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THE RIGHT TO PRIVACY WITHIN CRIMINAL INVESTIGATIONS: AN APPROACH FROM STRASBOURG

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Introductory remaks

The aim of this paper is to clarify how the right to privacy is protected in the process of investigating a criminal offence. In order to be possible moving forward into the investigation process, it might be necessary to interfere into the suspect's private life for collecting evidences. However, it is necessary to determine whether such interference is lawful in order to guarantee the admission of the evidences in trial. In this line, there are some limits that need to be respected in order to secure inherent rights of individuals.

In order to assess where the limits of the right to privacy during the criminal investigation process are to be set, a balancing test between security protection and citizen's inherent rights needs to be done. In this situation, the two main interests at stake are on the one hand individual liberty as a personal interest, and on the other hand, security as a general interest. Thus, it is not easy to strike a fair balance between them[1].

For the purpose of reaching a conclusion on the assessment proposed by this dissertation, the approach to be analyzed is based on the rules of the European Convention of Human Rights (ECHR, hereinafter) and its Protocols, as well as on the case law issued by the Strasbourg Court, the European Court of Human Rights (ECtHR, hereinafter).

So as to explain the procedure to assess the issue, first, the European Convention of Human Rights is going to be introduced; second, the scope of article 8 ECHR which refers to the right to privacy; third, the circumstances under which the ECtHR accepts an interference into art. 8 shall be analyzed; fourth, the specific criteria provided by the ECtHR for article 8 violations in the criminal investigation process are going to be

[1] N. Jörg, S. Field, C. Brants. "Are Inquisitorial and Adversarial Systems Converging?, in C.Harding, P. Fennel, NJörg, B. Swart (eds), Criminal Justice in Europe: a comparative study." *Claredon Press Oxford*. 1995. Pages 41-56.

studied, and fifth, the NSA scandal will be described as a practical example of all the theory previously explained[2]. Last, we will end up with some general conclusions.

[2] B. Rainey, E. Wicks, & C. Ovey. *Jacobs, White and Ovey: the European convention on human rights*. Oxford University Press. 2017. Pages 340-352.

Chapter 1. The European Convention of Human Rights

The European Convention of Human Rights (ECHR) was drafted after the Second World War (1939 - 1942) and it entered into force in November 1950.

The aim of the Convention was to secure individual's inherent human rights that in the recent historical moments had been violated in terrible events such as the nazi holocaust. Along with this aim, the Convention was also drafted to secure European States from communist subversion. This idea is reflected in the Convention when it refers to the necessity of enjoying rights and liberties within a democratic society.

The ECHR is a bill of rights that was inspired in previous historical events such as the American Declaration of Independence (1776) or the French Declaration of the Rights of Man and of the Citizen (1789), which were the first achievements in the struggle of securing fundamental rights. In this process, the United Nations Charter was also a giant step forward for human rights protection as a whole, which especially secured respect and observance of human rights. Furthermore, the United Nations Charter, represented for the first time in history the concern of the international community in compromising the creation of a binding instrument that gathered the most basic rights and it opened its applicability to all the 51 contracting states, as an instrument that overruled their national rules. The Charter was concluded in the International Conference of San Francisco in 1945. Together with the conclusion of the Charter, they also created a new institution, the United Nations, that ever since has worked in promoting not only global peace and international security, but also providing humanitarian aid together with, human rights and democracy protection to the most vulnerable countries in the world[3].

In spite of all the previous steps above mentioned, the ECHR does not simply duplicate the rights contained in the previous human rights declarations, since its imminent goal was to provide the sufficient tools and safeguards as to secure that the terrible human

[3] United Nations webpage, online access link: https://www.un.org/es/about-un/index.html

right violations that occurred in the Second World War would be prevented in the future. In conclusion, the aim was to create a binding normative instrument that could not be disregarded by the very States.

Finally, the ECHR was early accepted by twelve States (Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, Norway, Turkey, Netherlands and the United Kingdom) in November 4, 1950[4]. In its content englobes mostly civil and political rights. It is said that the Convention is a living instrument because the original idea was not only to create a Convention that was applicable at the time of creation but to create an instrument to be applicable throughout the times. This is why it needs to be remarked that the Convention is a changing mechanism which has been successful in answering the demands of modern society, by incorporating new rights that in the moment of drafting did not exist under its content, for example, the right to data protection[5]. This is possible due to the daily dedication of all the bodies that are involved within the Council of Europe[6], and the reshaping of the Convention by means of the new Protocols and amendments issued since its inception[7].

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[4] B. Van der Sloot. "Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of Big Data". *Utrecht Journal of International and European Law*. 2015. Pages 25–50.

[5] M. Martínez López-Sáez. *Una revisión del derecho fundamental a la protección de datos de carácter personal.* Tirant lo blanch. 2018. Page 139.

[6] L. Yu. Fomina. "Protection of the Right to Respect for Private and Family Life in European Court of Human Rights". *European Research Studies of Ogre Mordovia State University*. 2016. Page 98.

[7] B. Rainey, E. Wicks, & C. Ovey. *op. cit. supra* note 2. Pages 3-4.

Chapter 2. The scope of the right to privacy in the European Convention of Human Rights

According to the European Court of Human Rights, the right to privacy is the core of the rights within the liberal concept of freedom. It representes the importance of individual sovereignty of the person, along with the right to be left alone, to take individual decisions, and to the free development of one's own personality[8], as the starting point for human rights protection.

The Court has determined the scope of this right in its case law. In addition, it needs to be understood that the right to privacy lacks an exhausted definition provided by the Convention[9], as it is conceived to be a broad concept which shall only be limited by the Court in its jurisprudence on a case by case analysis[10].

The right to privacy applies to different circumstances as specified in the Convention, for example, to a person's private life, family life, home and correspondence. Indeed, home and correspondence have been regarded as the necessary ingredients for securing social life in a social community[11].

The concept of private life extends to personal autonomy, to the right to make choices regarding one's own life, the right to develop personality, establishing relationships with others, communicating, physical and psychological integrity, sexual life[12], gender,

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[8] Malone v. UK, (App. 8691/79), 17 December 1984.

[9] C. Ruiz Miguel. *El derecho a la protección de la vida privada en la jurisprudencia del Tribunal Europeo de Derechos Humanos.* Cuadernos Civitas. 1994. Pages 34-35.

[10] I. Ziemele. "Privacy, Right to, International Protection. Oxford Public International Law." *Max Planck Encyclopedia of Public International Law (MPEPIL).* 2009.

[11] B. Rainey, E. Wicks, & C. Ovey. *op. cit. supra* page 401.

[12] Bensaid v. United Kingdom, (App. 44599/98), 6 February 2000. §47.

personal data, reputation, names and photos[13] and the duty of professional secrecy[14], among others[15]. According to the Court's ruling in UZUN case[16], private life is regarded in situations in which the individual has a reasonable expectation of privacy[17]. This situation can be found in different places such as home[18] even if it is temporary[19], or other places such as business premises[20], or public spaces such as clubs, restaurants, or ski stations as defined in the HANNOVER case[21]. On the same line, in the NIEMIETZ case[22], the Court held that the scope of private life cannot be restricted because it cannot be limited the inner circle in which the individuals live their personal life. Even in public places, as long as exists an interaction of a person with others this situation might still fall within the scope of private life[23].

According to the Court's interpretation, the right to privacy's protection includes also right to individual's inner life[24] which concerns, philosophy, religious or moral beliefs,

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[13] Hambach Legal. *Article 8 EHCR - Right to private life, family life, correspondence and home*. webpage access here: https://human-rights-law.eu/echr/article-8-echr-right-to-private-life-family-life-correspondence-and-home/

[14] B. Rainey, E. Wicks, & C. Ovey. *op. cit. supra.*

[15] C. Ruiz Miguel. *op. cit. supra* pages 34-35.

[16] Uzun v. Germany, (App. 35623/05), 2 September 2010.

[17] G. Mukherjee and J. Wookey. *Resucitating Workplace Privacy? A Brief Account of the Grand Chamber Hearing in Barbulescu v. Romania*. Strasbourg Observers webpage, available here: https://strasbourgobservers.com/2016/12/20/resuscitating-workplace-privacy-a-brief-account-of-the-grand-chamber-hearing-in-barbulescu-v-romania/

[18] Buck v. Germany, (App. 41604/98), 28 April, 2005.

[19] Hembach Legal, *Ibidem.*

[20] Bărbulescu v. Romania, (App. 61496/08), 5 September 2017; Copland v. United Kingdom (App. 62617/00), 3 April 2017.

[21] Hannover v. Germany, (App. 59320/00), 24 June 2004.

[22] Niemitz v. Germany, (App. 13710/88), 16 December 1992.
German police officers carried out a search in the applicant's law office which amounted to a violation of article 8 ECHR, as the law office falls within the scope of private life, due to the private relationship between the lawyer and client. Thus, the Court concluded that right to privacy might also encompass spaces where individuals establish and develop relations with other human beings.

[23] Peck v. United Kingdom, (App. 44647/98), 28 January 2003. §57.

[24] I. Ziemele. *op. cit. supra* note 6.

and emotional life, as established in BRÜGGEMANN and SCHEUTEN case[25]. Inner life is protected aiming to guarantee individuals from the free development of their own personality.

Family life relates to individuals who live together without requiring legal marriage between them, a close relationship between two people is enough to create a family link[26]. Also, immediate relatives from grandmothers to grandsons[27] are included under the definition of family life[28].

According to the Practical Guideline of Admissibility Criteria (PGAC, hereinafter) issued by the Court[29], which generalizes the practice of the Court, article 8 of the Convention includes three different categories that regard as follows. The first one refers to the person's physical, psychological and moral integrity; the second one to privacy; and the third one, to the right to identity, personal development, and right to establish personal relationships[30]. The first one, includes medical treatment, psychological and moral integrity, as examined by the Court in cases such as X&Y v.

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[25] Brüggemann and Scheuten v. F.R.G., (App. 6959/75), 12 July 1977.
The applicants alleged that abortion amounted to a violation of the mother's right to privacy, however, the Court held that in cases where abortion is carried out by a doctor with the mother's consent the termination of the unwanted pregnancy is not punishable.

[26] Keegan v. Ireland, (App. 00016969/90) May 26, 1994.

[27] Marckx v. Belgium, (App. 6833/74), 13 June 1979.

[28] L. Yu. Fomina. o*p. cit. supra.*

[29] European Court of Human Rights. Practical Guideline on Admissibility Criteria - Item 300. Last update 31 December 2018. Online access: https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf

[30] B. Rainey, E. Wicks, & C. Ovey. o*p. cit. supra* page 402.

THE NETHERLANDS[31] and GLASS v. UK[32], where forced medical treatments and psychiatric examinations constituted a violation of article 8.

According to the PGAC, privacy is integrated by the right to personal portrait, the right to reputation, the right to information of files, data collection and storage, video monitoring, and health records[33].

Last, the PGAC established that identity concerns to the right to personal development, personal autonomy, the right to acquire information about person's origins, and ethic background[34] as established in the ODIÈVRE case[35] where the Grand Chamber remarked that it is vital for defining one's personal identity discovering information regarding one's parents, birth, the circumstances in which the child was born, and thus, all this constituted part of the adult's private life, which needed to be protected under article 8 of the Convention[36].

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[31] X&Y v. The Netherlands, (App. 8978/80), 26 March 1985. §22, 30.
The applicants, a transexual couple, alleged a violation of article 8 ECHR for the non recognition of their relationship before the birth registry authorities. The Court held that a long term couple relationship where one integrant was transexual amounted to a family and had to be protected under right to family life.

[32] Glass v. United Kingdom, (App. 61827/00) 9 March, 2004. §70-72.
The applicants were a mentally handicapped girl and her mother. The latest sued the hospital for applying to her daughter medical treatments without both, mother's consent and Court's approval in an emergency crisis. The Court concluded this situation amounted to violation of article 8 because even if the interference was in accordance with the law and the aim was legitimate, as they wanted to safe the handicapped girl's life, the necessity requirement was not accomplished as the medical team imposed their view on the mother's decision.

[33] … Practical Guideline on Admissibility Criteria - Item 302.

[34] … Practical Guideline on Admissibility Criteria - Item 303

[35] Edièvre v. France, (App. 42326/98), 13 February 2003. §29.

[36] B. Rainey, E. Wicks, & C. Ovey. *op. cit. supra* page, 402.

The Court also mentioned in S.A.S v. France[37] that individual appearance also falls within the scope of article 8 because personal choices as individual's desired appearance amounts to the expression of individual personality[38].

It needs to be mentioned that the right to privacy is used by the Court as a peripheral right that provides a legal basis for other rights that are not specifically included in the Convention. It works as an open door for new rights and freedoms, among others, the right to data protection[39], minority rights, or the right to healthy and clean environment are being assessed under article 8 by the Court. For this reason, the scope of article 8 has been broadened considerably, extending at the same time the scope of the Convention itself.

In LÓPEZ OSTRA case, the European Court of Human Rights concluded that article 8 also had to protect respect of home and private life whenever the correct enjoyment of this right was interfered by public authorities. In this case, the applicant lived some meters away from a solid and liquid waste treatment plant which produced disgusting smell, noise and contaminating smokes that had a damaging impact on the enjoyment of her right to home and private life. The Court argued that Spanish State had not been successful on striking a fair balance between the promotion of the city's economic development and securing the effective enjoyment of the citizen's rights[40].

The Court also incorporated under article 8 the protection to rights that could be thought to fall under other rights of the Convention. In this line, the Court has established that the Convention should be read as a whole, and thus, that there is not any strict dividing line between each of the articles. This is why article 8 is often used in reference to procedural guarantees that might also fall under article 6 ECHR, regulating the right to

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[37] S.A.S v. France, (App. 43835/11), 1 July 2014.

[38] B. Rainey, E. Wicks, & C. Ovey. *op. cit. supra.*

[39] M. Martínez López-Sáez. *op. cit. supra* page 139.

[40] López Ostra vs. Spain, (App. 16798/90), 9 December 1994.

fair trial. This is the case of right to be informed, prisoner's freedom to corresponding in private with lawyers, the right to fair trial when the hearing is conducted in the manners and circumstances affording due respect, or even article 8 is alleged by the Court when loss of home is caused as a consequence of the expropriation or destruction of it.

However, the Court also refused to include in article 8 other rights such as right to education, establishing that it does not fall under the right to family life[41]. Neither does fall within the scope of article 8 a complaint based on a reputation loss, as long as this is a consequence of one's own actions, as established by the Court in GILLBERG v. SWEDEN[42], where a Gothenburg University professor alleged reputation loss due to a criminal conviction caused by his denial to grant access to police officers to his research materials[43]. The Court held that article 8 cannot be relied to complain of a reputational loss when this situation is a "foreseeable consequence of one's own actions"[44], as it is the commission of a crime.

[41] B. Van Der Sloot. *op. cit. supra* note 4.

[42] Gillberg v. Sweden, (App. 41723/06), 3 April 2012.

[43] B. Rainey, E. Wicks, & C. Ovey. *op. cit. supra* page 402.

[44] *Vid supra* note 42. §67.

Chapter 3. The lawful interference with the right to privacy in the European Convention of Human Rights

Article 8 of the Convention protects the right to privacy from any arbitrary interference that could harm the exercise of the rights and freedoms of citizens. In that protection, States assume some positive obligations, which involve taking certain action in order to prevent any wrongful interference by third parties into the right to privacy[45]. In this line, States enjoy a margin of appreciation in order to establish the measures to be implemented for ensuring compliance with the Convention[46].

However, as mentioned on the second paragraph of article 8 ECHR, State authorities are allowed to interfere in right to privacy under an exhaustive list of conditions in order to determine the interference as lawful[47]. The Court follows a three step inquiry when a Contracting Party relies on exercising the limitation to right to privacy above mentioned. First, it concretes whether the interference is in accordance with the law, or prescribed by law. Second, it determines whether the aim pursued by the interference is legitimate, and specifically if it falls under any of the aims established in the second paragraph of the article. Third, it decides whether the limitation is necessary in a democratic society. By assessing this criteria, the Court will conclude whether the Contracting Party based its decision to interfere in the right on an "acceptable assessment of the relevant facts" as established in the GORZELIK case[48].

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[45] Hembach Legal. *op. cit. supra.*

[46] T. Gómez Arostegi. "Defining Private Life Under Article 8 of the European Convention on Human Rights by Referring to Reasonable Expectations of Privacy and Personal Choice". *Californian Western International Law Journal vol 35, issue 2, art. 2.* Available at https://scholarlycommons.law.cwsl.edu/cwilj/vol35/iss2/2. 2005. Pages 2-35.

[47] B. Van Der Sloot. *op. cit. supra* pages 1-4.

[48] Gorzelik and Others v. Poland. (App. 44158/98), 17 February 2004. §96.
The applicants aimed to register the "Union of People of Silesian Nationality" before national polish authorities, but they rejected its registration. The European Court of Human Rights considered the registration of this group unlawful because it refers to a non existing nation or ethnic group which could mislead to the general public and create unnecessary controversy in society. Court's decision does not interfere with article 11 ECHR freedom of assembly, as this decision was taken accordingly in protection of rights of others and prevention of disorder, both legitimate aims that justify the interference under paragraph 2 article 11 of the Convention.

A) Legal basis for the interference

In determining whether the interference or limitation to the right to privacy is in accordance with the law, a threefold test must be answered. First of all, it needs to be analyzed whether according to the national law of the Contracting State the interference to article 8 has a legal basis or not. Secondly, it needs to be determined if that legal basis is accessible for citizens. For instance, a rule meets the accessibility requirement if it has fulfilled the publicity requirements of national law[49]. And last, the Court will also analyze if that interference is foreseeable by the person in the circumstances of each case. The last two requirements are described by the Court as the foreseeability test[50] and takes the name of 'quality of law' requirements[51].

According to the MALONE case, the national rule must establish the scope of the discretion and the manner of exercise with sufficient clarity, always based on the legitimate aim pursued by the interference and providing sufficient protection towards any arbitrary interference that the individual could suffer[52].

In some circumstances the Court does not analyze national law in depth. As a general rule, the Court accepts the interpretation that domestic courts have adopted, as long as there are not very severe reasons to disagree. For example, in the ROCHE case, the

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[49] M. Martínez López-Sáez. *op. cit. supra* pages 138-145.

[50] S and Marper v. United Kingdom, (Apps. 30562/04 and 30566/04), 4 December 2008. §99.

[51] Al-Nashif v. Bulgaria, (App. 50963/99), 20 June 2002, (2003). §121.

[52] *Vid supra* note 8. §68.
The applicant suffered a telephone interception from the State authorities based on a warrant issued by the State Secretary. However, the investigative measure was not supervised by an independent authority and thus, the interference to article 8 ECHR was determined to be unlawful by the Court, as the "in accordance with the law" requirement for exceptions under article 8 was not complied.

Strasbourg Court had to disagree with national Courts because the right to court was unfairly restricted to the applicant[53].

It is also relevant to mention that the accessibility requirement does not necessarily require the existence of a written or statutory legal basis, as noted by the Court in the TIMES case, the domestic law regarded can be unwritten[54].

In SHIMOVOLOS case, a data base surveillance was carried out on the basis of a ministerial order which had not been published yet. Even if in this case the non publicity amounted to the lack of the accessibility requirement, the Court also remarked that the foreseeability test does not require to the individual to be aware of the fact that an interception is being conducted, as, in some situations, police investigations need to be kept in secrecy for investigatory purpose. The individual is only required to be aware of the circumstances prescribed by the law under which authorities are empowered to carry out such secret surveillance and data collection[55].

Finally, among the quality of law requirements established by the Court, it reiterated the necessity of establishing appropriate safeguards to counterbalance the interference with the important general principles at stake. This idea is reflected in SANOMA UITGEVENS B.V. case where the Court concluded that the quality of law was deficient as there was not an adequate legal proceeding where an independent authority assessed whether the criminal investigation overrode the public interest in the protection of

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[53] Roche v. United Kingdom, (App. 32555/96), 19 October 2005. §120.
The applicant alleged suffering from the effects of toxic chemical exposure caused by participating in gas tests while he was in the British Army without being aware of the harm that those tests were causing to his health. He claimed a pension based on the injuries suffered, and in light of such proceeding, alleged the violation of right to be informed and right to access to court as the British government rejected issuing the required documentation to the applicant in order to be able to proof the burden. The Court concluded that there was a violation of article 8 ECHR as the respondent State did not fulfill its obligation of providing the applicant the sufficient and required information about the test records which would enable him to assess the danger to which he was exposed.

[54] Sunday Times v. United Kingdom, (App. 6538/74), 26 April 1979.

[55] Shimovolos v. Russia, (App. 30194/19), 21 June 2011.

journalists sources[56]. In other cases, this discussion is held in the third step of the general lawfulness criteria, when assessing if the interference is necessary in a democratic society[57].

[56] Sanoma Uitgevers B.V. v. The Netherlands, (App. 38224/03), 14 September 2010 [GC].

[57] B. Rainey, E. Wicks, & C. Ovey. *op. cit. supra* pages 343-347.

B) Legitimate aim

The Convention establishes some legitimate aims in the second paragraph of articles 8 to 11 under which exceptions to these rights are legitimated. The assessment of whether the infringement of the right to privacy pursues a legitimate aim is going to be analyzed by the Court in the second part of the analysis. The aims described in the Convention are exhaustive, and usually the Contracting States justify their intervention in more than one legitimate aims, as indeed, their scope is very broad.

The legitimate aims for the infringement of the right to privacy set out in the second paragraph of article 8 are the following[58]: first, interests of national security are mentioned. National security is a broad and not easy concept to define. As Kempees mentioned, this limitation contains the necessary measures to protect "the safety of the State against enemies who might seek to subdue its forces in war or subvert its government by illegal means' including those features which make it a democracy."[59] As an example, in the KLASS case, the Court accepted the German measures of secret surveillance[60] as a counter act towards to sophisticated forms of espionage that democratic societies were facing from terrorist threats, in the light of national security protection[61].

Second, interests of public safety are mentioned in the Convention. However, the Court has not yet relied on this ground exclusively to justify an exception to right to privacy. Instead, this ground has always been used together with national security and prevention

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[58] I. Roagna. "Protecting the right to respect for private and family life under the European Convention on Human Rights". *Council of Europe*, Strasbourg. 2012. Pages. 42-45.

[59] P. Kempees. "Legitimate aims in the Case-Law of the European Court of Human Rights" in *Protecting Human Rights: The European Perspective. Studies in memory of Rolv Ryssdal"*. 2000. Page 662.

[60] M. Martínez López-Sáez. *op. cit. supra* page 139.

[61] Klass v. Germany, (App. 5029/71), 6 September 1978.

of disorder as mentioned in the REKVÉNYI case[62]. Public safety is interpreted by the Court as a synonym of public order as the Court remarked in the METROPOLITAN CHURCH OF BESSARABIA case, where interference to article 8 was accepted in the light of the power of States to inquire the religious aims used by a movement in order to guarantee the protection of order and public safety[63].

Third, interests of economic well-being of the country. The Court accepted an article 8 interference in the FUNKE case where the applicant considered that a house search amounted to a violation of article 8 of the Convention, as the house search was made in connection with an investigation process of financial dealings with foreign countries that violated the French domestic law[64].

Fourth, prevention of disorder or crime is mentioned. As established in the VAN DER HEIJDEN case, the Court confirmed that prevention of crime refers to securing evidence for the prosecuting and detecting crime[65]. In the REPUBLICAN PARTY OF RUSSIA case, the Court remarked that prevention of disorder amounted to "the protection of a State's democratic institutions and constitutional foundations."[66]

Fifth, protection of health and morals encompasses two different interests. On the one hand, the protection of health and on the other hand, the protection of morals. According to the Court's interpretation, the interference to the right to privacy does not have to be justified in both interests, since it is sufficient with justifying the infringement in one of the interests mentioned on the legal ground. Protection of health is referred in most

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62 Rekvényi v. Hungary, (App. 25390/94), 20 May 1999. §41.
The applicant had been prohibited from participating in political activities by the Hungarian Constitution, he alleged a violation of right to freedom of expression, under article 10 of the Convention. The Court held that such interference to article 10 was justified under the legitimate aims mentioned on paragraph 2, national security and public safety, and thus, concluded that Hungary had not violated the Convention.

63 Metropolitan Church of Bessarabia v. Moldova, (App. 45701/99), 14 December 2001. §113.

64 Funke v. France, (App. 10828/84), 25 February 1993.

65 Van Der Heijden v. The Netherlands, (App. 42857/05), 3 April 2012. §54.

66 Republican Party of Russia v. Russia, (App. 12976/07), 12 April 2011. §101.

cases with the protection of public health, for example, with regard to compulsory vaccination[67]. However, protection of health can also be referred to individual health, such as the refusal to blood transfusions due to religious beliefs, as occurred in the JEHOVAH'S WITNESSES OF MOSCOW AND OTHERS case[68].

The notion of protection of morals studied by the Court has in most cases referred to sexual morality, as stated by the Court in cases such as HANDYSIDE [69], DUDGEON[70], or LANKEY, JAGGARD AND BROWN cases[71]. However, in other cases such as A, B, C v. IRELAND, the Grand Chamber concluded that the protection of the right to life of the unborn child fell within the scope of protection of morals according to Irish domestic law[72].

Sixth, protection of the rights and freedoms of others has been used by the Court in order to protect the rights and freedoms of children, for example in child-care situations[73]. However, this ground does not limit the range of rights which are protected under it. For instance, in the CHAPPELL case the Court accepted under this ground the protection of intellectual property rights. The case involved the issuing of a search warrant aiming to find items that were produced in breach of intellectual property rights, in order to proceed to their seizure[74].

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[67] B. Rainey, E. Wicks, & C. Ovey. *op. cit. supra* page 354.

[68] Jehovah's Witnesses of Moscow and Others v. Russia, (App. 302/02), 10 June 2010.

[69] Handyside v. United Kingdom, (App. 5493/72), 7 December 1976.

[70] Dudgeon v. United Kingdom, (App. 7525/76), 22 October 1981.

[71] Laskey, Jaggard and Brown v. United Kingdom, (Apps. 21627/93, and 21974/93), 19 February 1997.

[72] A, B and C v. Ireland, (App. 25579/05), 16 December 2010.

[73] Johansen v. Norway, (App. 17383/90), 7 August 1996.

[74] Chappell v. United Kingdom, (App. 10461/83), 30 March 1989.

C) Necessary in a democratic society

In addition to successfully completing the previous two steps, the interference to the right to privacy must also comply with the 'necessary in a democratic society' requirement. This condition involves "showing that the action taken is in response to a pressing social need, and that the interference with the rights protected is no greater than is necessary to address that pressing social need"[75]. The later requirement is referred in the Court's rulings as the proportionality test, which requires to strike a fair balance between the individual restriction and the public interest ground on which the restriction is based. This criteria is perfectly described by the Court in the SILVER case, where the Court establishes some concepts such as the meaning of 'necessary' which refers to synonyms as admissible, ordinary, useful, reasonable or desirable. The Court also reiterates that the Contracting States enjoy a margin of appreciation on determining the imposition of the restriction, and it also clarifies that the statement 'necessary in a democratic society' refers to the idea that the interference must be proportionate to the legitimate aim pursued[76].

In assessing the margin of appreciation of the Contracting States to establish restrictions to the Convention's rights, the Strasbourg Court has established the doctrine of proportionality. This doctrine varies case to case, as established in the HANDYSIDE case where the Court remarked that its supervisory functions required to pay the utmost attention to the principles of a democratic society[77]. Thus, the proportionality test, instead of acting as a dispositive test, it is sometimes used by the Court as an imprecise justificatory strategy to support certain values that are not prescribed by law[78].

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[75] B. Rainey, E. Wicks, & C. Ovey. *op. cit. supra* page 359.

[76] Silver v. United Kingdom, (Apps. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, and 7136/75), 25 March 1983. §97.

[77] *Vid supra* note 69. §26.

[78] A. McHarg. "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" in *The Modern Law Review.* Wiley, vol 62, issue 5, 1999. Pages 671-696.

Furthermore, the Strasbourg Court analyzes the main principles of a democratic society in the REFAH PARTISI case. Between the most relevant values of democracy the Court mentioned the qualities of pluralism, tolerance, broad-mindness, equality, liberty, freedom of religion, expression and assembly, and lastly, right to fair trial[79].

In this line, the Court has also established through its case law some general principles that are applicable to the margin of appreciation of the Contracting States. In the X and Y case, where a mentally handicapped girl had been sexually assaulted, the Court acknowledged that even if the girl's right to privacy was at strike, the State's margin of appreciation would depend on the kind of interference to private life that had occurred. In this case, as the violation amounted to a core issue of privacy, which is, physical integrity, the Court concluded that State's margin of appreciation had to be abridged[80].

According to the Court's jurisprudence, it seems that in theory a wider margin of appreciation is granted to Contracting Parties whenever they have assumed a positive obligation over a certain right. However, the right over which the positive obligation is granted will need to be in balance with the community's general interests. So, indeed, the margin of appreciation could be limited by the general interest[81].

It also needs to be remarked from the Court's case law analysis, the connection between the existence of common European standards on a determined field and the consequent narrowing of the margin of appreciation of Contracting States. Thus, the clearer the European standards are, the narrower the margin of appreciation left to Contracting States is. This idea is reflected in the X, Y and Z case, which related a female transsexual that wanted to be registered as the father of a child that was born by artificial insemination to his female partner[82]. Also, the same conclusion is reached in A,

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[79] Refah Partisi (the Welfare Party) v Turkey, (Apps. 41340/98, 41342/98 and 41344/98), 13 February 2003.

[80] *Vid supra* note 31.

[81] Monory v. Romania and Hungary, (App. 71099/01), 5 April 2005. §72.

[82] X, Y and Z v. United Kingdom, (App. 21830/93), 22 April 1997.

B and C case, where the Court uses for its conclusion the European consensus regarding abortion for narrowing Ireland's margin of appreciation. In this case, the Court established that clear consensus was reached among the substantial majority of the Contracting States in line of allowing abortion for broader situations than the ones specified under Irish domestic law[83].

It is not firmly clear to determine which of the parties has the burden of proof in determining the existence or lawfulness of any possible interference to the rights protected under the Convention. The Court has in some cases shifted the burden to the respondent State[84]. The aim is proving the interference. However, in this requirement, the Court has established some specific issues to be proven. As established in the AUTRONIC case, the part bearing the burden needs to provide relevant and sufficient grounds that would justify the interference to any of the rights protected in the Convention. The grounds under which the restriction is justified need to be proven to be relevant and sufficient, the necessity for the interference has to be convincingly established[85]. In assessing whether the interference complies with these requirements, a confrontation between rights and exceptions allowed under the Convention could occur. In such situations a balancing test must be done taking into consideration the circumstances of each case in order to achieve a priority among the interests confronted[86].

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[83] A, B and C v. Ireland, (App. 25579/05), 16 December 2010.

[84] Chahal v. United Kingdom (App. 22414/93). 15 November 1996. §136; S. Greer. *The exceptions to Articles 8 to 11 of the European Convention on Human Rights.* Council of Europe Publishing. University of Bristol. 1997. Page 15.

[85] Autronic AG v. Switzerland (App. 12726/87), 22 May 1990.

[86] *Vid supra* note 61. §59.

Chapter 4. The interference with the right to privacy in the European Convention of Human Rights during the criminal investigatory process

The investigatory process is the moment where law enforcement officers start building a hypothesis in order to start prosecuting a crime or acting for preventing it. In this proceeding, law enforcement agencies need to comply with procedural rules and match the hypothesis with the definition of a criminal offence. In the end of the investigatory process, the officers will have to decide whether to prosecute the crime or dismiss the investigation archiving the case or ordering more investigation depending on the evidences collected. Intelligence is the information used by the officers to prove or disprove charges against a suspect. This is also known as evidence.

When deciding which investigative measure is the ideal for the investigatory purpose, law enforcement agencies need to draw attention to the proportionality and subsidiarity test. Under this criteria, law enforcement agencies have to use the least intrusive mean of investigation to obtain the required result of intelligence. Also, as long as the circumstances require it, more intrusive means of investigation can be used but only when the previous ones resulted to be ineffective. In such situations where more intrusive means of investigation are used, individual's privacy needs to be protected with higher safeguard standards as established in the HUVIG and KRUSLIN cases. In the HUVIG case the applicant was being investigated for a possible tax evasion offence. In the light of such investigation, his house and business premises were searched and his telephone was tapped for one entire day. Even if the French government alleged that several safeguards were applicable to the applicant's situation, the Court found that those safeguards did not have the sufficient legal basis to make them foreseeable and accessible for the applicant. Thus, as sufficient safeguards were not provided to the applicant, the Court considered there was a breach of article 8 of the Convention[87]. In the KRUSLIN case, the applicant was a suspect of a criminal offence that due to the evidences collected during the investigatory measures, specifically telephone

[87] Huvig v. France, (App. 11105/84), 24 April 1990.

interception, carried out to a friend of him with whom the applicant had a conversation which was being recorded by the police. The applicant alleged that the interception of his telecommunications amounted to a violation of article 8 ECHR and the Court concluded in the same way as on the HUVIG case, establishing the breach of article 8 due to the lack of minimum safeguards under the national law provision with regard to the investigatory measure carried out[88].

As explained above, when considering whether an interference of article 8 of the Convention is prescribed by the law, it does not only refer to be prescribed by national law but also by European Union law. In this line, the European Court of Human Rights has remarked which are the European standards to be followed in several judgements. Among others some of the most relevant cases regarding the violation of privacy in the criminal investigation process are going to be analyzed below.

In the UZUN judgement the Court explained clearly the criteria to be followed when assessing a violation of article 8 of the Convention during a criminal investigation process. As relates to the facts of the case, in UZUN, the applicant was monitored under visual surveillance, his home telephone was intercepted, and there was a GPS receiver in the applicant's car. The investigative measures were carried out by different judicial authorities as he was suspicious of having committed a criminal offence. The applicant alleged that he was suffering a violation of his right to privacy as his private life had been intercepted in several occasions. The Court concluded that there was no violation of article 8 of the Convention because the interference complied with all the criteria established by the law and remarked that the investigative measures carried out were proportionate to the legitimate aim pursued, as less intrusive means of surveillance had been used before and had resulted to be unsatisfactory.

Furthermore, the rationale that the Court wanted to remark with this judgement is concreted in two main ideas. The first one is that the safeguards to guarantee the

[88] Kruslin v. France, (App. 11801/85), 24 April 1990.

interference of State authorities in an individual's private life depends on the type of interference that suffers. When talking about the criminal investigation process, different safeguards need to be applied to a house search, to a telephone interception or to a GPS surveillance. Apart from this, the second idea is that the investigatory measure needs to be lawfully executed by the State authorities. This obligation requires law enforcement officers to comply both with national law standards and also EU standards. In this line, in the UZUN case, the Court establishes some requirements that the national law needs to incorporate on its content when determining the lawfulness of the application of an investigatory measure. First of all, the rule needs to establish whose telecommunications shall be intercepted. As it is going to be analyzed bellow, investigative measures can only be directed to suspects of a criminal offence. The criminal offences that require an investigative measure could be limited by national parliaments; however, the requirement that the investigated person has to be a suspect of a crime is a European rule applicable to all the EU Member States. The rule has to mention the nature of the offence in which the measure has to be used. Also, the law must specify the procedure to be followed in the application of the investigatory measure. The maximum duration of the measure is also a mandatory requirement. The record and report keeping method and the precautions to be applied in order to guarantee data protection[89], for example, to establish the amount of time that are going to be stored the records until their destruction. Last, national law needs to establish the participation of a judicial independent supervisory body implicated in the investigatory measure. This authority will guarantee the application of the law and the compliance with it. This requirement if fulfilled when for starting an investigatory measure the investigatory judge has to issue a warrant, or when the judge supervises the data created by the investigatory measure[90].

When taking into account the concern of complying with EU law standards, attention needs to be draw to the circumstances that justify the application of investigatory

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[89] M. Martínez López-Sáez. *op. cit. supra* page 139.

[90] *Vid supra* note 16.

measures. In this line, the O'HARA case determines the moment when a person becomes a suspect of having committed a criminal offence. As what relates to the facts of the case, the applicant Patrick O'Hara was arrested by the police officers who thought there were reasonable grounds of suspicion because he had previously been sentenced for different criminal offenses, including murder. However, in this case, the applicant alleged a violation of article 5 (1) of the Convention because he had been deprived arbitrarily from his right to liberty. In effect, the Court remarked that a person can be considered to be a suspect of a criminal offence as long as there is a reasonable suspicion and it described this situation as "facts that would satisfy an objective observer that someone might have committed a crime". The reasonableness of the suspicion depends on the facts of the case[91].

Also, in the BUCK case, article 8 was applied to the criminal investigation process and specific criteria were set to assess the proportionality of investigatory measures, in order to assess whether such investigatory measure constituted a lawful interference with article 8 of the Convention or not. In assessing proportionality, different factors such as the severity of the measure, the degree of evidence collected in the proceeding and the manner to carry out the measure need to be analyzed. For example, it is not the same to carry out an interception of telephone 24 hours a day or to only intercept the telecommunications between 8 p.m. and 12 p.m.. Furthermore, the safeguards provided to the individual are also relevant when assessing the proportionality of the measure, and last, it also needs to be analyzed the impact or consequences that such investigatory measure causes in the individual[92].

The requirements mentioned in this Chapter are added by the Court to the regular standard test analyzed in the previous Chapter 3 when assessing breaches of article 8 ECHR in the criminal investigation process.

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91 O'Hara v. United Kingdom, (App. 37555/97), 16 October 2001. Final 16 January 2002.

92 *Vid. supra* note 18. §45.

Chapter 5. The NSA scandal

The NSA scandal is an example of a massive surveillance carried out in the United States where millions of American and non American citizens suffered violations to their right to privacy. It is a great example of a disproportionate state interference into citizen's private life.

On April 2013 with Barack Obama in the presidency, the United States of America National Security Agency (NSA, hereinafter) was allowed by a foreign intelligence court to monitor some telephone company's customers for a three-month period. By way of this, the NSA was able to access the "metadata" of telephone calls some days before the Boston Marathon terrorist attack occurred. Metadata concerns all the information regarding the time when the telephone calls occurred as well as the names or addresses of the callers.

The Wall Street Journal reported that the telephone interception had been a massive attack that it might have extended to more than 150 million users. In addition, NSA internal documents have assured that the data monitoring program also extended to accessing emails, chat logs and other data directly from the servers of different companies. Such companies as Facebook, Apple or Microsoft among others have denied any information regarding such surveillance[93].

Barack Obama argued that this program was vital for keeping America safe, but also recognized that the United States was "going to have to make some choices between balancing privacy and security to protect against terror". In this line, it is also relevant to mention that the NSA was enabled to access to all the files by modifying the US surveillance law under the presidency of George Bush, which was renewed by the Obama presidency in 2012.

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[93] A.M. Alfonso Ramos. "Derecho a la privacidad versus seguridad del Estado: Límites en la lucha contra el terrorismo". *Universidad Pontificia de Comillas*. Law degree final paper. 2014. Pages 7-17.

As many observers mentioned, the most important issue at stake in this case is the compromise between security and privacy. Interference to individual privacy is produced with the pursue of promoting national security, however, in this case, legal safeguards and political oversight appear to be insufficient as to guarantee the proportionality of the measure.

The United States justice department is going to conduct the required criminal investigation process that will resolve on the merits of the case[94].

Furthermore, the German government summoned the US ambassador on October 24, after the media published that Chancellor Angela Merkel's phone had also been intercepted during the NSA scandal. The Chancellor demanded a full explanation from the US president Mr. Obama remarking that the trust between allies could be in danger if such information was true. The President of the United States ensured that Mrs. Merkel's telephone had not been intercepted in that time but did not deny bugging her telephone in the past. All together, the President promised to the German Chancellor he would refrain from intercepting her telephone in the future[95].

In the present case, the US National Security Agency intercepted the telephone of citizens without even considering them to be suspects of a criminal offence, which would have been unacceptable from the perspective of the European Human Rights as the Convention requires that there needs to be a reasonable suspicion as described in the O'HARA case[96], in order to State Authorities be able to interfere in the right to privacy.

Furthermore, the NSA alleges that their massive interception is based on the legitimate aim of national security. However, the fact that the violation to article 8 pursues a

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[94] The Guardian online source, available here: https://www.theguardian.com/world/2013/jun/10/nsa-spying-scandal-what-we-have-learned.

[95] BBC online source, available here: https://www.bbc.com/news/world-us-canada-23123964

[96] *Vid. supra* note 91.

legitimate aim does not automatically make the interference lawful, as the balancing test between the interests confronted requires to add extra safeguards to individual privacy protection in order to qualify the interference as lawful, which in this case did not occur.

Also, the fact that there was a legal basis that accepted such interference to the right to privacy, the US surveillance law, does not make the interference to be lawful, as the rule itself could deem to be unconstitutional according to the 10 amendments of the US constitution, which promotes under number four the right of people to the protection towards unreasonable search and seizures[97].

Last, it also needs to be considered under the criteria established by the Strasbourg Court whether the interference complied with the necessity in a democratic society, which refers to the proportionality of the measure and the subsidiarity. It is clear that the US authorities did not apply the least intrusive mean of surveillance in order to investigate about future terrorist attacks, and that the measure was simply disproportionate, as more than 150 million non suspected people's telephones were intercepted. Sadly, the massive surveillance method did not prevent the subsequent terrorist attack during the Boston Marathon.

To conclude, it is relevant to remark that events such as the NSA scandal would not have been possible to occur in any of the European Countries that have signed the ECHR, as the Court and the Convention have established an exhausted list of circumstances under which it is permitted to interfere into the right to privacy. In fact, the Data Protection Directive (EU) 2016/680 did not comply in the first drafting with the requirements established under article 8 of the Convention, and thus, the legislative act had to be modified before its entrance in force, in order to comply with the validity

[97] Online source, available here: https://nccs.net/blogs/americas-founding-documents/bill-of-rights-amendments-1-10.

requirements determined by the Strasbourg Court for interfering into the right to privacy[98].

In addition European privacy standards have risen in the past years due to the entrance into force of the Data Protection Regulation (EU) 2016/679 and the subsequent Directive (EU) 2016/680, which were designed under the data protection package and in light of the European rights, equality and citizenship program adopted for years 2014-2020. Their ultimate goal is to adjust European rules to the digital age. By means of this, the aim is to make data sharing more efficient, by using absolute means of trust and by promoting legal certainty. In practice, this idea is reflected in the harmonization of data protection rights and obligations throughout European Member States in order to guarantee equality in this field for citizens and also, clarifying data protection rules for businesses that operate in more than one Member States as well as, smoothening unnecessary administrative burdens.

These rules have a huge impact in the data sharing that occurs during the criminal investigation process between the different criminal law enforcement agencies and thus, makes international cooperation in crime prosecution and prevention easier by applying the same standards to the free movement of data. It also needs to be noted that the data protection rules do not only apply at a European level but also apply in an international scale, as long as European citizens data is concerned, because the aim is to protect Europeans data in all the world, not only inside the Union. Therefore, the data protection rules guarantee equal right to access to personal data for all European citizens who are suspects, witnesses or victims of a criminal offence. However, it is possible to limit the right to access as long as the necessity and proportionality requirements are fulfilled in circumstances such as to prevent disclosure of the ongoing investigations. European citizens do also have safeguards available in order to ensure the accomplishment of the above explained rules by mean of the right to ask for judicial

[98] D. Marinas Suárez. *El control iusfundamental de los actos legislativos de la Unión Europea, una aproximación desde el Tribunal de Justicia de la Unión Europea.* Thomson Reuters Aranzadi. 2015. Pages 185-192.

supervision, which is in first place dealt by national judicial authorities who work for guaranteeing the lawfulness of the data protection, and in last instance, European citizens can also resort to the Strasbourg Court[99].

[99] European Commission, online source, available here: https://ec.europa.eu/info/law/law-topic/data-protection/data-protection-eu_en

Concluding remarks

As analyzed throughout this paper, it appears to be clear that assessing the right to privacy violations involve following a concrete criteria that might vary on the case to case basis, as the criteria set by the Court needs to adjust to the circumstances of each case.

It is also true that the basic threshold test applies to all the circumstances and in this point, the Court has always followed a structured analysis when assessing possible article 8 violations. The same test applies to articles 8 to 11 which admit the State interference under their second paragraph according to the Convention drafting.

In order to try to predict the Court's outcome of the case, it is also very convenient to revise all the definitions, statements and basic standards that the Court has issued on a reputed basis though its case law. By these means, the Court has given to the Convention's wording significant meaning over its original drafting in the Convention.

All together, there is always some sort of unpredictability when assessing a case that puts together two confronted interests which are national security and individual liberty. It is usual to see reflected in the cases how European states have worked together in unifying the perspective of the minimum standards in matters such as individual liberty in all the Member States. However, at an international perspective, it is also relevant to be aware of the fact that there are other countries such as the United States, as analyzed in the NSA scandal, that might balance on a different way the two interests at stake, by giving more prominence to one of them when balancing the position of both, even leading to an imbalance of rights if seen from an European perspective of human rights protection.

When talking about European harmonization it also needs to be noted that European Member States have not reached yet total harmonization in most of the policy issues at

stake, and that in some circumstances, the margin of appreciation of States is even nowadays considerably broad in some matters, such as for considering the circumstances that fall within national security grounds for example. All together, European Member States alongside the Council of Europe are working towards reaching consensus on more policy issues that are yet to be studied. Among others, matters such as the euthanasia, or detainee's rights and safeguards under police custody are policy issues that one day might be regulated from a European approach. This way, it will be guaranteed the equal treatment of all the European citizens irrespective of which Member State they come from, as occurred with the data protection rules, which guarantee a minimum level playing field for all European citizens.

Moreover, when considering the grounds under which States justify their interference to the right to privacy under any of the legitimate aims considered in the second paragraph of article 8 ECHR, the contracting states need to strike a fair balance between security and individual liberty. The legitimate grounds described are going to be used as the limits that define the scope of individual liberty and the sacrifice that individuals need to burden in order to guarantee the complete enjoyment of the rights and liberties of the society as a whole. This assessment represents drawing the dividing line that exists between waiving individual rights and liberties and promoting the improvement of the values of society as a whole. In the end, it is all about where our institutions on behalf of their people ought to set the limits.

In this line, the Convention adopts a position that encourages individual liberty, meaning that the standards to enable a violation of the right to privacy by State authorities is set very high. This position is well received by European citizens because it is a safeguard that strengthens individual privacy, and protects the most awarded value that citizens might possess in the digital age which is information, in all of its domains.

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