What is more, Article 10 does not grant a person the right to access a register which comprises information on their personal post, nor does it oblige the government to provide such facts to the respective

individual.

In another case – *Rotaru v. Romania*[4], the European Court of Human Rights has also found that there is a violation of Article 8 (right to respect for private life) of the European Convention on Human Rights as well as Article 6 (right to an unprejudiced trial).

Mr. Rotaru is the applicant who was involved in administrative proceedings because of a letter from the Romanian Intelligence Service (RIS) that was sent to the Court. The letter included data about Rotaru's past political activities. It appeared that in 1937 he was a member of the far-right legionnaires' movement. Mr. Rotaru instituted legal proceedings against the Service. He demanded that the document, which in his opinion contained fake and defamatory details, be amended or destroyed. This very claim was rejected by the Court in view of the fact that the judicial power did not have the jurisdiction to get rid of or alter in any way the information in the letter submitted by RIS.

The applicant disagreed with the breach of his right to privateness since RIS had a file including personal data and it was unfeasible to refute the incorrect information.

The Court ruled RIS's ownership and usage of information about the applicant's privacy (though admissible in cases for example in the interest of national security) was not “in accordance with the law” because the law was formulated in very general terms and did not provide any guarantees for individuals to protect their privacy. Mr. Rotaru's right to privacy was therefore infringed. Thus, the Court has the view that the law itself needs to be particularized.

The Court also highlighted that the abovementioned letter consisted of diverse data about the applicant's life, such as his political activities, studies as well as criminal records. According to the Court, this type of information, when compiled and stored systematically in a file kept by state agents, constitutes an interference with

the individual's privacy. With reference to the judgment in *Leander v. Sweden* (1987) 9 EHRR 433, para 48, the Court stated storage of data relating to the individual's privacy in a secret register as well as releasing this sort of information might fall within the scope of Article 8, para 1.

5. Right to a fair trial

Following the European Court of Human Rights finding an infringement of the right to privacy, the ECHR also handled Mr. Rotaru's claim based on Article 6. Under this article, it is said in para 1 that people are entitled to a fair hearing and the press and public might be excluded from a trial when it comes to the interests of national security [8]. The applicant claimed that the refusal on behalf of the Romanian courts to examine applications for damages of his was a violation of his right to a fair hearing. The Court ruled that it was beyond question that Rotaru's claim for costs compensation was a civil one in the meaning of Article 6, para 1 ECHR [1]. The Court of Appeal failed to consider the claim in the case and thus breached the applicant's right to an impartial trial.

6. Conclusions

To sum up, in various cases connected with national security issues, the Court is ready to accept considerable limitations upon the type of the accessible means of protection under Article 8 in areas such as secret checks of applicants for being employed at sensitive job positions. A significant issue regarding the usage of EU databases is the probability of lodging claims on the basis of Article 6. It includes damages caused by using information by governmental bodies in violation of Article 8 and this implementation of Article 6 with reference to damage performed by the government data files is recognized by ECHR [4].

It could be inferred that states have a wide margin of discretion when choosing the manners in which they make decisions to protect their national security [9]. The few indications identified in the jurisprudence of a number of states in connection with the right to private life covered by the paper feasibly fail to meet the criteria of legal certainty necessary to guarantee the proper functioning of the rule of law.

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