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"The right to respect for private and family life, home and correspondence"

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1. INTRODUCTION.

According to Article 8 of the ECHR, "Everyone has the right to respect for his private and family life, his home and his correspondence". The second paragraph of this same Article contains a clear expression of the principle of proporcionality ("There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others").

These provisions are directly applied in Bosnia and Herzegovina (Article II.2 of the Constitution). Furthermore, Article II.2 of BH Constitution foresees that rights and freedoms set forth in the ECHR "shall have priority over all other law".

The Spanish Constitution lacks a similar provision. Even so, the ECHR plays two roles in Spanish Constitutional Law. First, it is a mean for the interpretation of the fundamental rights (art. 10.2 of the Spanish Constitution[1]). Second, as an international treaty validly concluded, it is law of the land (art. 96.1[2]).

It's important to pay attention to the interaction of both effects. Treaties are agreements concluded between States [art. 2.1 a) of Vienna Convention on the Law of Treaties], that in the classical theory of international law did not contemplate judicial review before supranational Courts. Treaties had binding effects between contracting States whose differences were settled according to the logic of international relations among equals. Needless to say that the concept of sovereignty provided the theoretical ground.

2. TRANSFORMING INTERNATIONAL OBLIGATIONS INTO NATIONAL RULE OF LAW.

From an analytical point of view, the creation of supranational judicial bodies entrusted with the function of assuring the achievement of treaties' provisions can be considered as the most significant novelty. However, this kind of judicial review suffers from a serious deficiency. Even though this system attributes a right of appeal to the individuals, the efficiency of the

[1] Article 10, paragraph 2 of the Spanish Constitution states that "Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain". Within these treaties is obviously included the ECHR.

[2] "Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law"-

system trusts in an opportunity criteria. Shortly, these courts handle only with serious offences to the international treaty (*de minimis non curat iudex*).

Therefore, a systemic solution is required. The success of the system depends on the collaboration between national courts and these new supranational judiciary bodies, which implies a sort of *nationalization* of international obligations. In Weiller's words, that helps to the introduction of "the habit of obedience and the respect for the rule of law which traditionally is less associated with international obligations than national ones"[3].

In the European context, we find two examples of this solution. First, the European Community, where the Court of Justice plays a well known major role. Second, the European Court of Human Rights, originally created as a part-time body and a piece of a three level system, also composed by the Commission and the Committee of Ministers and later on transformed by Protocol Nº 11 to the ECHR into a full-time Court.

The collaboration between the ECtHR and national Courts raises problems provided that the latter must deal not only with the ECHR but also –even, first of all- with the municipal law (in a narrow sense). Furthermore, a slight difference in legal propositions can lead to a wide difference in law, specially in Constitutional law, due to the open-textured nature of constitutional provisions. That's why art. 10.2 of Spanish Constitution provides us such a relevant instrument for the sound comprehension of fundamental rights. It can be described as a mean for the translation of ECHR into Spanish law, into Spanish legal standards.

In our case, everyone's right "to respect for his private and family life" was originally divided into three different fundamental rights and a guarantee, later on transformed in a new fundamental right. According to Article 18, paragraph 1, of the Spanish Constitution, "the right to honour, to personal and family privacy and to the own image is guaranteed". On the other hand, Article 18 (4) states that "the law shall restrict the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights"[4]. Originally born as a constitutional guarantee against risks raised by data processing (i.e. as "habeas data"), this provision has become a new fundamental right with the Constitucional Court Decision Nº 254/1993, July 20th.

The Spanish Constitutional Court has tried to be a good translator of ECHR provisions into the Spanish legal system. It enjoys a suitable position to achieve this goal. First, it works with constitutional provisions only, therefore it is not restricted by "ordinary" (i.e. subconstitutional) legislation. Second, its interpretation of these provisions, which open-textured nature has been remarked, has binding force for all the Courts [according to Article 5 (1) of the Organic Statue of Judiciary].

Next pages are devoted to some leading cases that reveal some of the problems which the Spanish Constitutional Court faces in the achievement of this goal. It is not necessary to

[3] J.H.H. WEILER, *The Constitution of Europe*, Cambridge University Press, 2000, 28.

[4] Everyone's home protection is assured by Article 18 (2), that states: "The home is inviolable. No entry or search may be made without the consent of the householder or a legal warrant, except in cases of *flagrante delicto.* Article 18 (3) is devoted to the respect for correspondence and proclaims that "secrecy of communications is guaranteed, particularly regarding postal, telegraphic and telephonic communications, except in the event of a court order."

notice that this is not an exhaustive inquiry, but only a sample –not random anyway- of the doctrine established by the Court solving cases dealing with fundamental rights equivalent to those protected by Article 8 ECHR.

3. A CLASSICAL CONFLICT: FREEDOM OF INFORMATION V. PERSONAL AND FAMILY PRIVACY.

Article 20 (1) of the Spanish Constitution "recognizes and protects" not only freedom of expression but also "the right to freely communicate or receive truthful information". The exercise of rights protected in this provision can collide with those proclaimed in Article 18 (1), i.e. rights "to honour, to personal and family privacy and to the own image". Apparently, Article 20 (4) solves this problem when it states that liberties recognized in paragraph 1 "are limited by respect for the rights recognized in this Part, by the legal provisions implementing it, and especially by the right to honour, to privacy, to the own image and to the protection of youth and childhood".

Obviously, this is not so simple. If this limitation was absolute, the exercise of the right to free speech and information would turn out to be impossible. Thus the Constitutional Court has elaborated a doctrine in the matter. We will summarize its essential ideas.

First. The Spanish Constitution "recognizes and protects" the right to freely communicate or receive *truthful information*. Thus, neither any information nor only the "true" are recognized and protected by the Spanish Constitution. So we can at this point question what is precisely protected by Article 20.1 d) of the Spanish Constitution.

According to the Constitutional Court's interpretation of this Article, information means knowledge of facts, more restrictedly, facts that can be esteemed news of public interest (see Decision 126/2003, June 30th). When the Constitutional Court requires that news has public interest to deserve the highest protection in Spanish Law, shortly, to have information value, it is implicitly opting for an institutional theory of this freedom.

What's a "truthful" information? According to the Spanish Constitutional Court's doctrine, to comply with the requirement of truthfulness it is neccessary a previous investigation, i.e., to behave diligently, doing the best to check the facts or the reliability of the sources. So, truthfulness is not the same as accuracy of the piece of information transmitted. Shortly, the Constitution protects inaccurate pieces of information, provided that the journalist –in most cases information is given through the media- acts with diligence, but it does not protect gossipying (see Decisions 6/1988, January 21st, 105/1990, June 6th and 21/2000, January 31st).

Second. Freedom of speech protects the expression of thoughts, ideas and opinions, including beliefs and value judgements (see, among others, Spanish Constitutional Court's Decision 57/1999, April 12th). The limit to this freedom is the ban of insult. In the Court's own words, the Spanish Constitution does not recognize a right to insult because that would be contrary to the dignity of human beings that is the ground of the fundamental rights (see Decision 20/2002, January 28th).

It is important not to identify insult with criticism, specially in political speech or questions of public interest. In these fields there is little scope for restriction (see Spanish Constitutional

Court Decision 148/2001, June 27th and ECtHR Nilsen and Johnsen v. Norway, 25 November 1999, § 46)[5].

Third. In contemporary societies there is an ever growing field of collision between privacy rights and freedom of expression and –mainly- of information: the so called "gutter press" (tabloids, romance magazines and so on). This kind of publications are focused on the life and affairs of celebrities. Usually, these celebrities do not care much about their privacy, but from time to time the papers go beyond the limits and the celebrity sue them. In most cases the ordinary Courts solve the problem according to the constitutional principles, but it's not strange that the Constitutional Court has to deal with individual complaints.

In these cases the violation of the fundamental right has taken place in a relation between individuals, i.e., this is a problem of *Drittwirkung*. Since the Constitutional Court does not deal with individual applications concerning private relations, it has been necessary to blame the judiciary for the violation. Shortly, the Constitutional Court protects the plaintiff because the ordinary Courts have misinterpreted the fundamental rights.

This is a very delicate question, because the interpretation of the fundamental rights proclaimed by the Constitution is a duty of all the Courts. The interpretation carried out by the Constitutional is the supreme, but not the only one. In most cases this interpretation is followed by the achievement of a test of proportionality. Furthermore, the Constitutional Court should not make an scrutiny of the facts of the case. But it is impossible achieving this test without taking into account the facts. The Constitutional Judges need reading the news to decide whether there has been a violation of the right to privacy or not. And this a very delicate task because it can confront the Constitutional Court with the ordinary Courts.

This was the case in the Constitutional Court's Decisions 115/2000, May 5th and 186/2001, September 17th. The plaintiff was a celebrity whose former maiden had leaked out family and bedroom secrets on a radio program. The celebrity sued the maiden and obtained a favourable decision in the first instance (actually, it was the second), but later the Supreme Court repealed the Sentence on the basis of labeling the facts spread by the maiden as "gossip of scanty entity" that did not enter into the sphere of personal and family privacy. In the Decision 115/2000, the Constitutional Court reached the opposite conclusion, analyzing the facts and pieces of information and held that there had been a violation of the right to privacy.

But the Constitutional Court gave no answer to the petition of compensation because, as matter of civil liability, it belonged to the jurisdiction of the Supreme Court. The first Sentence had recognized a compensation of 6010 €. Surprisingly, the Supreme Court reduced the amount to 150,25 €. The plaintiff appealed once again before the Constitutional Court alleging violation of her right to "obtain effective protection from the judges and the courts" [Article 24 (1) of the Spanish Constitution]. Finally, the Constitutional Court, in the Decision 186/2001, revoked the judgment of the Supreme Court and corroborated the former.

[5] In Krone Verlag GMBH & Co. KG v. Austria, 26 February 2002, § 35, the Court states: "The limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance. A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of the open discussion of political issues (e.g. Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204, p. 26, § 59)".

This episode illustrates about the problems raised in the relations between the Constitutional Courts and the ordinary Courts.

4. LOOKING FORWARD IN THE PROTECTION OF HOME: ENVIRONMENTAL DISTURBANCES.

Protection of home was originally conceived –in classical Constitutional Law- as a guarantee against the investigation powers of the police. However, the ECtHR has elaborated a very modern doctrine that has widened the sphere of protection. According to this doctrine, "it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings" (Niemitz v. Germany, 23 november 1992, § 29).

For instance, Article 8 (1) of ECHR has been applied to protect the nomadic way of life of gypsies (see Jane Smith v. the United Kingdom, Coster v. the United Kingdom, Lee v. the United Kingdom, and Beard v. the United Kingdom, 18 January 2001) and, initially, to require the States "to minimise (when drafting the Airport Schemes), as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights", in Hatton and others v. the United Kingdom, 2 October 2001. This judgement, given by the Third Section, was referred to the Grand Chamber, which pronounced its judgement on July 8th 2003 revoking the former Decision.

The case López Ostra v. Spain (9 December 1994) was a landmark Decision in this field. The applicant was a Spanish national who had her family home in a district with a heavy concentration of leather industries; temporarily the town council evacuated the area to prevent damages to inhabitants and eventually the applicant left her home because certain nuisances continued and might endanger the health of those living nearby. The Court considered that the State had not succeeded "in striking a fair balance between the interest of the town's economic well-being - that of having a waste-treatment plant - and the applicant's effective enjoyment of her right to respect for her home and her private and family life" (§ 58) and stated:

> "51. Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.
>
> Whether the question is analysed in terms of a positive duty on the State - to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 (art. 8-1) -, as the applicant wishes in her case, or in terms of an 'interference by a public authority' to be justified in accordance with paragraph 2 (art. 8-2), the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8 (art. 8-1), in striking the required balance the aims mentioned in the second paragraph (art. 8-2) may be of a certain relevance (see, in particular, the Rees v. the United Kingdom judgment of 17 October 1986, Series A no. 106, p. 15, para. 37, and the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, p. 18, para. 41)."

The Spanish Constitutional Court echoed this doctrine in the Decision No. 119/2001, May 24th. In this case, the applicant sued the City Council of Valencia for the disturbances caused to her private life and health by the noise caused by pubs located in the nearby. Her demand was rejected by the Administrative and the Constitutional Courts on the basis of a lack of proofs bound to the alleged damages and the lack of adequate administrative measures to reduce the noise. The Constitutional Court stated that "the constant exposition to a high level of noise hazards the individual health, this situation could imply a violation of right to physical and moral integrity", protected by Article 15 of the Spanish Constitution.

We must bear in mind that with this statement the Spanish Constitutional Court receives the doctrine of the López Ostra Decision. It places the question in the area of Article 15, but also in the area of Article 18 (privacy) because "a constant exposure to preventable and unbearable noises deserves the protection given to the fundamental right to the personal and family privacy at home".

5. OLD HABITS DIE HARD. SECRECY OF CORRESPONDENCE AND CRIMINAL PROCESS.

Or old sins cast long shadows. Spain suffered a military dictatorship for decades (1939-1975). During that long period neither the right to a fair trial nor the due process were protected in the Spanish Criminal Law. Even more, as it is usual in all dictatorships, defendants were quite often presumed guilty rather than not guilty.

The approval of the Constitution was a landmark in the history of the Spanish Criminal Law. Not without effort, the Constitutional Court has developed a constitutional theory of the criminal process that, at least since the Decision 114/1984, November 29th, emphasizes the protection of the rights of the defendant presumed not guilty until the judgement.

The Constitutional Court has emphasized that, prior to the search and seizure of documents, the police needs a judicial reasoned authorisation. Otherwise, these documents are not a legally valid evidence. The ground to this doctrine is the idea that evidences obtained with violation of fundamental rights are void. The same rule is applied to the interception and recording of telephone calls[6].

In this field the Spanish Constitutional Court has received promptly and without reluctance the doctrine of the ECtHR. In the case Prado Bugallo v. Spain, 18 February 2003, the Court stated that the Spanish Criminal Process Act does not provide and adequate legal basis for interception of telephone calls and, therefore, failed to fulfil the requirement of Article 8 (2) ECHR, as far as the interference must be "in accordance with the law. The Spanish Constitutional Court Decision 184/2003, October 23rd, has echoed this doctrine.

Anyway, the Spanish Constitutional Court has not assumed the "fruits of a poisoned tree" doctrine[7]. The Court has preferred a more pragmatical approach to this problem and has elaborated the "unlawfulness connection" doctrine. According to it, the nullity of connected

[6] In Amman v. Switzerland, 16 February 2000, the ECtHR reiterates that "telephone calls received on private or business premises are covered by the notions of private life and correspondence within the meaning of Article 8 1" (§ 44).

[7] This notion jeans that if serious procedural violations have taken place at the beginning of an investigation or trial, everything the court will do in the future, including the final sentence, is considered invalid.

evidences depends on the necessities in order to preserve the violated fundamental right (see, among others, Decisions 49/1999, April 5th and 171/1999, September 27th). This is a clear conservative and pragmatic approach to the problem, and illustrates quite clearly about the vague limits of constitutional jurisdiction and the frequent self-restraint of Constitutional Courts in their judgements.

6. A NEW FUNDAMENTAL RIGHT: "HABEAS DATA".

New technologies are so familiar to us that we hardly see the risks they can imply to our fundamental rights. Specially, but not only, to privacy rights. From time to time these risks become real and Law must face them. In the Spanish Constitutional Court's case Law we can find various Decisions handling with this problem.

The first only –in chronological order- is the Decision 254/1993, July 20th. A citizen asked his "personal data" stored in automated data files processed by the Administration. The Administration gave no reply to this petition, that was later on rejected by the Administrative Court. The plaintiff appealed to the Constitutional Court that took the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, made in Strasbourg in January 28th 1981, as a mean to "discover" the contents of the right to "habeas data" proclaimed in Article 18 (4) of the Spanish Constitution. Shortly, the Court identified among those contents the right of any person to obtain from the public Administration confirmation of whether personal data relating to him are stored in the automated data file and the communication of such data in an intelligible form[8]. The Constitutional Court added that this right does not depend on legal (i.e. subconstitutional) regulation but comes directly from the above cited constitutional provision. According to the Constitutional Court's reasoning, "habeas data" is nowadays a necessary guarantee for the protection of privacy rights.

With the Decision 11/1998, January 13th started an interesting series of judgements concerning the use of data processing in labour relationships. A Trade Union ("Workers' Commissions") went to the strike in the national system of railways. According to the Spanish Labour Law, the enterprise had the right to reduce the salaries in proportion to the strike's days, provided that the worker went to strike. The problem arose when the workers refused to declare whether they had joined or not the strike. Eventually the strike reduced the salaries of the workers who were members of "Workers' Commissions". The Constitutional Court stated that by acting so the enterprise had violated the "right to freely join a trade union", protected by Article 28 (1) in connection with Article 18 (4) of the Spanish Constitution. We must bear in mind that the exercise of the fundamental right proclaimed in Article 28 (1), without taking into account any other circumstances, had resulted in a prejudice to the workers. And such a consequence is absolutely contrary to the preferred position of fundamental rights in a democratic system.

[8] According to Article 8 (b) of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.