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Research Article

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The right to private and family life and the need for protection against the digital environment

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Abstract

The right to private and family life is difficult to define, since it encompasses a wide range of overlapping and interrelated rights that protect the individual's freedom from state interference. This means that the individual has the right to live free from state interference, placing the individual in a higher position compared to the state in the enjoyment of this right. The right to private and family life is protected both at the international level by the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, the European Convention on Human Rights and at domestic level starting with the Constitution of the Republic of Albania and the legal framework. This right may be limited under specific conditions for the interest of others, provided that the interference is not arbitrary or unlawful. The article deals with the development of the right to private and family life in Albania at the constitutional level, at different periods of time, highlighting the range and the progress of this right compared to international legal framework. The article highlights one of the aspects of the right to private and family life such as data protection, on the challenges faced by the development of technology and the digital environment. The analysis is accompanied with the jurisprudence of European Court of Human Rights which elucidates the engagement undertaken by Albania as a contracting party of the European Convention to raise the standards of protection of human rights.

Keywords: The right to private and family life, digital environment, Albania, data protection.

1. Introduction

The right to private and family life was first sanctioned and protected at the international level, before becoming part of the fundamental rights included in any state constitution. When the human rights system was created in the early years after

the World War II, the constitutions of various states protected only certain aspects of this right, such as the inviolability of home and correspondence, not offering a clear meaning for the term "private life" (Diggelmann & Cleis, 2014). It was the Universal Declaration of Human Rights that gave due form to this right by prohibiting any arbitrary interference with life, family, home, correspondence and personal honour and prestige. In this way, this international instrument has determined the sphere of a person's private life, both in the context of the environment where this right is realized, and in the context of the values that constitute human dignity that are related to personal honour and prestige. Being that life and personal liberty are inalienable rights and inseparable from a dignified human existence, the individual has the right to live free from state interference. Article 12 of the Universal Declaration of Human Rights precisely defines the scope of this right (United Nations [UN], 1948).

"*Article 12*

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

The inclusion of the right to private and family life as one of the fundamental human rights creates guarantees that the individual may enjoy life in full, with dignity and independent from arbitrary interventions of the state or of other subjects. Through this article, the Universal Declaration of Human Rights legitimizes the protection of private life from interference and attacks that affect its violation. In cases of intervention, it provides that everyone has the right to protect themselves from these attacks, guaranteeing at the international level the protection of private life.

The protection of the right to private and family life has been strengthened by the International Covenant on Civil and Political Rights, which, through the article 17, has prohibited arbitrary or illegal interference in the private life, family, home or correspondence of any individual, as well as in his honour and reputation (UN, 1966).

"Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."

This right has also found broad support in the European Convention on Human Rights, which was drawn up in 1950 by the newly formed Council of Europe and entered into force on September 3, 1953 (Council of Europe, 1950). Article 8 of this international instrument focuses on the protection of private and family life (Kilkelly, 2003). The scope of this right extends to the field of private life, family life, the individual's residence and his correspondence. On the other hand, this right has been recognized as having its own limitations, in the same the extent of limitations provided for human rights by the European Convention. It can be violated due to the need of the democratic society, public security, public order, health or morality as well as for the protection of the rights and freedoms of others (European Court of Human Rights, 2022; Bianku, 2020).

"Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. 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."

The first part of this article provides what are the rights guaranteed to an individual by the state in the sphere of private and family life, while the second part of this article specifies that these rights are not absolute but can be limited by the state only for the protection of the freedoms and rights of citizens as well as for the protection of a public interest, anticipating the possibility of intervention by public authorities (Council of Europe, 1985). In cases where the state interferes in a person's private or family life, in his residence or correspondence, it must justify this action, interpreting it as an action performed "in accordance with the law", with "legitimate aim" and as "necessary in a democratic society" (European Court of Human Rights, 2022).

Meanwhile, in Albania, this right is developed after the changes of the monist system, with the democratic developments of the country and the legal framework developed after the '90s. However, it cannot be said that it was a non-existent right in terms of its sanctioning and recognition by the legal framework, given that it is included in the Basic Statute of the Republic of Albania (1925), in the Basic Statute of the Kingdom of Albania (1928), as well as formally throughout the communist period, specifically in the Constitution of the People's Socialist Republic of Albania (1976). However, the extended range of this right has come hand in hand with the evolution of society, including a whole range of other rights related to it, among others data protection. Emphasizing the progress of the right to private and family life, the article will shed light on the right of data protection, as one of the novelties of the Albanian Constitution after the democratic changes, by analysing its development in relation to the digital threats. In the development of new technologies, it bears special responsibility to the state the striking of the right balance between individual freedom on one hand and social welfare as well as public interest on the other.

1.1 *The right to private life since the creation of the Albanian state from 1912 to 1945*

The Constitutional Assembly in its meeting on March 2, 1925 approved the Basic Statute of the Republic of Albania, by which Albania is declared a Republic. Chapter 3 of the Basic Statute of the Republic of Albania (1925) provided the rights of citizens, where the right to inviolability of residence and correspondence is included.

"Art. 127. Housing is inviolable.
Art. 132. Postal privacy is inviolable and is regulated by law."

Despite the fact that there was no clear and complete perception of the right to private and family life (Anastasi, 2007), elements of this right such as the inviolability of the residence or the secrecy of postal correspondence are sanctioned in the Basic Statute

of the Republic of Albania of 1925.
The change of the form of government from republic to monarchy was preceded by the adoption of the Basic Statute of the Albanian Kingdom. It was the most important legal act in sanctioning the principles and institutions that would govern the Albanian state in the coming years (Pëllumbi, 2019). The rights of citizens are stipulated in the Title VI of this Statute, where the inviolability of the residence is provided for in Article 196. This right is reinforced by sanctioning simultaneously the prohibition of forced entry into the house, except for the cases provided by law (Basic Statute of Albanian Kingdom, 1928).
"Art. 196. The house is inviolable. No forced entry into the house can be made, except when and as the law orders."
The inclusion of this right in the Basic Statute of the Albanian Kingdom brings more guarantees to the protection of private and family life, especially when it is decided that its limitation should be provided for by law. Moreover, the right to private life included the right to the secrecy of letters, telegraphic and telephone correspondence, which was provided for in Article 201 of the Basic Statute.
"Art. 201. The secrecy of letters, telegraphic and telephone correspondence is inviolable, except in cases of war, mobilization, insurrection, and in investigations of serious crimes."
Despite the sanction given in the Statute regarding the violation of the secrecy of letters and correspondence, it was foreseen that in times of war, mobilization, insurrection and investigations on serious crimes, this right could be limited. The law assigns responsibility to those who violate the confidentiality of letters and telegraphic and telephone correspondence. While the right to family life was regulated by the Civil Code of 1929. The Civil Code of Albanian Kingdom was particularly important, since it established for the first time the family relations on a legal basis among continuous influence of canon and religious norms (Pëllumbi, 2019).

1.2 *The right to private life in the communist period 1945 – 1990*

The end of the Second World War and the following years brought radical changes in the countries of Eastern Europe, including Albania. Local communist parties came to power in Poland, Czechoslovakia, Hungary, Romania, Bulgaria, Yugoslavia and Albania with the active support of the Soviet Union and established complete control over all spheres of public life (Montais, 1965).
The right to private and family life, stipulated in the article 49 of the Albanian Constitution of 1976, was truncated and sufficiently influenced by the communist ideology, emphasizing the obligation of parents to educate children with the communist spirit (Xhepa & Kodra, 2022).
"Article 49
Marriage and family are under the protection of the state and society.
The marriage is solemnized before the competent state bodies.
Parents are responsible for the good upbringing and communist education of the children.
Children have the duty to take care of parents who are incapable and without sufficient means of living.

Children born out of wedlock have the same rights and duties as children born in wedlock. Children left without parents and without support are raised and educated by the state."

On the other hand, the sphere of private life included housing and correspondence. The individual enjoyed the right to inviolability of the house, as well as the right to enjoy his residence. However, this right was limited by certain conditions provided in specific laws recognizing the right of the competent state authorities to enter in the residence.

"Article 57

The residence cannot be violated. Without the consent of the relevant person, no one, other than the representatives of the competent state bodies and under the conditions set by law, is allowed to enter to other's residence."

The 1976 Albanian Constitution is also focused on the right to secret correspondence, as well as other means of communication. Still, this right was not guaranteed in cases of investigation of a crime, state of emergency or state of war.

"Article 58

The confidentiality of correspondence and other means of communication shall not be violated, except in cases of investigation of a crime, state of emergency or war."

However, during the period 1944-1990, Albania, under the communist regime, was far from respecting human rights and freedoms, and even less from respecting the written rights recognized in the Constitution and laws (Szczerbowski & Piotrowska, 2010). Despite the fact that the secrecy of correspondence was stipulated in the Constitution, this right was not respected by the government, interfering in people's correspondence, especially in communication with the outside world (Authority on Information on former State Security documents & Friedrich Ebert Stiftung, 2020; Omari & Anastasi, 2017).

1. **Analysis on the current protection of private and family life - basic principles, legal and institutional guarantees**

With the adoption of the Constitution of the Republic of Albania of 1998, a number of basic human rights and freedoms have been sanctioned, protected and guaranteed, one of which is the right to private and family life. This right is widely sanctioned in the Constitution, according to the spirit of international instruments (Kilkelly, 2003; Bianku, 2020), leaving behind the communist legacy. According to Omari and Anastasi (2017), the right to private and family life is connected to several other fundamental human rights such as protection of personal data (art 35); the right to organization and association (art 46 and 47); the inviolability of the residence from control interventions that were not allowed by the will of the person and unauthorized police interventions (art 37); freedom and confidentiality of the correspondence (art 36); the right of the person not to be subjected to self-control; the individual guarantees given by the Constitution towards a person not to incriminate himself (art 32) and the right to get married and to have a family (art 53).

State interventions in a person's private or family life must be legally justified and supported by legal criteria and to the extent of interventions allowed by the European

Convention (Omari & Anastasi, 2017; Bianku, 2020; Constitution of the Republic of Albania Law of 1998, Pub. L. No. 8417/1998, as amended). Despite the fact that the right to private and family life is seen under the guise of protection from arbitrary interferences of public authority,[1] the state also has positive obligations to ensure that this right is respected even between private parties (Council of Europe/European Court of Human Rights, 2022). The need for positive obligations by the part of the state is highlighted even in the case Bajrami versus Albania (2006). The Strasbourg Court has evidenced the authorities' failure to provide any framework affording the applicant the practical and effective protection to reunite him with his daughter and to keep parent-child relationship enshrined as the State's positive obligation in Article 8 of the European Convention on Human Rights.[2]

The sanctioning and protection of the right to private and family life by the 1998 Constitution is in tune with the developments of society, given that this right is violated frequently in the digital age (Milašiūtė et al., 2022). Technological and digital developments have made this right fragile and vulnerable to its abuse and violation, given that the means of mass media and communication (telephone, television, radio and the Internet) carry a series of data on the personal files of individuals, the unauthorized use of which constitutes a violation of the right to enjoy private life (Ireton & Posetti, 2018; UNESCO, 2016). The most recent UN Human Rights Council report on the right to privacy in the digital age engages with numerous threats to privacy and highlights how digital tools can expose people to new forms of monitoring, profiling and control (UN, 2022).

The protection of personal data is one of the constituent elements of the right to private life sanctioned in Article 35 of the Constitution (Constitution of the Republic of Albania Law of 1998, Pub. L. No. 8417/1998, as amended).

Article 35

1. No one may be obliged, except when the law requires it, to make public the data connected with his person.

2. The collection, use and making public of data about a person is done with his consent, except for the cases provided by law.

3. Everyone has the right to become acquainted with data collected about him, except for the cases provided by law.

4. Everyone has the right to request the correction or expunging of untrue or incomplete data or data collected in violation of law.

The Albanian Constitution has guaranteed the right of everyone not to make the personal data public. This right can only be limited by law, focusing concretely on the cases and reasons for the publication of personal data. Moreover, Albania ratified in 2005, the European Convention "On the protection of individuals with regard to the automatic processing of personal data", which has influenced the approach of domestic legislation to the European and international one (Council of Europe, 1981). The protection of personal data has given a new dimension to the right to private life (UN, 2019). This is considered related to the need for the prior consent of the data subject, in order to carry out the processing of personal data by other persons. In the framework of the type of data, in case of sensitive data, the only valid condition is

the written approval of the person whose data will be processed. The term "sensitive data" is related to any information about the natural person, related to his origin, racial or ethnic, political opinions, trade union membership, faith, religious or philosophical, criminal conviction, as well as data on health and sex life.[3] The cases when it is not necessary to obtain written approval are determined by law. These are considered exceptional cases and are mainly related to the protection of public interest and transparency in the work activity in the state agencies. The obligation of official persons to declare their assets to the High Inspectorate of Declaration and Control of Assets and Interests can reflect the public interest for a good governance (Xhepa & Kodra, 2021).

Omari and Anastasi (2017) have emphasized the necessity to provide for the right of every person to be familiar with the process of handling the personal data and to receive information within a certain period. The data subject has the right to object in any case to the processing of personal data, requesting the correction, deletion and clarification of the data. The same position was held by the Strasbourg Court in the case of Rotaru versus Romania (2000). The European court ruled that Romania had breached Mr. Rotaru's right to privacy. According to the court's view, Romanian law lacked proper safeguards against abuses in the storage and use of personal information, including the way the security services handled communist-era records, by breaching the right to store the information and its accuracy (Bianku, 2020).

Acknowledging that the discussion on the right to privacy should be based upon existing international and domestic legal obligations, it is reasonable that the protection of personal data goes beyond the national sphere, including the transfer of data outside the country (UN, 2019). From this point of view, the protection, stipulated in the Albanian legal framework, is in accordance with the European Convention, including state commitments (Xhepa & Kodra, 2021).

In addition to the sanctioning and materialization in the law of the rights on personal data, a series of jurisdictional guarantees are provided in order to make possible the protection and full realization of this right in case of violation. It can be mentioned the right of appeal of the given subjects provided for in a wide network of laws, exercised through jurisdictional means such as, administrative appeal, appeal to the Ombudsman for violation of human rights; appeal to the Commissioner for the right to information and protection of personal data, judicial appeal, request for compensation, etc.

However, despite legal sanctioning and protection of the right to private and family life, this right is threatened by digital technology. UN Human Rights Council report on the right to privacy in the digital age is focused on three trends in state actions in relation to the right to privacy: '(a) the widespread abuse of intrusive hacking tools; (b) the key role of robust encryption in ensuring the enjoyment of the right to privacy and other rights; and (c) the widespread monitoring of public spaces (UN, 2019).

[3] Law No. 9887/2008 "On the Protection of Personal Data".

1.1 *The threat from digital technology*

The widespread abuse and publication of the personal data, which were officially gathered by the Albanian state authorities, brought to light the problems of governmental protection of fundamental human rights and freedoms.

The first case is connected to the gathering of personal data for political purposes, creating a database and its distribution to the internet (Albanian Helsinki Committee, 2022). The database provided the information on personal data of Albanian citizens and their political preference. The Commissioner for the right to information and the protection of personal data issued a recommendation to the political party which collected the data in order to meet in continuation higher standards of data protection (Recommendation of the Commissioner, 2021).

The second case is connected to the leaking of 630,000 employees' salaries in December of 2021 (Albanian Helsinki Committee, 2022). Since the information on an identified or recognizable individual is referred to as personal data and any data that can directly or indirectly identify a person, such as their name, identification number, contact information, or any other information that is particular to their identity, falls under this category, the salary of an individual constitutes a private information that falls under the protection of personal data. This implies the breach of the confidentiality of the salary of the individuals and constitutes a violation on the right to privacy by public authorities.[4] According to the decision of the Commissioner, the dissemination constitutes a serious violation of private life and the right of citizens to protect their personal data.

The third case is connected to the data leak of 530,452 license car plates, altogether with the credentials of the owners and other detailed information of the vehicles (Albanian Helsinki Committee, 2022). Administrative investigation by the Commissioner revealed that the information was obtained from the General Directorate of Road and Transport which was responsible for storing and protecting the personal data. According to the decision of the Commissioner, the public authority has breached the law on data protection, violating the right to privacy.

The cases show the vulnerability of the right to privacy and how easily this right can be violated on a large scale, for a large number of people through digital devices. While the Internet offers numerous possibilities for exercising human rights, it also has certain features which make it a source of risk and threats for human rights (Milašiūtė et al., 2022). It results that the right to private and family life demands both the restraint from the abusive intervention of the state, and the public authorities' proactive approach towards creating special structures to preserve this right. According to Article 8 of the European Convention, Party Members have positive obligation which implies "obligation to carry out effective inquiries", otherwise they will violate the right to privacy and data protection.[5]

2. Conclusion

[4] Decision of the Commissioner for the right to information and the protection of personal data, 2022.

[5] *M.D and others v Spain*, (dec.), no. 36584/17, 28 June 2022.

The right to private and family life has made significant progress, especially after the democratic changes in Albania. The number of related rights found under "the umbrella" of the right to private and family life is increased, ensuring in this way a better interaction towards protection of human rights. However, in an increasingly digital and data-driven society, the right to private and family life and the right to data protection are in constant need to be safeguarded by digital threats. This requires an increased awareness of the Albanian governmental actors to reflect on the approaches towards constructing better mechanisms of protection of the right to private and family life in front of digital challenges. Showing maximum care in regulating the fragile relationship between the right to private and family life and the protection of other human rights and freedoms, requires the fundamental respect for the criteria of limiting basic human rights, defined in the Constitution and in the European Convention of Human Rights. The effective mobilization of the international legislators and courts by determined societal actors, including key institutional players, expert groups, civil society organizations, and citizens themselves, will let to the current, comparatively comprehensive international system of protection of the right to private and family life and personal data (Granger & Irion, 2018). The Albanian public authorities shall take measures to extend the benefits of technology, taking into consideration the risks that come along with the advancement of technology. This approach has to be accompanied by procedural safeguards, effective domestic oversight and remedies, with the aim of protecting and caring for human rights, human personality and its physical and intellectual integrity.

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