Chapter 9

Balancing the Protection of Genetic Data and National Security in the Era of New Technology: The Role of the European Court of Human Rights

Cristina Contartese
University of Bologna, Italy

ABSTRACT

The aim of this work is to examine the European Court of Human Rights’ (ECtHR) balancing exercise between genetic data protection and national security, under Article 8 of the European Convention of Human Rights (ECHR). It analyzes, more specifically, the core principles of the Strasbourg Court that the Council of Europe’s Contracting States are required to apply when they collect and store genetic data in order to reach specific purposes in terms of public security, such as the fight against crimes. It will emerge that the Court, in consideration of the risks new technologies pose to an individual’s data safeguards, pays special attention to the strict periods of storage of such data and requires that their collection be justified by the existing of a pressing social need and a “careful scrutiny” of the principle of proportionally between the intrusive measure and the aim pursued. This work is divided into three main parts. The first part provides a general overview on personal data protection under Article 8, while the second and third part concentrate, respectively, on the collection of genetic data and on their storage for police purposes.

I. INTRODUCTION

In the era of new technologies, where collecting, storing and disclosing data is easier and faster and where sensitive data, such as genetic information, can be extracted, personal data deserve a special attention in the context of the more general right to privacy, where the protection of personal data falls. Privacy, in order to preserve human dignity, serves mainly three purposes: individuality, inti-
macy, and liberty (Chadwick, 2006). However, in society, privacy is not an absolute right. Other values, such as national security, compete with it. States, in their domestic legislation, therefore, have to establish the compromise, that technology is creating complexities between the different interests at stake. The aim of this paper is to investigate to what extent the European Court of Human Rights (ECtHR) protects a particular category of personal data, that is, genetic data, under Art. 8 of the European Convention of Human Rights (ECHR). As it is known, DNA, which is unique in each person, stands for deoxyribonucleic acid and contains full genetic information of an individual. Over recent years, in the Council of Europe’s Member States, there has been considerable practice towards compiling a comprehensive national DNA database. This latter can serve two possible objectives, that is, investigative purposes and/or the mere inclusion in a database. In the first case, DNA information has a forensic value, being a powerful tool for the investigation of offences, as it can determine the innocence of a person suspected of having committed an offence as well as providing probative evidence of guilt. In the second case, the aim is to enlarge the inclusiveness of the database itself. This work examines, more specifically, when the collection and retention of genetic data, by a State, is perceived necessary in order to reach specific purposes in terms of public security, such as the fight against crimes. In other words, it seeks to provide how the ECtHR balances the right to protection of genetic data and a State’s necessity to guarantee national security against crimes, in consideration of the risks new technologies pose to an individual’s information safeguards. This work is divided into three main parts. The first part provides a general overview on personal data protection under Art. 8, while the second and third part concentrate, respectively, on the collection of genetic data and their storage for police purposes.

II. THE RIGHT TO PERSONAL DATA PROTECTION UNDER THE ECHR

Under Art. 8, par. 1 of the ECHR, providing that ‘everyone has the right to respect for his private and family life, his home and his correspondence’, the right to respect for ‘private life’ is ‘a broad term not susceptible to exhaustive definition’ (Peck v. United Kingdom, para. 57). As indicated by the Court, elements such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by Article 8, as well as the right to personal development, to establish and develop relationships with other human beings and the outside world. Art. 8 imposes two categories of obligations, that is a “negative” and a “positive” obligation. The “negative” obligation refers to avoiding interference with Art. 8, par. 1 unless the conditions in Art. 8, par. 2 are satisfied. The “positive” obligation indicates taking actions to protect individuals’ private life, particularly against interference by third persons. According to the doctrine, five sub-categories of private life interest can be identified from within the Art. 8 jurisprudence:

First, there are the three “freedoms from” rights (the first two of which correspond loosely with traditional private law conceptions of “privacy”) – the right to be free from interference with physical and psychological integrity, from unwanted access to and collection of information, and from serious environmental pollution. Then there are the “freedoms to” – the right to be free to develop one’s identity and to live one’s life in the manner of one’s choosing” (Moreham, 2008).

It is, in fact, accepted that protection of personal information is part of the “privacy” interest. “Personal data”, under the Council of Europe Convention of 1981 for the protection of individuals with regard to automatic processing of personal data (“the Data Protection Convention”), is defined as “any information relating to an identified or identifiable individual” (Art. 2).