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1. EUROPEAN CONVENTION FOR THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

Brief background

Introduction

Taking into consideration that the General Declaration on Human Rights announced by the General Assembly of the United Nations on the 10th of December of 1948;

Taking into consideration that this Declaration is aim to ensure the recognition and universal and effective application of rights determined by it;

Taking into consideration the objective of the Council of Europe which is comprised of 47 member states to fulfil a more close cooperation between its members and that one of the tools to achieve this objective is the protection and development of fundamental human freedoms and rights;

By emphasising again their deep commitment to these fundamental freedoms which constitute in themselves the foundations of justice and peace in the world and the protection of which is supported mainly on a political reaction that is truly democratic from one side and from the other side is a concept and a joint adherence to human rights which they have undertaken to protect;

By being a government of the European states motivates by the same spirit and a wealth of ideals and common political traditions for respecting

freedom and the rule of law state, determined to undertake the first appropriate measures to ensure collective guarantees of a number of rights mentioned in the General Declaration, agree as in the following

Parties to the contract recognise the rights and freedoms of every person who is located under their jurisdiction determined in the first part of the Convention.

**The Convention was adopted on the 4th of November 1950 in Rome.
The Convention has entered into force in September 1953.**

The first part of the Convention deals with the fundamental human rights and freedoms –

Article 2 – the right to life

Article 3 – prohibition of torture

Article 4 – prohibition of slavery and forced labour

Article 5 – the right to freedom and security

Article 6 – the right to a proper process

Article 7 – no punishment without a law

Article 8 – the right to respect of private and family life

Article 9 – freedom of thought, conscience and religion

Article 10 – freedom of speech

Article 11 – freedom to assembly and association

Article 12 – freedom to marry

Article 13 – the right to effective appeal

Article 14 – prohibition of discrimination

These rights are divided into those absolute, qualified and limited

Articles **2, 3, 4 (1)** and Article **7** are **absolute rights**

Article **5, 6** and **12** are **limited rights**

Articles **8, 9, 10** and **11** are **qualified rights**

The second part of the Convention

With the aim of ensuring the adherence to commitments for contractual parties resulting from this Convention, the following was created:

European Commission of Human Rights and the European Court of Human Rights

The European Court of Human Rights and Freedoms is located in Strasbourg of France. This Court acts on the initiative of the individual or contracting parties to the Convention, specifically the State.

The Court is comprised of an equal number of judges as member states, which are 47 judges which are selected by the Parliamentary Assembly. The Court considers individual claims and those of states.

The Court rules in:

- Committees of **3 Judges**
- Chambers of **7 Judges**
- Higher Chamber of **17 Judges**

The Procedure before the European Court is initiated with the filing of a claim, while its continuation is subject to the fact of whether this claim will be accepted.

The claim from any of the above mentioned contracting party can be referred to the Court pertaining to any violation of the convention or its protocols by another contractual party;

A natural person, non government organisation or group of individuals who are victims of a violation made by one of the contractual parties;

The European Court of Human Rights is a court of precedence is bases its work on its own decisions related to similar cases.

2. ARTICLE 8 AND ARTICLE 12 OF THE CONVENTION

2.1 Article 8 – The right to respecting private and family life

Article 8 is divided into two parts:

Paragraph 1 of this article prescribes the accurate rights which are guaranteed to an individual by the state – the right to private life, specifically family, residential, and correspondence.

Paragraph 2 of this article clarifies the fact that these rights are not absolute so far as in making it acceptable for the public authorities to intervene in the right under article 8 in certain circumstances. Circumstances in which public authorities can intervene in a legal manner in the rights under paragraph 1 are: only an intervention in a democratic society in the pursuit of one or more legitimate objective specified in paragraph 2 will be considered as acceptable limitations by the state on the rights of the individual according to article 8.

2.1.1. The essence of private life concept

According to the Court private life contains a wide concept that cannot have a accurate determination, however the notion of private life would be very narrow if it was limited to a narrow circle in which the individual would be able to live his personal life according to his choice and to exclude everything else that is out of the notion that includes this narrow circle. The respect for private life should contain also to a certain degree the right to create and develop relationships with other human beings, also in foreign countries.

2.1.2 Life of the family

The concept of the life of the family was developed in a slow manner during the life duration of the Convention and continues to be developed in order to take into consideration social and legal changes.

The Court like in the concept of private life holds the same balanced position in interpreting the life of the family, by taking into consideration the diversity of problems of a modern family, issues of divorce and medical advances. In this article the life of the family is directly positioned to belong to the private sphere, where it has the right to act without the arbitrary intervention of the state.

What does the life of the family contain.

The family based on marital relations.

The protection ensured by Article 2 is always related to marital relationships

which can appear as legal and true. Those that have deficiencies and exist formally like, for example a fictitious marriage which has taken place in order to avoid rules of emigration or in order to obtain citizenship, it is possible not to fall under the aim of Article 8.

A child born from parents that are legally married will based on this fact truly be part of that relationship from the moment and the fact of his birth.

Article 8 is applied automatically in the relation between a mother and her child, irrespective of her marital status.

Unmarried couples which live together with their children are normally considered to be enjoying their family life.

Is living together enough to enjoy the life of the family?

Living together is not a necessary condition of family life irrespective of the marital status of parents, therefore members of families which do not live together due to divorce or separation or even agreement can of course be provided with protection under Article 8.

Family life can exist between children and their grandparents, kinships, relations between the uncle or aunt and their nephew or niece, relations between parents and extra marital children, adopted parents and children.

2.1.3 Place of residence

Residence is the location where one person lives or where this person is based, and within this all the places of residence comprise the place of domicile within the meaning of Article 8, par. 1.

2.1.4 Correspondence

The right to respect correspondence of one person is a right which is related to uninterrupted and unimpeded communication with others.

The meaning of correspondence includes materials which are forwarded by mail, but this concept also will be considered continuously by being

interpreted step by step in parallel to technological developments which can bring new communication methods, like the email, within the sphere of protection guaranteed by Article 8.

The identity of the sender or receiver of the correspondence will play an important role in determining what is required by Article 8. The court has made the fact clear that the protection offered for such correspondence like letters and other like this which are exchanged between lawyers and their clients and especially the imprisoned is very high.

Article 8 par. 2 states that the public authority will intervene in cases where it is necessary for a democratic society in the interest of national or public security or economic welfare of the country to prevent the destabilisation or a crime, for protection of health or morals, or for the protection of human rights and freedoms of others.

What does intervention involve? ³⁴

Intervention involves:

- Taking children from their parents and sending them to public case centres.
- Prohibiting the correspondence of inmates
- Searches in the houses of persons
- Collection and storing of information in a secret archive of the police.

If the intervention has occurred in one of the rights under Article 8, the comes the question?

1. Is the intervention in accordance to law?
2. Does the intervention follow a legitimate objective?
3. Is the intervention necessary in a democratic society?

Meaning of in accordance to law

The intervention should have a legal basis and the law in question should be very accurate and contain a measure of protection against arbitrariness of the state.

³⁴ Manual for the implementation of the European Convention – manual on human rights

The intervention should have a legal basis, as measures will open up problems in this regard when these were not authorised specifically by a state and regulated from administrative practice or other guidelines in mandatory force.

Example: the case Malone against England; the Court considered the fact is the authority to listen in to telephone call had a legal basis.

At that time the surveillance of telephones was regulated by administrative practice the details of which were not published and there was no specific statutory authorisation, therefore the court concluded that there was no sufficient clarity on the objective or manner in which the freedom of the authorities to secretly tap into telephone conversations because this contained an administrative practice which could change at any time and this constituted a violation of Article 8.

In order to fulfil the legal requirements of Article 8, the quality of the law should be formulated with sufficient accuracy in order to allow for persons, if necessary even through counselling, to determine to a certain extent if the measures taken where reasonable in comparison to the circumstances, the consequences of which have caused a given action, is known as the condition of being foreseeable.

Does the intervention follow a legitimate objective

At the moment when an intervention is determined to be in line with the law, the court will continue to consider if it is following a legitimate objective according to Article 8, par. 2 which contains the list of objectives based on which the state can request to support its actions as part of it: The State can argue that:

- Collection and storage of information on individuals is of interest for national security.
- The checking of correspondence of inmates aims to prevent instability and crime.
- Removal of children from a abusive household, or denying custody of a couple or contact with the objective of protecting the health or morals, or the rights and freedoms of others.

- Order of deportation or removal serves the interest of economic welfare of the country.

Is intervention necessary in a democratic society?

Within the context of Article 8 the importance of a rule of law state was highlighted for a democratic society and the need to prevent arbitrary interventions in the rights of the Convention. The Convention was written to protect and promote ideals and values of a democratic society. In general what is necessary for a democratic society for the purposes of Article 8 is to determine from the reference the equilibrium gained between the rights of the individual and the public interest through the application of the principle of proportionality.

The principle of proportionality recognises the fact that human rights are not absolute and that the exercise of the rights of one individual should always be checked in line with a larger public interest.

An overarching principle in the Convention is the effort to create a fair equilibrium between the requirements of general interest of the community and the conditions of protecting the fundamental rights of the individual.

Freedom to evaluate

The Court gives the State the freedom to evaluate when it takes decision is an intervention in one of the rights of Article 8 is justified according to paragraph 2 of this provision. The freedom of evaluation which is given to competent national authorities will be varied based on circumstances, subject matter and its background.

2.2 Article 12 – The right to marry

A husband and wife from reaching the age of being eligible to marry have the right to get married and create a family according to national laws that regulate the exercise of this right.³⁵

³⁵ Article 12 of the European convention on human rights and fundamental freedoms

Fundamental rights are rights that a state guarantees to its citizens and which are included in its Constitution. Their application can be required by a citizen before a court. While human rights include the fundamental idea behind these fundamental rights.

As part of fundamental human rights is also the right to marry. However, we need to have in that Article 12 of the Convention protects single occurring actions – marriage, while Article 8 protects continuously. This difference is best expressed in the fact that states cannot prevent inmates from getting married, but can prohibit the married inmates to live together.

Article 12 guarantees gender equality between the wife and husband in the privileges of this right. However, Article 12 does not determine the right to choose marriage (divorce) and neither the perspective to be remarried (case of Johnston and others against Ireland 1986). It is important to mention that Article 5 of protocol no. 7 foresees the equality of spouses both within marriage and in the event of choosing it, specifically the right to privacy and family under Article 8 and the right to marry under Article 12, and the equality between the spouses under protocol 7 and Article 5 are all interconnected and as a consequence together protect a range of rights that overlap and interconnect.

Conclusion

The Republic of Kosovo has a priority in attaining membership in the UNO and the Council of Europe by taking obligations for the application and advancement of human rights, all the rights guaranteed under the Convention are guaranteed under the Constitution of the Republic of Kosovo, specifically the rights guaranteed under Article 8 and 12 are guaranteed under Article 36 and 37 of the Constitution.³⁶

³⁶ Article 36 and Article 37 of the Constitution of the Republic of Kosovo

