

OPEN ACCESS

ISSN 2280-4056

*E-Journal of  
International and Comparative*

# LABOUR STUDIES

Volume 8, No. 1, January 2019



**ADAPT**  
www.adapt.it  
**UNIVERSITY PRESS**

*Scientific Directors*

Lauren Appelbaum (USA), Greg Bamber (Australia), Stuart M. Basefsky, (United States), Daria V. Chernyaeva (Russia), Richard Croucher (United Kingdom), Maurizio del Conte (Italy), Tomas Davulis (Lithuania), Tayo Fashoyin (Nigeria), József Hajdu (Hungary), Ann Hodges (USA), Richard Hyman (United Kingdom), Maarten Keune (The Netherlands), Chris Leggett (Australia), Guglielmo Meardi, (United Kingdom), Shinya Ouchi (Japan), Massimo Pilati (Italy), Valeria Pulignano (Belgium), Michael Quinlan (Australia), Juan Raso Delgue (Uruguay), Raúl G. Saco Barrios (Peru), Alfredo Sánchez Castaneda (Mexico), Malcolm Sargeant (United Kingdom), Jean-Michel Servais (Belgium), Silvia Spattini (Italy), Michele Tiraboschi (Italy), Anil Verma (Canada), Stephen A. Woodbury (USA)

*Joint Managing Editors*

Malcolm Sargeant (Middlesex University, United Kingdom)  
Michele Tiraboschi (University of Modena and Reggio Emilia, Italy)

*Editorial Board*

Lilli Casano (Italy), Emanuele Ferragina (United Kingdom), Antonio Firinu (Italy), Valentina Franca (Slovenia), Erica Howard (United Kingdom), Karl Koch (United Kingdom), Attila Kun (Hungary), Felicity Lamm (New Zealand), Cristina Lincaru (Romania), Nikita Lyutov (Russia), Merle Muda (Estonia), Boaz Munga (Kenya), Peter Norlander (USA), John Opute (UK), Eleonora Peliza (Argentina), Daiva Petrylaite (Lithuania), Aidan Regan (Ireland), Marian Rizov (United Kingdom), Salma Slama (Tunisia), Machilu Zimba (South Africa)

*Language Editor*

Pietro Manzella (ADAPT Senior Research Fellow)

*Book Review Editor*

Peter Norlander (Loyola University Chicago)

*E-Journal of  
International and Comparative*

# LABOUR STUDIES

Volume 8, No. 1 January 2019

**@ 2019 ADAPT University Press**

Online Publication of the ADAPT Series  
Registration No. 1609, 11 November 2001, Court of Modena  
*www.adaptbulletin.eu*

The articles and the documents published in the *E-Journal of International and Comparative LABOUR STUDIES* are not copyrighted. The only requirement to make use of them is to cite their source, which should contain the following wording: **@ 2019 ADAPT University Press**.



# Monitoring of Employees' Personal Communications at Work. Practice of the ECtHR

Stefan Stanev <sup>1</sup>

---

**Abstract:** The purpose of this paper is to advance a conceptual, analytical framework to help explain employment regulation as a dynamic process and the link between the privacy of workers and the ECtHR practice.

**Design/methodology/approach:** the concept of privacy, article 8 ECHR and workers' privacy, video surveillance at the workplace

**Findings –** the interpretation of Article 8 leads to the protection of a number of labor and social right.

**Research limitations/implications –** The research proposes an analytical framework and invites future empirical investigation.

**Originality/value:** The paper explores the link between labor law and the European Convention on Human Rights

**Paper type -** Conceptual paper.

**Keywords:** *Privacy, Labour law, the European Convention on Human Rights (ECtHR), Surveillance at the Workplace, Employment Relations.*

---

<sup>1</sup> Trainee at Bulgarian Lawyers for Human Rights (<http://blhr.org/en/>). Email address: stefaninstanev@gmail.com.

## Introduction

Scrutiny of the topic is necessary, (1) allowing for the development of new technologies, which significantly influences all spheres of the private lives of citizens (including at their workplace) — applying primarily to the inviolability of their correspondence. Whether or not control over correspondence is acceptable depends fundamentally on its nature (private or business), the reason for initiating the monitoring and its appropriateness.

The Strasbourg Court examines this issue under Article 8 of the European Convention on Human Rights (ECHR), which has been organized for the respect for one's private and family life, home, and correspondence, as well as the conditions on the basis of which the rights in paragraph one can be restricted. Article 8 ECHR states:

Right to respect for private and family life

1. Everyone has his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this such as is with the exercise of this right except such as is in accordance with the law and is law 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 the protection of the rights and freedoms of others.

In order to rely on Article 8 paragraph 1, the applicant must prove that his application falls within the scope of one or more of the four interests identified in the article – private life, family life, home or correspondence. For the preliminary research, it is necessary to examine first the concepts of private life and correspondence, as well as their application to personal data protection.

As notions of private life are hitherto broad, the precise scope yet has been determined. Nevertheless, even in their early case law under Article 8, the Strasbourg authorities used a broad interpretative approach, which focused on the opportunity to live life without arbitrary interference.

In the fundamental case of *Niemietz*, which helped develop the Human Rights Doctrine, the Strasbourg Court regarded that it would be too restrictive to limit the idea of private life to an inner circle within which the individual can live their private life as they wish, but exclude the entire outside world. Respect for private life should include to a certain extent the right to establish and maintain relationships with other people.

In the case of *Peev v Bulgaria*, the European Court of Human Rights (ECtHR) had the opportunity to define further the scope of “private life” as regards the

workplace. The case related to the search of the office premises of an employee of the Supreme Public Prosecutor's Office of Cassation. The Strasbourg Court held that the employee could reasonably have expected his workplace or at the very least his desk and his cupboards where he kept his personal belongings, to be treated as "private property."

It should be noted that the ECtHR adopts a similar broad interpretative approach regarding the term "correspondence," from which it follows that the concept is not restricted to traditional forms of communication, but should be interpreted in light of all new technological developments.

The most important approach to interpreting Article 8 of the ECtHR used by the Court is the teleological interpretative approach. The Court interprets the Convention in light of its purpose and intent: to offer "actual and effective" guarantees to individuals. The teleological approach to interpretation is especially appropriate when a broad interpretation of the concepts in the Convention is required. Which undoubtedly makes the Convention an instrument for the protection not only of fundamental civil and political rights but also of a number of new rights arising out of technological developments including socio-economic rights, and the right to personal data protection of employees. In 1978, the Court emphasized the fact that it cannot ignore the changes and developments after the creation of the ECHR: "[...] The Convention is a living instrument, which [...] must be interpreted in light of the current day and age." The Court cannot ignore scientific progress and significant changes in morals, relationships, and technological achievements since 1950.

It is precisely technological changes that pose many challenges to the privacy of employees, which has led to several cases heard by the ECtHR. According to European law, specific information contains personal data when the individual is either identified or identifiable (although not identified, the individual is described in such a way as to be identified following further research). This approach, laid down in the General Data Protection Regulation, is followed accordingly by the Strasbourg authorities. The ECtHR has had the opportunity to note that the protection of personal data is of great significance for the right to respect for personal and family life of individuals.

It can be concluded from the legal definition of "personal data" that states have the negative obligation not to interfere arbitrarily with the private lives of citizens, as well as the affirmative obligation to ensure that there are legal guarantees for the protection of the rights under Article 8. The concept of the affirmative obligations of the state is especially critical in employment relationships, which for the most part are between individuals. In order to hold states liable under Article 8 of the ECHR, the applicant must prove the lack of effective means of protection – the absence of legislation regulating privacy at



the workplace, the absence of a controlling authority which should have been created, the absence of administrative, conciliatory or judicial forms of protection, or any other obligation arising from European law.

The concept of certain obligations was adopted in the case law of the Court in 1979 in the *Marckx* case. In the case, the ECtHR held that the state is not only obliged to refrain from interference with protected rights but also, in addition to this negative obligation, may have affirmative obligations suitable for the adequate protection of private and family life.

Having established an interference with the protected right to respect for private life and correspondence, the Court examines the restrictive measure on the basis of the so-called three-step test of permissibility, considering in turn whether the measure was in accordance with the law, whether it pursued a legitimate aim and whether it was necessary for a democratic society. The ECtHR leaves a margin of appreciation to the Contracting Parties, as well as to the national legislature and those bodies, including the judicial bodies, tasked with the interpretation and enforcement of the current legislation. The national authorities have to make the initial assessment of the existence of a pressing social need and take such actions as they consider necessary. This freedom to make an assessment is unlimited and in any case can be controlled by the Strasbourg authorities, which check not only if the measures are in accordance with the law, but also if it pursued a legitimate aim (proportionality and necessity in a democratic society).

### **How Does the ECtHR Interpret “in accordance with the law”?**

Strasbourg Court adopts a broad interpretation of the concept “law,” as it includes a variety of acts of the state authorities creating rights and obligations of the citizens. The law includes all normative acts – constitutional, statutes, bylaws, written and unwritten. The Court considers “law” to include case law, as well as the ethical rules of associated organizations. It should be noted that, as far as respect for private life and correspondence, the ECtHR considers the “law” to be the legislation of the European Union.

The existence of a “law” is not enough to justify interference with private life. In all cases, the ECtHR considers its quality.

First, according to the principle formulated in the *Sunday Times* case, the law should be accessible: citizens should be able to receive adequate guidance in light of the specific circumstances regarding the content of the legal norms applicable to the case. Second, a norm cannot be considered a “law” unless it is formulated with sufficient precision to enable citizens to regulate their behavior. In the *Olson v Sweden* case, the ECtHR held that a law which allows

an administrative body to have discretion, by itself, is not incompatible with the requirement for foreseeability if the scope of its discretion and the way it is used are established with reasonable clarity in view of the legitimate aim of the specific measure in order to ensure adequate protection against arbitrary interference.

In the context of employment relations and personal privacy, the ECtHR applied these principles in the *Copland v UK* (62617-00) case. The applicant complained that her telephone calls and her e-mail correspondence had been monitored. According to the government, the measure pursued the legitimate aim of protecting the rights and freedoms of others by ensuring that no abuse took the place of the material base provided by an employer-funded with state finances. Secondly, the interference had a legal basis as the college, is an institution established by a special law, had the right to exercise reasonable control over the funding provided to it in order to ensure that it can perform the functions bestowed upon it by law. The legislation regulating this issue came into force after the events of the case took place. Therefore, it follows that the applicant did not have a reasonable expectation of non-interference with her private life and no laws were regulating the conditions on which her private correspondence could be monitored. After the legislation regulating surveillance at the workplace came into force, the employers could record and monitor the communications of their employees without their consent, but only when the latter had been duly informed.

In the *Rotaru v Romania* case the ECtHR concluded that the national legislation in Romania did not specify the types of information that could be processed, the categories of people who could be subject to such measures, or the procedure that had to be followed. Therefore, the Romanian national legislation was not in accordance with the requirement of foreseeability.

The aforementioned cases should not be understood to mean that states are obliged to prohibit or restrict considerably control over employee correspondence. On the contrary, control over correspondence is a significant part of the employer's right to control the actions of their employees and workers. If the company has adopted rules for the use of information technologies and equipment in general, the breach of these rules can be the basis for imposing disciplinary sanctions. Undeniably, a specific feature of such measures for control is that they protect the property of the employer and the ordinary course of employment relations.

As regards correspondence, the Strasbourg Court has noted that it is of great significance whether that correspondence is private or work-related. Business correspondence is part of the employment obligations of the employee or the worker, it is created for the employer and can be controlled. Private correspondence, unlike business correspondence, is created and used outside

the place where the employee performs his or her employment obligations. This distinction is adopted by many employers, who understand electronic correspondence from a work e-mail to be business correspondence, created for the purposes of the employer and therefore subject to control. In the *Libert v France* (588/13) case, the ECtHR deemed that there was no breach of article 8 of the Convention as the files in the employee's computer were work-related and the employer had the legal right to demand that they are used for business purposes. The ruling would be acceptable insofar as the employee had not explicitly informed the employer that specific files or correspondence were of a personal nature. There was no express prohibition, and, as often happens, the same email account was used both for personal and for business purposes. In such cases, the employer is deemed to give express or implied consent. However, if an email account is created for business purposes, on the express orders of the employer, then the employee cannot reasonably expect the correspondence not to be controlled. That is why the ECtHR accepts that the employer is entitled to open the files saved to the hard drives of computers provided by the former to his or her employees to fulfill their obligations, but cannot open files designated as private unless the specific employee is present. In the cases mentioned above the ECtHR limited itself to considering only whether the measure was "in accordance with" the law. However, as is evident in paragraph 2 of Article 8 of the Convention, any measure must be proportionate to its specific purpose, as well as necessary in a democratic society.

These requirements arise from the principle that the law must be used for beneficial purposes, so it must form a quantitative causal link between the means and the purposes, aimed at achieving a desirable result.

The Strasbourg Court follows the definition given by the Court of Justice of the European Union (CJEU) in the *Fromançais* case, which noted that in order to establish that a certain measure is following the proportionality principle it must first be established. Whether the means for the attainment of the corresponding objectives to the significance of that objective and second, whether they are necessary for achieving it. In its decision in the *Soering* case the Court confirmed that the principle of proportionality is one of the founding principles of the Convention mechanism:

*[...] intrinsic in the entire Convention is the pursuit of a fair balance between the needs arising out of the common interests of the public and the requirement for the protection of the basic rights of individuals.*

National authorities comply with the proportionality principle when the measure adopted by them is suitable for the purpose it is carried out. Secondly,

the measure must be necessary – there should be no alternative mechanism for achieving the set purpose. Lastly, the measure cannot be disproportionate to the restrictions it imposes on the individuals.

The critical case of *Barbulescu v Romania* (2) illustrates the approach of the ECtHR to balancing the right of the employer to organize the business activities in the interests of his or her property, on the one hand, and the right of the employee to privacy.

Throughout several years, the applicant worked for a private company. As part of his work responsibilities, he had to create a work account in Yahoo Messenger. The internal company rules expressly prohibited the use of the work account for personal correspondence. Nevertheless, printouts provided by the employer showed that the applicant repeatedly used the account for personal correspondence. After he was warned that he was in breach of the company rules, the employer imposed the harshest sanction on him – dismissal. The applicant appealed against the decision to the Romanian courts, which held that control over correspondence was the only effective means for the employer to monitor the enforcement of the internal rules.

In its decision of 12 January 2016, the ECtHR held (with one dissenting opinion) that there was no breach of Article 8 as the applicant did not have a justified, reasonable expectation of personal privacy when using the work account. As it was created specifically for business purposes, the employer expects to find only work-related correspondence. Regardless, the Court noted in its decision that the right to respect for private life and correspondence continue to apply to the workplace, although they are subject to certain restrictions. Furthermore, this case can be distinguished from the *Copeland* case, in which the ECtHR established that the applicant had been monitored without her knowledge.

The Romanian courts correctly concluded that in this case, according to the documents presented to them, the employer had initiated disciplinary proceedings against the applicant. The employer had demanded from the employee to give written explanations twice, stating the purpose, date, place and time of the meeting, as well as that the applicant could present arguments in his defense in respect of the alleged misconduct, judging from the two notes presented in the case.

The right of the employer to monitor his or her employees at the workplace is part of the broader right, regulated in employment legislation, to control the fulfillment of their professional obligations. This control is necessary due to the risk of employees causing damage to the company's information technologies or carrying out illegal activities on social media platforms, and throughout cyberspace.

In his dissenting opinion, Justice Pinto de Albuquerque emphasized the absence of a surveillance policy over Internet browsing, created by the employer. He further noted the sensitive and private nature of the messages, which should have been protected from control. Therefore, the issue required a more thorough assessment.

The decision of the ECtHR is not interpreted uniformly by many authors as it does not take into account several significant factors in employment relations, especially those arising from technological advancements. The Court did not extend enough protection to the right to respect for the private lives of employees, which poses the risk of the adoption of similar practices using new and innovative methods of control. It should be noted that the Strasbourg authorities had to decide whether in the specific case it was possible to create a monitoring system based on less intrusive methods and infringing the privacy of the employees and the workers to a lesser degree.

It is apparent that new technologies have made the control over the personal data of employees and workers, including their dissemination, significantly more accessible. Means of business communication provided to employees in the course of and for the purpose of the fulfillment of their obligations and the information contained in them should be used only for the audit. Although numerous technical measures of control exist over correspondence, this does not mean that such control is acceptable in all circumstances, even if it is in accordance with the law, albeit its function of employee protection primarily characterizes European employment law. Considering the high standards of personal data protection in the EU, the Grand Chamber of the ECtHR heard the same case again.

The main point in the case was whether employees have a reasonable expectation of personal privacy at the workplace. The Grand Chamber held that there is such a reasonable expectation when the employer expressly allows the use of the company equipment for personal use, or when such use is tolerated. In any case, the selected method of personal data processing should be carried out with as little interference with the privacy of employees as possible.

The ECtHR held that employment legislation has unique characteristics which had to be taken into account. The relationship between the employer and the employee is contractual, with individual rights and obligations of each party, and is characterized by the subordination of the employee.

The Romanian government noted that messages sent by an employee using technical means provided by the employer have to be considered work-related unless the employee has designated them as private. The applicant, in turn, claimed that the Romanian courts had not given enough consideration to specific facts in the case, for example, the specific features of Yahoo

Messenger, including the absence of an internal policy for the use of the company equipment. He further argued that a distinction had to be made between using the internet for profit, on the one hand, and personal conversation which did not cause any damage to the employer, on the other.

The French government, which gave an opinion in the case, relied on the particular French understanding of the scope of the affirmative obligations of the national authorities to guarantee the protection of the private lives of employees. Moreover, it presented a broad overview of the applicable regulations in the French court, employment, and criminal law; in this context, as well as the case law of the French Court of Cassation. Holding all data processed, sent or received, using the electronic equipment of the employer are to be considered business-related unless the employee has clearly and precisely designated them as personal.

The French government claimed that states should have broad discretion in this context, as the aim is to achieve a balance between the interests in question. The employer can monitor the employee correspondence on the condition that there is a legitimate purpose and in any case, it is proportionate to that purpose.

The European Confederation of Trade Unions claimed that the protection of privacy at the workplace is of critical significance, keeping in mind the fact that employees are dependent on the employer. Furthermore, in the current technological era, using the internet should be considered to be a human right, and the protection against arbitrary interference with the privacy of employees should be strengthened.

The ECtHR noted that the Romanian courts had not established whether there had been alternative means of control over the activities of the employee and whether there had not been another mechanism of achieving the same goal, as well as whether it had been possible to affect the concerned individual to a lesser degree. Therefore the Court in Strasbourg defined the affirmative obligations of states concerning the respect for the confidentiality of the correspondence of employees. Individually, it should be considered whether the employee had been informed of the possibility that the employer may initiate surveillance of his or her correspondence. Furthermore, the national authorities should consider the scope of the monitoring and the degree of interference with the private life of the employee. Lastly, the national authorities should check if the employer had given valid reasons to justify the monitoring and whether it would have been possible to create a surveillance system based on less intrusive methods, as well as whether the employee has an opportunity to defend himself or herself before the employer and the national administrative and judicial bodies. It is precisely because the national

courts in Romania did not apply the proportionality principle that the Grand Chamber of the ECtHR held that there had been a breach of Article 8 of the Convention.

From the case law of the ECtHR discussed above, the following conclusions and recommendations can be made. Firstly, it is recommended that employers prohibit the use of business correspondence for personal use altogether. They can do this by enforcing an internal company policy or through a suitable alternative, for instance by issuing an order. If nevertheless there is correspondence which may be deemed personal, it is recommended that employees designate it as such. Thus in the course of a potential audit, the employer would not be entitled to process the private correspondence of the employees, only their business correspondence. Secondly, employers should implement suitable alternative measures to control the activities of their employees, and control over correspondence should be eventual and always the last resort. Control over correspondence will only be acceptable when it is in accordance with the national legislation (and the European personal data protection law), or a case of reasonable suspicion of severe disciplinary misconduct or crime.

In all cases of doubt, the employer should check whether any form of monitoring would be necessary for the attainment of the objective. Employers are obliged to inform company employees not only of the possibility of control over their correspondence but also when such control is initiated — allowing for a preventative function. The principle of transparency demands that all information related to the processing of correspondence be easily accessible and understandable. Employees should be aware of the scope of the actual or potential control over their correspondence, as well as of the rights they have in respect of such forms of control. Suitable technical and organizational measures should protect the information contained in the correspondence of employees.

It is of quintessential importance that the privacy of employees cannot be entirely restricted in the workplace. Legal certainty dictates that the protection of the right to respect for private life and correspondence of the weaker party in an employment relationship should be strengthened. The deciding argument in favor of this position is that the founding idea of employment law is that factual inequality should be transformed into legal equality.

# Adapt International Network





**ADAPT** is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Centre for International and Comparative Studies on Law, Economics, Environment and Work, (DEAL) the Marco Biagi Department of Economics, University of Modena and Reggio Emilia, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at [www.adapt.it](http://www.adapt.it).

For more information about the E-journal and to submit a paper, please send a mail to [LS@adapt.it](mailto:LS@adapt.it).

