



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

**Opening of the Judicial Year
Seminar**

**The European Convention on Human Rights:
Living Instrument at 70 – Science and Technology**

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Introduction

I will address three points. Firstly, I will show that the development of science and technology, while enhancing human potential like never before, challenges those concepts and intellectual frameworks which have been instrumental in conceiving and building our modern democratic societies. The notion and value of human dignity has been one such central concept. Secondly, through the lens of Article 8 case-law I will address the question of the challenges that the digital age brings for human dignity. Finally, I will provide a few comments on what lies ahead for the courts. It is true that there are by now a number of initiatives and studies being carried out to assess the impact on human rights of developments in science and technology. However, a great many questions will have to be solved in practice, not least by the courts, using the concepts and methods that we have developed so far.

Human dignity in the digital age

There is one fundamental value at the very centre of our liberal worldview – the dignity of each human being. In this regard privacy is an essential element of human dignity. It is a necessary part of a person's self-determination, which is one of the qualities that drive human evolution. The ECtHR, while always acknowledging that there is no exhaustive definition of the notion of private life under Article 8 of the Convention (see *Niemietz v. Germany*¹), has defined, among its many aspects, the right to personal autonomy and self-determination (see, for instance, *Pretty v. the United Kingdom*²). The Court's case-law in the field of human beings' internal and external space is extensive; this attests to the fact that in the European worldview the protection of that space is very important for who we are and how we evolve as personalities and societies.

The twenty-first century has arrived together with the realisation that technology, especially digital technology, not only opens up new possibilities for individuals and societies but also

¹ European Court of Human Rights, *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B.

² European Court of Human Rights, *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III.

allegedly blurs the boundaries of, and even challenges, the behaviour and concepts that we developed as democratic societies in the twentieth century.

If, on the one hand, the Internet was hailed as the new public place where all opinions could meet, today, on the other hand, algorithm-driven social media and other phenomena are enclosing us in bubbles, ultimately preventing a transparent and all-inclusive discussion.

Although our societies benefit greatly from technological tools, these are simultaneously creating more and more vulnerabilities. Cyberspace, which is a non-hierarchical system with no clear points of control, creates a platform where hackers and analytical systems in fact enjoy their right to privacy much more than we do, because they are anonymous. The fact is that our societies and social behaviours can be easily manipulated, since technologies offer individuals, governments and businesses growing possibilities to collect and analyse our personal data. Analytical systems collect information on our personal choices, habits, interests and intimate preferences.

If technologies reduce our privacy or make us believe that privacy is something obsolete, does that not also affect a person's self-determination? Somebody else might own our personal data to such an extent that it raises a question firstly about the very possibility of our right to privacy, and ultimately about human dignity. In a post-liberal, technology-driven world are we still the masters of our inner self? In a world where algorithms are using our data, questions about the changed scope of the right to privacy arise and may reasonably suggest that we ought to look at subtle changes in the concept of human dignity³.

The importance of Article 8 case-law

The Court, too, has been drawn into these processes of increased opportunities for access to and control of personal information in cyberspace. The same is equally true for national courts. Certainly, the Latvian Constitutional Court has had to answer questions concerning the impact of the development of technologies on the legislative work of Parliament and the Cabinet of Ministers. It has pointed out that "as a result of the development of technologies and relations in society ..., rules that were once compatible with the Constitution may become outdated and eventually violate human rights"⁴. The ECtHR has ruled that the Internet is part of the exercise of freedom of expression and part of the means of access to information. It has grappled, for instance in the *Delfi* case⁵, with the issue of the protection of honour and reputation, which is evidently more difficult to ensure on the Internet. If we consider such judgments as *Delfi*, *Magyar Helsinki Bizottság*⁶, *Roman Zakharov*⁷, and *Szabó and Vissy*⁸, we can see the growing tension between the value of freedom of expression and the right to privacy, a tension that is heightened by technological developments. The Internet has pushed this tension to the extreme owing to its particular character (speed, spread, lack of possibilities of control).

³ For more detail see: Ziemele I., *Human Dignity in Technology Driven World: Role of Constitutional Courts*. Speech at the Constitution Day of the Republic of Slovenia. Accessible at: www.satv.tiesa.gov.lv/

⁴ Judgment of the Constitutional Court of the Republic of Latvia of 11 October 2018 in case no. 2017-30-01, paragraph 19.

⁵ European Court of Human Rights (Grand Chamber), *Delfi AS v. Estonia*, no. 64569/09, ECHR 2015.

⁶ European Court of Human Rights (Grand Chamber), *Magyar Helsinki Bizottság v. Hungary*, no. 18030/11, 8 November 2016.

⁷ European Court of Human Rights (Grand Chamber), *Roman Zakharov v. Russia*, no. 47143/06, ECHR 2015.

⁸ European Court of Human Rights, *Szabó and Vissy v. Hungary*, no. 37138/14, 12 January 2016.

Article 8 case-law has often generated criticism because of its supposedly casuistic character. For example, after the *Delfi* judgment, when the judgment in *Magyar* was adopted it was difficult to explain and to distinguish the Court's approach in these two cases for the general public. Both cases show the heightened tension between freedom of expression and the right to privacy on the Internet.

In the context of the challenges and changes described above, I would take the view that the **clarity** of the Court's position assumes a particular importance. By clarity I mean a clear view on the Court's part as to what competing values are at stake and as to the need to distinguish carefully between individual cases where the need arises.

Conclusions

What lies ahead? On the issue whether privacy should be given up in the epoch of science and technology, I would argue strongly that from the point of view of human dignity that is not an option. Privacy in terms of private space, freedom of choice and free will is intricately linked to human dignity. The philosophy underlying cases such as *S. and Marper v. the United Kingdom*⁹ and, more recently, *Bărbulescu v. Romania*¹⁰, is good law in this broader context. In *Bărbulescu*, the Court ruled in favour of the importance of privacy in the following terms: "... an employer's instructions cannot reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continues to exist, even if these may be restricted in so far as necessary"¹¹. That is the position of the Court on privacy as a value in a controversial setting.

The epoch of science and technology has increased the burden of responsibility on the courts, both national and international. Legislators will lag behind in legislating on these matters and on the new paradigms of human relationships that will emerge owing to the possibilities created by science and technology. Interestingly, the comparative-law material presented in the *Bărbulescu* judgment attests to this point. Based on the practice at the Constitutional Court, I can see that in continental legal systems also, more responsibility will lie with the courts for reiterating the values and choosing among them in a context of Internet-dependent relations. This may also revive the question in the ECtHR as to how the Court looks at the work done by the national courts in upholding the human rights concerned. This was the point of distinction between the Estonian and Hungarian cases. However, the courts should be aware and ready to accept that often this might not simply involve a decision on rights enhanced by the opportunities provided by technologies. It may also involve decisions on vulnerabilities and threats posed to existing rights by the development of science and technology. Since Europe is a space of common minimum values among which human dignity has a central place, it is important that the courts within the common European legal space take similar approaches on values. The age of science and technology reinforces the importance of judicial dialogue in Europe.

⁹ European Court of Human Rights (Grand Chamber), *S. and Marper v. the United Kingdom*, nos. 30562/04 and 30566/04, ECHR 2008.

¹⁰ European Court of Human Rights (Grand Chamber), *Bărbulescu v. Romania*, no. 61496/08, 5 September 2017 (extracts).

¹¹ *Ibid.*, § 80.