TOPIC: RIGHT TO PRIVACY IN EUROPE

(Author: Prof. Ewa Łętowska)

1. Human Rights in A "Mature Democracy"

Protection of human rights in "mature democracies" raises far lower interest or emotions than in countries of Central and Eastern Europe. This is understandable: states with longer democratic traditions, long-standing constitutions in which individual rights form a separate part (frequently referred to as "fundamental rights"), states where the tradition of judicial protection of individual rights against the excesses of public authorities was formed as early as in the nineteenth century—these states possessed at the time of the entry of the European Convention on Human Rights and Fundamental Freedoms in 1950 existing and working systems protecting individuals against arbitrary treatment in the realm of rights and liberties deemed inviolable by the public authorities.

These states knew first the rights and liberties protected constitutionally, which were later, after the Second World War, "capped" by the European Convention. The situation was different in the countries of Central and Eastern Europe where the human rights and liberties, contained in the UN Covenants or the European Convention on Human Rights and Fundamental Freedoms, were the foundations and patterns for amending the national constitutions with regulations on the protected status of an individual in case of an arbitrary encroachment by one of the branches of the government.

Legal protection of various manifestations of a person's privacy is nothing particular and is found in the legal systems that severely restrict individual rights. It is characteristic, however, that—historically speaking—right to privacy was not protected *as such* but rather in various instances such as the protection of domestic peace, secrecy of correspondence, the value of family life, human dignity etc.

Over a hundread years ago two American professors, Brandeis and Warren launched a new way of thinking about the private sphere of human life. They referred to "privacy" as a value in itself of such significance to a civilized person. The right to be left alone—ability to shape one's private sphere without the interference from others or excessive invasion by the authorities—is a component of the right to privacy. An individual is autonomously entitled to this right and does not have to prove why he or she wants to be left alone. The realm of privacy as such has become a subject of proper protection that is available to every human being.

According to Resolution No. 428 of 1970 passed by the Parliamentary Assembly of the Council of Europe, "the right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection against misuse of private communications, protection from disclosure of information given or received by the individual confidentially."

Considering the issue negatively, ie. in a situation of a breach of privacy, the following symptoms are mentioned: the interference with the realm of separation and aloneness and with the realm of private rights; disclosure of compromising private facts concerning an individual; disclosure of false information on a person who is publically recognisable; appropriation of

someone else's name, dissemination of someone else's image without that person's permission.

The standard of protection of privacy in mature democracies was formed by Article 12 of the Universal Declaration of Human Rights: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation." Hence Article 8 of the European Convention on Human Rights and Fundamental Freedoms states that "everyone has the right to respect for his private and family life, his home and his correspondence."

2. Constitutional Protection of Privacy in Central and Eastern Europe

The situation in the countries of Central and Eastern Europe during the Communist period did not favour the individual-centred approach to law. It is true that criminal law had traditionally contained some disciplinary measures against libel or offense as well as restrictions on conducting body or house searches. Civil law envisioned protection of abode against unlawful trespass as part of property guarantees, and multiple forms of protection of personal goods such as the first and last names, reputation or goodwill. Family law contained various regulations in favour of the child's welfare or the integrity of the family. Labour codes also included provisions implying protection of the family or even, though to a limited degree, of informal relationships (concubinages), while administrative law included clauses on the secrecy of correspondence.

Upon closer investigation, the system of the positive law in force could be shown to include provisions enabling protection of specific goods, comprising a broad realm of the individual's private or family life. This is insufficient for effective protection of privacy comprehensively. It may be observed if the basic laws of these countries are analyzed. First of all, the constitutions did not consider the "private realm" as a whole, taking the form of a single civic law. The novelty of this issue is reflected in the vocabulary: the terms "privacy" and "protection of privacy" are of recent date.

Legal texts and publications have mainly referred to personal goods, which constituted particular areas of privacy protected by law. Where references were made to particular situations within the private realm to be under legal protection of the state, such as the secrecy of correspondence or inviolability of abode, no limits were placed on the legislator's ability to regulate the matters otherwise while lowering the degree of protection accorded to the citizen. The constitutions of the countries of Central and Eastern Europe were characterized by the absence of mechanisms through which the citizens could be protected against the breaches of constitutional rights and liberties. The Constitution was an act invoked only during state holidays, which was not applied on a daily basis. Thus, the idea of the "private realm" being a constitutionally-protected good in itself sounds alien to an average Central and East European reader. Constitutional and administrative courts have developed in Central and Eastern Europe for the past few decades. For instance, administrative courts have operated in Poland since 1989, while the Constitutional Court started operating effectively only six years later.

Societies of Central and Eastern Europe were traditionally raised in the belief that individual interest ought to be naturally subordinated to the interests of the society, social group or the state. In these countries, the idea has taken root that the "authorities" are not subject to legal control by the citizens and this politically-driven paternalist vision of the relations between the authorities and the citizens, promoted for many years, is still deeply casting in the citizenry's frame of mind. Some still appear to believe that "anything can be done" through the exercise of

power. This conviction has been reinforced by the mistakenly broad understanding of the parliamentary sovereignty and the insufficient capacities of the courts for constitutional review of the legislation.

While other European countries were busy developing institutions protecting the individual's privacy on the basis of appropriate constitutional provisions over several decades or centuries, the countries of Central and Eastern Europe lacked the opportunity for getting acquainted with the idea that certain areas of the individual's private life represent unbreachable barriers to the legislators and administrations, protected by the Constitution.

3. The Right to Privacy as a Right Protected Supraconstitutionally in Central and Eastern Europe

The constitutional practice and reality of the countries of Central and Eastern Europe does not offer much material on the right to privacy. The national constitutions do not contain uniform statements of the right to privacy. While in Western Europe the courts have been preoccupied with constructing a general right to privacy within the context of constitutional law, the courts were more reserved in this regard in Central and Eastern Europe. Also few cases of this type have been noted in the practice of newly-established constitutional courts with the exception of the highly active of the Hungarian Constitutional Court, including the decision putting into question the admissibility of universal introduction of personal identification numbers. Also the decision on informal marriage relationships defined the cope of protecting the individuals' privacy, extends them beyond the immediate issue of concern.

In the future, the issues may fall within the scope of interest of the courts of the countries of Central and Eastern Europe, mostly due to the binding force of the European Convention on Human Rights and Fundamental Freedoms. The protection mechanisms contained in the Convention offer opportunities for relying on supranational human rights legal acts.

Making reference to the Convention has become a practice in several states. For instance, in a case involving limitations to the individual's privacy, the Polish Supreme Court reviewed the legality of a ban on drinking alcohol in public places, introduced by several municipalities. In this context, the Supreme Court referred to the decisions and criteria applied in similar cases by the Court in Strasbourg (decision of 8 April 1994, III ARN 18/94).

It should be noted that the European Convention grants the opportunity to lodge a complaint with international bodies to any person within its jurisdiction. This must, of necessity, provoke a response of the national authorities, including the courts.

Therefore, **the right of privacy, containing a prohibition on interference by any public authority with a broadly understood private and family life, even if not expressly stated in the constitutions in force as a "civil right", is known to the legal systems of the countries of Central and Eastern Europe—parties to the Convention—as a right of the individual. The rights is protected supraconstitutionally, at the level above that of the national legislation. It follows therefore that, to be lawful and admissible, all instances of encroachment on privacy by the public authorities need to comply with the standards derived from Article 8 of the Convention.**

4. Privacy Protection in the European Convention on Human Rights and Fundamental Freedoms

Article 8 of the European Convention on Human Rights and Fundamental Freedoms refers to the notion of the right of privacy as a human right. It does so by extending the scope of protection to the most significant specific components of privacy (secrecy of correspondence and inviolability of adobe, etc.), and by formulating the general right of every person to the **respect for his or her family and private life, home and correspondence**. The family and private realm has been defined in very broad terms, without determining its future boundaries, which ensures the protection of a whole range of issues of privacy, as demonstrated in the following case-law decisions in relation to Article 8 of the Convention.

Apart from this statement of the general right of privacy, the European Convention of Human Rights and Fundamental Freedoms contains several other provisions related to the rights that may be considered aspects of privacy. These include Article 12 of the Convention, which reads: **„Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right;"** Article 2 of the additional First Protocol to the Convention: **"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the rights of parents to ensure such education and teaching are in conformity with their own religious and philosophical convictions;"** Article 5 of additional Protocol 7: **"Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and their relation with their children, as to marriage, during marriage and in the event of its dissolution."**

The rights and freedoms laid down in the Convention are not absolute and permit the interference of the authorities (in particular the legislature and administration) with the individual's privacy upon satisfying certain conditions. Article 8(2) of the Convention defines the scope of such interference, ruling that "**there shall be no interference by a public authority with the exercise of this right such as is in accordance with the law and is necessary in a democratic society in the interest 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."**

Article 8 of the European Convention, framing the protection of the individual's privacy as a human right, does not introduce any limitations on the subject of the interference on the part of the „authorities." Thus every realm of human privacy may be potentially subject to government intervention. However, regardless of the depth of encroachment on privacy of the intervention.

Article 8(2) defines the limits to the interference of the authorities to be considered admissible in light of the Convention. Each case of invasion, however, must meet a three-level test. This refers to the legal basis for the governmental invasion; the rationale for the invasion and the value justifying the imposition of the restriction. It is therefore necessary to demonstrate:

- sufficiently precise and detailed legal grounds for the intervention in the form of a statute. It is not admissible to introduce legal restrictions to privacy through lower-level acts or as part of the implementation of the governmental "tasks". However, even if introduced through a statute, the required rationale is not going to be fulfilled if the statute is too general, not sufficiently detailed or too broad. This is supported by the cases reviewed under Article 8 of the European Convention on Human Rights and Fundamental Freedoms on operational and investigative activities, such as the cases against France **(Huvig, 1990; Krusling, 1990; B., 1992)** and in the case of **Malone v. United Kingdom** (the cases concerned information collection and wiretapping). In those cases it was ruled

that France and the United Kingdom had violated the Convention since the statutory grounds for encroachment on privacy in domestic legislation were insufficiently detailed.

- that the introduction of restrictions was necessary from the point of view of requirements of a democratic state of law. It is not sufficient to refer to the factors of utility, need or benefit etc. It is necessary to demonstrate the necessity of a specific (in terms of the scope and manner) limitation introduced through an ordinary statute. Moreover, the measure of what is appropriate in a democratic state of law must incorporate the standard of an enlightened, open, tolerant state whose administrative units are capable of acting in a reliable, professional rather than petty manner, treating the interference with the realm of protected individual rights as a necessary evil and not as a factor making the administrative work easier.

- the objective of the interference (the rank of the protected public interest), listed in Article 8 of the Convention. Privacy restrictions are admissible only on the grounds of state or national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others. Of course, a mere verbal reference to the objective is not a sufficient legitimizing factor. It is necessary to demonstrate a genuine necessity of taking the restrictive measures for sake of the protection of the very principles of a democratic order. This necessity must be verifiable through a fair controlling procedure.

All these limitations (concerning the statutory basis for intervention and its necessity in a democratic society, justification of the objectives in terms of the criteria listed in Article 8) must be present jointly. Absence of any of them is a necessary and sufficient premise for drawing a conclusion that the authorities' action created a breach of privacy.

The Convention mandates that "an effective remedy" is guaranteed in national legislation is required which would afford domestic protection to the aggrieved party (Article 13). Lack of such a guarantee determines the existence of a breach.

The statutory basis for interference must not only be found in the legal system and be interpreted in „any" manner, but must be sufficiently precise and detailed in the description of the method and objective of the intervention and the precise time it starts and ends. Lack of precision in this regard was the reason for accepting complaints against the United Kingdom in the above-mentioned cases of **Malone, 1984** and against France in the case of **Krusling and Huvig, 1990** (telephone tapping). In turn, in the case of **Klass and others v. the Federal Republic of Germany, 1978** it was ruled that, although allowing severe incursions into privacy (wiretapping, violation of the secrecy of correspondence, etc.) applied in cases of suspected activities facilitating terrorist actions, the German legislation was nonetheless detailed enough in stating limits to interference. It was also concluded that the limits had been introduced for the sake of an objective that is worthy of protection and that cannot be achieved otherwise (protectoin of the values of a democratic state of law against terrorism), while being accompanied by sufficient safeguards in terms of control and relevant procedures, according necessary degree of protection to the affected party. Moreover, interference on the part of the authorities remains subject to external control (although not the judicial one, but exercised by a special office, including the parliamentarians), and the application of the measures is communicated to the affected party after completion of the activities, allowing the person to file their petition ex post in cases if the activities had breached the law.

It is worth repeating that the problem in light of the European Convention is not the „depth," severity or subject of interference with privacy, but the objective and method of its application as

well as the procedural guarantees, protecting an individual against the excesses of the authorities acting arbitrarily.

The criteria for the admissibility of interference laid down in Article 8 of the European Convention clearly indicate that it ought to be purposeful and intentional. "Incidental", "spur-of-the-moment" or "unintentional" breach of privacy is not likely to be defensible against the charge of its illegality under Article 8(2). For instance, the Polish Parliament considered whether, in response to concerns over leakage of confidential information, the director of the State Protection Office was authorized to require his subordinates to submit written statements on their contacts among journalists and politicians, including information on the character, origin and duration of those contacts. Although the order originally targeted the officers of special services, aiming to discipline them, it was interpreted as a violation of privacy of an unspecified circle of journalists and politicians. The most alarming was the fact that the invasion of privacy had no statutory basis and appeared to take place as if by accident, as a side effect of the undertaken measure. Also the measure was not proportional and did not necessarily lead to the objective, but instead affected the privacy of third persons.

Proportionality of interference (through activities of the legislative or executive branches) with the realm of civic rights is a generally accepted principle for assessing the adequacy of response by the state of law. This decision has been upheld in cases based on the European Convention. It is considered that the interference is proportional when „necessary," that is in cases when the applied measure (intervention) is capable of producing intended results, is essential for protecting the public interest whose protection led to the interference, and where the results of the interference are proportional to the burdens placed on the citizen.

5. Protection of Family Life: a Broadly-Understood Notion of Family

In the case-law decisions of the Commission and of the Court, p**rotection of family life does not cover family only in a legal sense**. Protection under Article 8 is extended to family relationships of blood, and, to a lesser extent, concubinages of heterosexual character. The protection is not limited as a rule to a single-generation family. Very diverse decisions have been issued, considering the specificity of particular cases, which reflects the focus on investigating the existence of a **genuine family and emotional bond**, subject to the degree of the family relationship and actual circumstances.

The protection covers not only the direct lineage, but extends to the indirect descent. In the case of **Olsson v. Sweden, 1988**, the Court explicitly stated that that authorities were under the obligation to ensure mutual contacts between siblings placed in different adopted families. Protection of family life covers also the right of family to "live together" or joint habitation (the case of **Abdulaziz, Cabales and Balkandali v. United Kingdom, 1985),** although a problem arises as to the extent to which the right grants the right to demand immigration or deportation of family members. Case decisions have been quite diverse in individual countries and circumstances of particular cases.

Adoptive families and the transfer of the child to adoptive parents are also protected under Article 8 **(Pini and Bertani as well as Manera and Atripaldi v. Romania, 2004)**.

6. Right to Marry

The protection of the **right to marry** applies in principle only to heterosexual couples. Conclusion of marriage for post-operation transsexual persons was found to fall within the scope of protection under Article 12 of the Convention in the case of **Christine Goodwin v. the United Kingdom, 2002**. This does not grant the request for immigration of a would-be spouse. A temporary ban on entering a marriage issued to a person intending to marry for the fourth time over an eighteen-year period was judged to be in breach of the right to marry (case of **F. v. Switzerland, 1987**).

7. Protection of Family Life: Protection Against Deportation

The issue of protection against deportation, which has been very vital and rich in decisions, is related to the presence of a large group of economic immigrants and shifting positions of the authorities towards immigrants in light of changing economic conditions. The issue has marked its presence in the countries of Central and Eastern Europe with the influx of immigrants from East and South and the countries' accession to the European Union.

The considerations of the protection of family life (family separation) do not present absolute barriers to deportation. However, decisions under Article 8 of the Convention ruled deportation to be inadmissible in light of the requirements of protection of family life. The decisions were made conditional upon the assessment of the strength of ties with the country of origin (**Moustaquim v. Belgium, 1991; Languindaz v. United Kingdom, 1993**), intensity of family relations (even in cases of divorce: the case of **Berrehab v. the Netherlands, 1988**), the likelihood of the breakup of the family as a result of the deportation **(Beldjoudi v. France, 1992**). The fact that a crime has been committed may be decisive in the negative decision on protection of the family and of privacy of the person under threat of deportation: **C v. Belgium, case 21794/93.**

8. Protection of Family Against Excessive Interference of the Authorities Driven by the Government-Preferred Model of Family Life

In a series of cases against Sweden (**Eriksson, 1989; Andersson, 1992; Rieme 1992; Olsson, 1992**; as in **O,H,W,B,R v. United Kingdom, 1987, Hokkanen v. Finland, 1994),** the Court put into question as constituting a breach of family life the limitations on personal contacts with children and among siblings placed in adopted families as well as all forms of hasty decisions on removing children from their natural families.

The Court also found as incompatible with the right to family life the decision to deprive a mother of the right of care over the child after the divorce due to the fact that she was a Jehovah's Witness **(Hoffmann v. Austria, 1993).** The child's welfare and the possibility of its negative stigmatisation were invoked in the **Hoffmann** case, where religious discrimination was identified as well.

As a result of the ban imposed by the British authorities, a Romani family was prevented from residing in a mobile home on their own plot of land (**Chapman vs. the United Kingdom, 2001**). Although the issue of the choice of place of residence falls within the scope of protection under Article 8 of the Convention, the Court found the purpose and reasons for the ban (questions of spatial order) to justify the authorities. On the other hand, it was pointed out that proper procedural protection of the Roma

against eviction from the campsite was mandatory under Article 8 as a required form of facilitating the way of life proper to this population group (**Connors v. the United Kingdom, 2004)**.

9. Other Matters In Protection of Family Realm

The Court found in breach of the right to family life the provisions of the Dutch law which made it impossible for a woman to deny that her husband was her child's father, which prevented the biological father from acknowledging the child as his own (**Kroon and others v. the Netherlands, 1994**).

Another breach of family life was identified in the decision to **allow the adoption of a child without the knowledge and consent of its biological father** (**Keegan v. Ireland, 1994**). It is a significant ruling, especially as regards inmates as the laws approve of cases in which decisions on their marital and family status are taken without their knowledge or involvement.

Refusal to have a child adopted by a homosexual person is a matter of the state's regulatory freedom (**Frette v. France, 2002**).

Refusal to grant the permission for the detainee to participate in the parents' funeral is in breach of Article 8 of the Convention (**Płoski v. Poland, 2002**).

10. Protection of Inmates' Privacy

Observation of the Court's practice indicates a gradual extension of the protection accorded to **the private life of prison inmates**. In the period directly following the entry into force of the Convention, all the restrictions concerning searches on the inmates, their obligation to wear prison clothes, restrictions in their contacts with children and spouses and with other inmates were concluded by default as consequences of incarceration. With the passage of time, inmates' private life has been recognised to be protected in principle under Article 8 of the Convention. Limits on the administrative intervention towards prisoners have been found to fall under the review as to their compliance with the criteria listed in Article 8(2) of the Convention, requiring assessment on their necessity and proportionality in view of the purpose of its severity.

Prisoners are also entitled to respect for family life, although in such cases the assessment of the severity and of restrictions raised by the inmate is subject to review in light of the proportionality as to the necessity of restrictions due to the fact of incarceration. Considering cases, the Commission found justified security-motivated refusal to allow a family member to take part in the funeral (**X v. Switzerland, 8166/81**), but considered placement of an inmate in an institution located far enough to preclude family visits to be a breach of right to family life (**Hendriks v. the Netherlands, 9166/78**). The Commission decisions have varied, concentrating on the critical assessment of the grounds for restrictions applied to inmates. It is worth noting that incarceration alone does not represent sufficient basis for justifying the authorities' actions; governments need to point to **justifiable reasons for applying restrictions in a given case.**

The right to the joint habitation of a couple when one spouse is incarcerated is not protected; however, the right of prison inmates to conclude marriage is under the protection of the Convention.

An evolution similar to that in protection of inmates' private and family life has taken place in questions of protection of their correspondence as seen in the relatively rich stock of relevant

decisions. Since the case of **Golder v. United Kingdom, 1993** it has been commonly believed that inmates' mail falls under the protection and that the imposed restrictions ought to meet the test of compatibility with the standards listed in Article 8(2), including the proportionality to the intended purpose for their application (e.g. censorship of letters is admissible in case it is suspected that the mail may be used for criminal purposes, see the case of **Silver and others v. United Kingdom, 1983**). Discarding inmates' letters, whether read or unread, is unacceptable (see **Campbell and Fell v. United Kingdom, 1992**).

Questions of protecting inmates' privacy, and especially the evolution of decisions towards safeguarding their private realm, including the period of incarceration, deserve attention. A deep-rooted mindset of the prison administration in the countries of Central and Eastern Europe leads to knee-jerk justification of each restriction and deprivation by the fact of incarceration. The brief stereotypical statement "prison is not a health resort" is used as a substitute for all possible rationalizations of the restrictions towards prisoners or defining optimal proportions for the restrictions related to the fact of incarceration. A reminder is needed that the inmates are also entitled to the right of privacy protection, which is codified on the supraconstitutional level as a human right.

11. Parents' Right to Decide on Children's Education

The conflict between parents' views on the direction and form of education of their children and the school system's requirements, in which the influence on children's schooling is viewed as a manifestation of the right of privacy), presented an issue in the context of the European Convention. The language controversy **against Belgium, 1968** consisted in granting access to the use by the French-speaking residents of the Flemish part of Belgium of their native language. However, the Court failed to identify a breach of the Convention in the effects of introduction through a domestic legislation of a special regime on the choice of the language of instruction in some regions of the country. Thus, the Court affirmed a negative character of the protected law, as opposed to its positive aspect denying the validity of demands to organising the education in the manner requested by the plaintiffs.

In the case of **Kjeldsen, Busk Madsen and Pedersen v. Denmark, 1976** the plaintiffs, parents, protested against the introduction into school curricula mandatory sex education courses, charging the breach of the right to decide on children's education (Article 2 of the First Additional Protocol to the European Convention). The charge was dismissed. The Court declared that the provision of knowledge to warn children and youth against such threats as unwanted pregnancies, abortions and sexually-transmitted diseases could not be made equal to indoctrination as the latter would have constituted a breach of the Convention and the parents' right to educate children according to their beliefs. The Court emphasized that modern democratic societies provide opportunities for educational pluralism: while parents have the right to respect for their beliefs, that should not be identified with the existence of their absolute right to establish a system of education that they consider appropriate.

With regard to granting the state the opportunity to control the parents in the education of their children, in the case of **H v. United Kingdom, 10233/1983**, while granted an opportunity for the choice of home schooling considering better study conditions for dyslexics, the parents were shown to be obliged to controls by educational authorities.

12. The Limits of the Protection of Sexual Life in General

In several cases (**Dudgeon v. United Kingdom 1981, Norris v. Ireland,1988 and Modinos v. Cyprus,1993**) the Court of Human Rights ruled that the states' criminal laws penalizing homosexual practices among adults constituted arbitrary interference in private life. Following the Human Rights Court's view, the right of privacy covers the way of life in line with the individual's will and the right to enter relations with other persons, especially in the realm of emotions, serving personal development and meeting individual needs.

Not all forms of sexual life enjoy protection under Article 8 of the Convention. In particular, the need for protection by the legal system is affirmed, resulting in limitations on the right of privacy in sexual life, justified by the necessity of protecting children and youth. One decision found the statutory limits in the German law on sexual contacts with persons under a certain age notwithstanding the minors' consent to comply with the standards of Article 8(2). The case failed to reach the Court after being closed in earlier proceedings in the Human Rights Commission— see case 5935/72). The Commission (case 1160/84 against Switzerland) also ruled that engaging in paid sexual contacts was outside of the scope of protection of privacy as stated in the Convention.

At the same time, both the Commission and the Court have adopted a more restrictive position on the extent of protection of right of privacy towards homosexual relationships than toward the heterosexual ones. This concerns in particular the age of one of the partners, opportunity for retaining the shared apartment after the partner's death. The application of the double standards based on sexual orientation in the decisions of the Commission and the Court has been criticised in literature by some authors (J. Cooper, Human Rights and Sexuality, Interrights bulletin, 4/1995).

The decisions based on the Convention have so far consistently denied protection to homosexual couples on the basis of Article 12 of the Convention (right to marry). The protection on this basis has been denied to transsexual persons as well. In the case of **Christine Goodwin vs. United Kingdom, 2002**, the national ban on concluding marriages by post-operation transsexuals was in breach of Article 12 of the Convention.

13. Abortion Issue in Decisions Related to the Convention

The issue of abortion, traditionally ridden with controversy, frequently charged with strong emotions, has appeared in the context of the European Convention on the Human Rights and Fundamental Freedoms. Although the text of the Convention contains a guarantee of the right to life (Article 2), the literature and Convention-related practice are in agreement that the provision fails to supply arguments for or against abortion. The Court has not faced the issue up front with its decisions.

An opinion was expressed in a case which was brought to a conclusion at the Human Rights Commission (against United Kingdom, 8416/79, in which the husband – plaintiff whose wife had undergone abortion against his will filed a complaint, charging that the operation had not been prevented without his consent) that absolute protection is not afforded to the foetus' life, but that the latter is restricted by the requirements flowing from the protection of woman's life and health.

In the case of **Bruggemann i Scheuten v. Germany, 1977** the Court asserted in turn that "pregnancy is not to be seen exclusively in terms of private life.... the private life of the pregnant woman becomes directly intertwined with the life of the developing foetus". As seen, the European jurisprudence maintains considerable reserve on the issue of extending the right of privacy either to free decisions on performing or non-performing of abortion and to the absolutizing of protection of the life of the foetus.

14. Other Aspects of Protection of Private Life and of Decisions Related to the Convention

The **right to name** is also a component of protection of privacy, however the Court stressed simultaneouosly that individual state governments retain broad freedom in setting positive and negative conditions of a name change. Thus, not all refusals to the demand for a name change are considered to be in breach of the right of privacy (**Stjerna v. Finland, 1994**). However, the prohibition on the use of the wife's family name (while the domestic law allowed such use as regards the husband's name) was found to be in breach of Article 14 of the Convention (discrimination) in relation to the Convention's Article 8 (Burghartz v. Switzerland, 1994). The right to choose the name for a child is within the scope of individual freedoms (**Guillot v. France, 1996). Keeping a person in uncertainty over his or her civil status** (descent) due to a very long and inefficient system of determining paternity is a breach of Article 8 (**Mikulic v. Croatia, 2002).**

The Commission has consistently placed outside of the scope of protection of privacy such issues as keeping pets and the obligation to wear safety belts while driving a car. The duty of the military men to have a crewcut was found to be an invasion of privacy, which was justified by reference to the standards listed in Article 8(2) (the case of **Sutter v. Switzerland, 8209/1979**). Similarly justified was the compulsory blood test in cases of paternity identification or blood test for alcohol content conducted on drivers (the case of **X v. the Netherlands, 8239/1978)**. Compulsory medical practices, including minor ones, have been found to be invasions of privacy that lack sufficient justification (**case of X v. Austria, 8278/1978**) as have been forced gynecological examinations related to arrest (**Y.F. v. Turkey, 2003)**.

Issues of euthanasia or consent to the death of a person in the state of a coma have only recently been the subjects of proceedings in Strasbourg, where the Human Rights Commission and Court are located. The question of "right to die" and its limits was taken up through the case of **Pretty v. United Kingdom,** 2000. In the case, the English woman who was incurably ill and in great suffering argued that the Convention (Articles 2, 8) granted an individual the right to dignified death and on these grounds questioned the ban in the English law to assist in suicide the person who wanted the suicide but was unable to commit it herself. While not excluding that the "right to dignified death" could fall within the scope of the right to privacy in some cases, the Court ruled, however, that the British ban on assisted suicide had not overstepped the limits of proportionality and that the rights of an individual had not been arbitrarily violated.

In ultimate questions, the Commission regarded as a breach of privacy the prohibition of scattering the ashes of a deceased person in his garden following his will (**X v. Germany, 8741/1979**).

15. Information collection

The European Convention allows limits to privacy which involve the control of correspondence and of phone calls, intrusion into lodging for the purpose of collecting information on suspects of crimes. As a result of the introduction of legal regulations in this matter invoked on several occasions in cases against France (**Huvig,1990; Krusling,1990; B, 1992)** and the United

Kingdom, the acts were found to be too general and lacking in necessary details, thus failing to meet the Convention standards (Article 8(2)). The Court ruled similarly in connection with the case of **Amman v. Switzerland, 1998.**

The German legislation restricting the secrecy of correspondence and telephone calls (**Klass and others v. Germany, 1978**) passed the test of sufficient detail and meeting the objective „as is necessary in a democratic society," and of the proportionality of applied limits and ensuring adequate control and appeal measures. The criteria of Article 8(2) of the Convention were passed by the Swedish regulations on a secret register of staff control (Leander v. Sweden, 1987). The regulations in this regard were found to be sufficiently rich in detail for conducting controls, and the objective of maintaining the register (hiring for positions of importance to state security) is valid. Although the register records are not made available to the interested parties, the entire range of the security features and guarantees does not validate the charge that the restrictions fail to meet the requirements of Article 8(2) of the Convention. The Court ruled differently in the case of **Rotaru v. Romania, 1999**, in which it was concluded that the concerned person did not have access to effective procedural guarantees and safeguards against the use of information on personal life, collected by the authorities.

The above cases exemplify the thesis that interference with privacy may be very extensive as long as the authorities' manner of operation is liable to verification, „transparent" or immune to charges of arbitrariness. Neither is it objectionable for the domestic legislation to permit collecting data (e.g. photographs of demonstrators), as in **Friedl v. Austria, 1995.** Application of phone tapping in accordance with domestic legislation to combat crime constitutes a violation of privacy, but it ought to be considered justified in light of the criteria listed in Article 8(2) of the Convention **(Lüdi v. Switzerland, 1992**). It is evident that cases of breaches of national laws spelling out the procedures for planned wiretapping consistently result in violations of the right of privacy as defined by the Convention (the case of **A v. France, 1993**).

Searching a barrister's office as part of the criminal procedure against a third person was found to fall within the scope of the protection of privacy covered by Article 8 of the Convention (**Niemietz v. Germany, 1992**). **"Private life" may encompass professional activity, and the protection for the inviolability of abode may extend to the premises serving the barrister.**

16. Protection of Reproductive Rights as Part of Privacy Protection

The gap between privacy protection found in the countries of Central and Eastern Europe and that of established democracies has effected a shift of the points of view on the protection of 'reproductive rights', the category of individual rights identified at times in the U.S. literature.

The constitutional protection of privacy in countries of Central and Eastern Europe, particularly in the practice of its application in specific cases concentrates on the protection for privacy of correspondence, protection against interference as a result of data collection and marking boundaries between permissible encroachment on the private realm and the privacy of an individual. These classic problems of protecting privacy have only recently surfaced in the public discourse as rights to privacy protection. In this context, he issue of reproductive rights is not raised as a right to constitutional protection of privacy.

An example of the above are the controversies on the admissibility and limits to legality of abortion in Poland, appearing recently with high intensity, which have centred on the political and ideological aspects. In the debates, the argument of constitutional protection of privacy has not been invoked, although both conflicting parties ten to reduce or extend the scope of the

legal admissibility of abortion. Constitutional protection of privacy as such is not developed to the extent that it could serve as an effective argument in the discussion of this extremely sensitive issue.

This also applies to the questions that, although ridden with ideological and social controversies, are regulated by ordinary legislation without excessive invasion of individual privacy: for instance, lack of prohibitions on the sale of contraceptives or decriminalisation of homosexuality (which had constituted a criminal offence in some countries of Central and Eastern Europe only a short period before). It is thus likely that, in the future, the question of limits on the application of such pressure would need to be addressed by state authorities.

In the course of drafting the new constitutions, the idea of granting constitutional protection to the realm of reproductive privacy is „discovered" as an argument in ideological and political disputes. Attempts have been made, for instance in Poland, to introduce to the draft of the constitution of a guarantee of protection of life from the moment of conception, which would amount to the constitutional ban on abortion, and strong opposition has been voiced by the conservative circles to inclusion in the draft of the prohibition of discrimination, considering the explicit reference to the criterion of "sexual orientation" or even gender.

17. Positive Right to Privacy

In basic terms, the protection of the individual's privacy is limited to ensuring personal freedom from state interference. It refers to certain "negative" obligations of the state authorities, and not to the injunction of positive action.

However, decisions have not been consistent and in several cases, positive actions were enjoined to allow the individual make use of their rightful realm of privacy. It is worth mentioning the case of **Airey v. Ireland, 1979,** where the plaintiff, filing for judicial separation (as divorce was illegal at the time in Ireland) from her abusive husband, could not obtain relief from fees payable for instituting proceedings, preventing her from carrying through the case. The Court accepted the complaint and found Ireland to be in breach of the right of privacy, concluding that under the national legislation, the spouses may demand legal separation. " This amounts to recognition of the fact that the protection of their private or family life may sometimes necessitate their being relieved from the duty to live together. Effective respect for private or family life obliges Ireland to make this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse thereto." This view acknowledges not only the obligation of the state to refrain from interference with the individual's privacy, but moreover it binds the state to take measures that would ensure access to judicial procedure (here through adequate regulation of the fiscal aspect of court proceedings), thus affording judicial protection of a component of the right of privacy.

Likewise in the case of **Lopez Ostra v. Spain, 1994**, where lack of reaction (or lack of positive action!) of municipal authorities to the nuisance of the excessive proximity of a waste-processing plant to the plaintiff's apartment was considered to be in breach of his right of privacy (protection of abode).

The state is obliged to undertake positive actions in the field of data protection (including those covered by the medical secrecy. This view was formulated in the case of **Z v. Finland, 1997** with reference to the disclosure of a person to be an HIV carrier. The disclosure was considered to be drastic interference with private and family life.

The state is bound to take positive actions aiming at the execution of a judicial order to transfer children to the mother—**Ignaccolo-Zenide v. Romania, 1998.**