

The right to respect for private life: ukrainian approach and European Court of Human Rights practice

El derecho al respeto de la vida privada: enfoque ucraniano y práctica del Tribunal Europeo de Derechos Humanos

O direito ao respeito pela vida privada: abordagem ucraniana e prática do Tribunal Europeu dos Direitos Humanos

Vitalii Cherneha¹
Kateryna Dobkina²
Yevhen Horban³
Larysa Hrytsyshyna⁴
Oksana Zalizko⁵

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- ¹ Dr. of Science. Professor at the Department of Private Law of the Kyiv National Economic University named after Vadym Hetman, Ukraine, Kyiv.
E-mail: v774910@gmail.com
- ² Dr. of Science. Dean of Faculty of Law of the State University of Infrastructure and Technologies, Ukraine, Kyiv. E-mail: dobkia@ukr.net
- ³ PhD. Assistant at the Department of Commercial Law and Transport Law of the State University of Infrastructure and Technologies, Ukraine, Kyiv.
E-mail: horban_yevhen@ukr.net
- ⁴ PhD. Associate Professor of the Department of Civil Law and Process of the Leonid Yuzkov Khmelnytskyi University of Management and Law, Ukraine, Khmelnytskyi.
E-mail: grytsyshynal@gmail.com
- ⁵ PhD. Assistant at the Department of Civil Law of the Educational and Scientific Institute of Law of Taras Shevchenko Kyiv National University, Ukraine, Kyiv.
E-mail: oksanazal@gmail.com



Abstract

The right to respect for private life is one of the fundamental values in modern society. That is why it is important to ensure its reliable protection. In European practice, in particular, in the practice of the European Court of Human Rights (ECHR), clear approaches to understanding the essence and constituent elements of the right to private life have been elaborated. However, in Ukraine, despite the establishment of the right to private (personal) life at the constitutional level, the approach to its ensuring is not perfect. In Ukraine, there is no clear definition of the scope and constituent elements of the right to private life, there are ongoing discussions regarding the very concept of "private life". To improve the current situation in Ukraine, it is worth taking into account the ECHR practice, which clearly defines the content and constituent elements of the right to private life. It is also necessary to consider the ECHR practice when ensuring the right to personal data protection, which is an important element of the right to respect for private life. The personal data protection in Ukraine also needs some improvements based on modern European practice in order to bring it into line with European standards.

Keywords: privacy, private life, personal life, personal data protection.

Resumen

El derecho al respeto de la vida privada es uno de los valores fundamentales de la sociedad moderna. Por eso es importante garantizar su protección confiable. En la práctica europea, en particular en la práctica del Tribunal Europeo de Derechos Humanos (TEDH), se han elaborado enfoques claros para comprender la esencia y los elementos constitutivos del derecho a la vida privada. Sin embargo, en Ucrania, a pesar de que el derecho a la vida privada (personal) está establecido a nivel constitucional, el enfoque para garantizarlo no es perfecto. En Ucrania no existe una definición clara del alcance y los elementos constitutivos del derecho a la vida privada; hay debates en curso sobre el concepto mismo de "vida privada". Para mejorar la situación actual en Ucrania, vale la pena tener en cuenta la práctica del TEDH, que define claramente el contenido y los elementos constitutivos del derecho a la vida privada. También es necesario considerar la práctica del TEDH al garantizar el derecho a la protección de datos personales, que es un elemento importante del derecho al respeto de la vida privada. La protección de datos personales en Ucrania también necesita algunas mejoras basadas en la práctica europea moderna para alinearla con los estándares europeos.

Palabras clave: intimidad, vida privada, vida personal, protección de datos personales.

Resumo

O direito ao respeito pela vida privada é um dos valores fundamentais da sociedade moderna. Por isso, é importante garantir a sua proteção de forma confiável. Na prática europeia, em particular na jurisprudência do Tribunal Europeu dos Direitos Humanos (TEDH), foram desenvolvidas abordagens claras para compreender a essência e os elementos constitutivos do direito à vida privada. No entanto, na Ucrânia, apesar de o direito à vida privada (pessoal) estar estabelecido constitucionalmente, a abordagem para garantir esse direito não é perfeita. Na Ucrânia, não há uma definição clara do alcance e dos elementos constitutivos do direito à vida privada; há debates em curso sobre o próprio conceito de "vida privada". Para melhorar a situação atual na Ucrânia, vale a pena considerar a prática do TEDH, que define claramente o conteúdo e os elementos constitutivos do direito à vida privada. Também é necessário considerar a prática do TEDH ao garantir o direito à proteção de dados pessoais, que é um elemento importante do direito ao respeito pela vida privada. A proteção de dados pessoais na Ucrânia também precisa de algumas melhorias baseadas na prática europeia moderna para alinhá-la aos padrões europeus.

Palavras-chave: Intimidade, vida privada, vida pessoal, proteção de dados pessoais.

I. INTRODUCTION

Human rights, including the right to respect for private life, are universal and contribute to the formation of a single humanitarian space. Such manifestations of personal freedom as privacy, secrecy of personal life and communications, and inviolability of private life are guaranteed by international acts and constitutions of democratic states.

Everyone has the right to a private life, but the level of ensuring this right is quite heterogeneous in different states, which is caused by many factors: the level of public welfare, the state of economic development, the level of democracy, transparency and responsibility of public administration, customs and traditions, and mentality. At the same time, one should not forget that any right should be considered together with other interrelated rights that ensure its implementation and protection.

Undoubtedly, addressing such a large-scale construction as the right to personal (private) life includes both the dynamics of social relations and the positive obligation of the state to ensure this right.

According to Article 32 of the Constitution of Ukraine,¹ no one can be subjected to interference in his or her personal and family life, except for the cases stipulated by the Constitution. The right to non-interference in private life enshrined in the Constitution of Ukraine defines the right to private life as an object of protection, the legal regulation of which is provided by the norms of special legislation. Provisions on the protection of personal (private) life in Ukrainian legislation are contained in various branches of law, in particular, criminal, civil, civil-procedural, etc. However, a comprehensive approach is necessary for the full protection of the right to non-interference in private life.

This approach is complicated by the fact that in the norms of different branches of law, the Ukrainian legislator operates with different legal definitions regarding the protection of private life. Thus, in certain articles of the Civil Code of Ukraine,² the terms “personal life” and “private life” are used simultaneously. In the Criminal Code of Ukraine,³ the legislator defines a violation of the inviolability of “private life”. The

1 Constitution of Ukraine (28 June, 1996). Verkhovna Rada of Ukraine. Available at: <https://tinyurl.com/yvu56zcn>

2 Civil Code of Ukraine (16 January, 2023). Verkhovna Rada of Ukraine. Available at: <https://tinyurl.com/yett3rzm>

3 Criminal Code of Ukraine (5 April, 2001). Verkhovna Rada of Ukraine. Available at: <https://tinyurl.com/y69u9cr5>

Criminal Procedural Code of Ukraine⁴ mentions the principle of non-interference in “private life”, and the Civil Procedural Code of Ukraine⁵ refers to “personal life”.

Analysis of the norms of international legal acts, in particular, the Universal Declaration of Human Rights of 1948⁶ and the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950⁷, which are the basis for the normative consolidation of the right to private life, reveals that both concepts are used in these acts.

Based on the fact that the European orientations of Ukraine foresee the need for the formation of an effective mechanism for the provision and protection of personal non-property human rights, which certainly includes the right to personal life, the question arises of bringing Ukrainian legislation into line with international standards in the definition of concepts related to the sphere of personal, private life. A better understanding of the specifics of the use and regulation of these concepts can provide an analysis of the practice of the European Court of Human Rights (ECHR) regarding the specifics of the protection of the right to private life.

II. TERMINOLOGICAL ISSUES IN THE DEFINITION OF THE RIGHT TO PRIVATE LIFE IN UKRAINIAN LEGISLATION

The right to personal life, mentioned in the Constitution of Ukraine, did not find its definition in the normative legal acts of the state. The interpretation of this concept was given the Decision of the Constitutional Court of Ukraine dated January 20, 2012, where “personal life” of an individual was defined as one’s behavior in the sphere of personal, family, household, intimate, professional, business and other relations outside the scope of public activities, in particular, when a person performs the functions

4 Criminal Procedural Code of Ukraine (13 April, 2012). Verkhovna Rada of Ukraine. Available at: <https://tinyurl.com/5n83tdny>

5 Civil Procedural Code of Ukraine (18 March, 2004). Verkhovna Rada of Ukraine. Available at: <https://tinyurl.com/3epvmnrm>

6 Universal Declaration of Human Rights, adopted by the UN General Assembly in Paris on 10 December 1948. Available at: <https://tinyurl.com/5dajawxn>

7 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950. Available at: <https://tinyurl.com/2dujtyh4>

of the state or local self-government bodies⁸. In the motivational part of the same Decision, is also mentioned the term “private life”.

The simultaneous use of the concepts of “personal” and “private” life in Ukrainian legislation and court decisions can be explained by the position of the Soviet times, when everything “private” was consistently denied. As a result, during Soviet times, the concept of “private life” didn’t exist in the regulatory acts and the research, which most likely became the reason for the consolidation of the concept of “personal” life at the level of the Constitution of independent Ukraine.

There are many different approaches to definition of the concepts of “personal life” and “private life”, which sometimes offer to use them as synonyms, sometimes suggest different ways of their correlation.

The term “personal life” is quite common in the theory of human rights, but it does not have a single definition. Some scholars argue that personal life is a complex of various circumstances of a person’s existence and information about a person, which the person treats as confidential, taking measures to close it from external intervention⁹. According to other researchers, “personal life” includes the right to establish, maintain and develop relationships with other people, therefore it goes beyond the boundaries of intimate life and work, other business interests¹⁰.

There are opinions that “personal life” also includes a special sphere of human activity that is controlled by the person, aimed at satisfying various needs related to the freedom and independence of a person as well as the measure of a person’s possible behavior in the private sphere, or in the sphere that does not fall under the direct legal regulation of the state and is supported by state prohibitions to interfere in this sphere¹¹.

Most often, “personal life” is defined as the behavior of a person outside the scope of fulfilling any social duties, outside the boundaries of state, political, public activity, i.e. the activity of a person in the sphere of family, domestic, personal, intimate and other relationships, which are free from the public interests or as a special part

8 Decision of the Constitutional Court of Ukraine dated January 20, 2012 No. 2-пн/2012 in the case of the constitutional submission of the Zhashkiv District Council of the Cherkasy Region regarding the official interpretation of the provisions of the first and second parts of Article 32 and the second and third parts of Article 34 of the Constitution of Ukraine. *Official Gazette of Ukraine*. 2012. No. 9. Article 332

9 В. В. Тертишник. *Особисте життя людини та проблеми правосуддя [Personal Life of a Person and Problems of Justice]*. Права нотаріуса, no. 6. 2005. P. 24-32.

10 П.М. Рабінович, М.І. Хавронюк. *Права людини і громадянина [THE RIGHTS OF HUMAN AND CITIZEN]*. Атіка. (2004).

11 О. В. Стогова. *Особисте життя людини: проблема визначення [Personal Life of a Person: The Problem of Definition]*. Правовий вісник Української академії банківської справи, vol. 1, no. 10. 2014. P. 6-10.

of the private sphere of human life, which consists of various relations, phenomena, events, etc., that do not have public significance and are determined directly by the person, and are guaranteed and protected by law against unlawful interference. Therefore, behavior in the sphere of personal life is self-regulated by internal moral guidelines and is not controlled by society and the state.

The concepts of “private life” and “privacy” are also not clearly defined. The analysis of current research on this matter reveals that “privacy” is understood as security, inviolability of personal life, a person’s interest in keeping secret information about himself or herself and the circumstances of his or her personal life, and at the same time the opportunity to determine what information about personal life to disclose. The three constituent elements of privacy should be considered while defining this notion: secrecy, anonymity, and seclusion.¹² These constituent elements of privacy appear in most definitions of private life. The latter is proposed to be considered in a broad sense as a person’s constitutional right to the inviolability of various secrets and personal data, and in a narrow sense, as information of a personal nature without taking into account personal data that allow identifying a person in society.¹³

Some scholars propose to define private life as the spiritual and physical spheres of a person’s life, which allow to satisfy one’s specific interests (in self-expression, self-identification, solitude, uniqueness, establishing family relationships, etc.), which are determined by the individuality of a person.¹⁴ Others argue that private life is a system of social relations that are protected by law and determine the development of a person as a private one, which are not related to the performance of public functions and are removed from the public view.¹⁵

A broad understanding of private life covers a number of components, including the sphere of family life, freedom of communication between people in an informal setting, intimate relationships; the state-guaranteed opportunity of a person to control information of a personal nature and prevent its disclosure; the ability to communicate with other people by phone and mail without any hindrance; disposal

12 Silvina Álvarez Medina. *La interferencia estatal en la vida privada y familiar*. CUADERNOS ELECTRÓNICOS DE FILOSOFÍA DEL DERECHO, no. 42. 2020. P. 1-23.

13 О.П. Горпинюк. *Стан дослідження проблеми кримінально-правової охорони приватності в юридичній літературі [The state of research of the problem of criminal-law protection of privacy in legal literature]*. Науковий вісник Львівського державного університету внутрішніх справ, no. 4. 2009. P. 198-206.

14 О. О. Андрієвська. *Охорона та захист прав на приватне життя особи [Protection of the rights to a person’s private life]*. Часопис Академії адвокатури України, no. 14. 2012. P. 1-6.

15 В. С. Серьогін. *Приватне життя як об’єкт конституційного права на недоторканність приватного життя [Private Life as an Object of the Constitutional Right to Inviolability of Private Life]*. Вісник Академії правових наук України, vol. 1, no. 64. 2011. P. 51-62.

of personal property, as well as the ability to entrust one's secrets to doctors, lawyers, notaries, etc.¹⁶

Summarizing scientific sources, the two approaches to the correlation between the concepts of "personal life" and "private life" can be revealed. According to the first one, these categories are synonymous, according to another, personal life is covered by the concept of private life, is its constituent element. It seems that the latter approach better reflects the essence of the concept of "private life". The concept of "private life" covers a kind of autonomous environment of a person's life, natural personal interests, the way of their realization, etc., as well as relationships with other people and the outside world.¹⁷

It should be noted that the ECHR also considers the concept of private life in an expanded sense, where the concept of inviolability of personal life goes beyond the narrow limits of guarantees of a life free from unwanted publicity and belongs to the sphere of direct personal autonomy. This includes aspects of physical and moral integrity that provide an opportunity to freely engage in the development of one's personality.

The formation of a full-fledged protection of the private interest of an individual who participates in social life, and its protection from interference from the outside should begin with the formation of a new personal non-property right. Such a personal non-property right should not be the right to "personal life" of an individual, but rather one's "privacy" as a single and complex right that covers all components of the private interest of an individual.¹⁸

Based on the fact that personal life is self-regulated by internal moral guidelines and is not controlled by society and the state, the category "personal life" has no legal meaning, and therefore legal regulation only establishes the limits of its inviolability ("privacy") and, accordingly, the limits of permissible interference. Therefore, it makes sense to replace the category "personal life" with "private life" in Ukrainian legislation, which will also bring it into line with international standards.

16 Koldo Casla. *The Rights We Live In: Protecting the Right to Housing in Spain through Fair Trial, Private and Family Life and Non-Retrogressive Measures*. INTERNATIONAL JOURNAL OF HUMAN RIGHTS, vol. 20, no. 3. 2016. P. 285-297.

17 Ю. М. Кириченко. *Конституційне закріплення права на невтручання в особисте і сімейне життя в Україні та європейських державах: порівняльно-правовий аналіз [Constitutional consolidation of the right to non-interference in personal and family life in Ukraine and European countries: a comparative legal analysis]*. Наукові записки Інституту законодавства Верховної Ради України, no. 5. 2013. P. 34-40.

18 V. I. Galagan, S. Y. Ablamskiy, Z. V. Udovenko, V. V. Ablamska. *Judicial Control as a Guarantee of Non-Interference in Private Life During the Pre-Trial Investigation: An Observation under the European Court of Human Rights*. DIXI, vol. 23, no. 2. 2021. P. 27-35.

III. THE RIGHT TO RESPECT FOR PRIVATE LIFE IN THE EUROPEAN COURT OF HUMAN RIGHTS PRACTICE

The ECHR has not given a clear definition of “private” life so far, deliberately avoiding that, since the concept of private life is so broad that it does not lend itself to an exhaustive definition. But since the role of the Court is not to express an abstract opinion, but to apply the European Convention on Human Rights to the specific cases the Court delineates certain aspects of the concept of “private life” and prefers (as a rule) to focus on a specific issue; or, taking into account that this concept collides with other areas protected by Article 8 of the Convention (family life, housing, correspondence), uses a general approach without specifying which aspect was violated.¹⁹ To summarize, from Court’s perspective, the concept of inviolability of personal life goes beyond the narrow limits of guarantees of a life free from unwanted publicity, and belongs to the sphere of direct personal autonomy. This includes aspects of physical and moral integrity, within which everyone can freely engage in the development of their personality.

Based on the analysis of the ECHR practice, four main components of the right to respect for private life can be distinguished, namely: informational, which includes the dissemination of information about a person, collection and processing of personal data; physical, meaning the protection of a person’s physical integrity; communicative, which includes the security and privacy of correspondence, e-mail, telephone conversations and other types of private communications; and spatial, which includes the concept of home, workplace, that is, the place of living of a person.²⁰

Analyzing the main concepts that are included in the scope of protection of Article 8 of the Convention, it should be noted that, firstly, the concept of “family life” is most detailed in *Marckx v. Belgium*²¹, where it was defined as ties between family members, for example between father, mother and children, as well as between grandparents and grandchildren, and, according to the Court, there is no difference between “established by law” and “not legally registered” family. “Respect” for family

19 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950. Available at: <https://tinyurl.com/2dujtyh4>

20 С. С. Шевчук. Судовий захист прав людини: Практика Європейського Суду з прав людини у контексті західної правової традиції [JUDICIAL PROTECTION OF HUMAN RIGHTS: PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE CONTEXT OF THE WESTERN LEGAL TRADITION]. Правова єдність. (2007).

21 Case of *Marckx v. Belgium* (Application № 6833/74).

life imposes on the state the obligation to promote the normal development of such relationships.

Secondly, the definition of the concept of “dwelling” can be found in *Buckley v. United Kingdom*,²² where the Court noted that housing is a residence that is arranged in accordance with current legislation, and recognized that the protection of Article 8 of the Convention covers even a gypsy khibitka (tent). In addition, the guarantees of Article 8 of the Convention also apply to offices (lawyers, notaries, etc.) and other possessions of a person.

Thirdly, the concept of the right to secrecy of correspondence was elaborated in *Klass and Others v. Germany*²³, and it means the right to communicate with other people that is not censored and not interrupted. However, this right ceases to exist as soon as the letter reaches the addressee. The term “correspondence” includes letters and telephone communications. Protection concerns the means of communication, not their content (which usually falls within the competence of Article 10 of the Convention).

The very concept of “right to private life” or “right to privacy” is analyzed in many ECHR decisions. This concept includes many components, namely: physical and psychological integrity of individuals (*Pretty v. United Kingdom*²⁴), numerous aspects of a person’s physical and social identity (*Mikulić v. Croatia*²⁵), gender identification, self, sexual orientation and sexual life fall into the sphere that is also protected by Article 8 of the Convention (*Bensaid v. United Kingdom*²⁶), a person’s name, her or his private life may include other means of personal identification and contact with the family (*Burghartz v. Switzerland*²⁷), information about state of health (*Z. v. Finland*²⁸), personal development and the right to start and develop relationships with other people and the surrounding world (*Friedl v. Austria*²⁹), certain structural components of the right to one’s own image (*Sciacca v. Italy*³⁰).

An important aspect of the study of the outlined issues is that the ECHR in many of its decisions emphasized the existence of both a negative and a positive obligation of the state to ensure the right to respect for private and family life. In turn,

22 Case of *Buckley v. United Kingdom* (Application № 20348/92).

23 Case of *Klass and Others v. Germany* (Application № 5029/71).

24 Case of *Pretty v. United Kingdom* (Application № 2346/02).

25 Case of *Mikulić v. Croatia* (Application № 53176/99).

26 Case of *Bensaid v. United Kingdom* (Application № 44599/98).

27 Case of *Burghartz v. Switzerland* (Application № 16213/90).

28 Case of *Z. v. Finland* (Application № 22009/93).

29 Case of *Friedl v. Austria* (Application № 15225/89).

30 Case of *Sciacca v. Italy* (Application № 50774/99).

the negative duty is embodied in the protection of private and family life, housing and correspondence from arbitrary interference by the state. But according to Article 8 of the Convention, the state must not only refrain from illegal interference, but also create a mechanism for effective protection of private life. In general, such a mechanism consists in taking measures to ensure respect for private life in relations between individuals.

Thus, in its decisions, the Court has repeatedly noted, in particular, that there is a certain boundary between negative and positive obligations of the state. According to its established practice, when determining obligations, it is necessary to take into account a fair balance that should be established between the competing interests of society and an individual, as well as the principle of freedom of discretion of the state (Palomo Sánchez and others v. Spain³¹).

In a number of decisions, the Court emphasized that the concept of “private life” from the point of view of Article 8 of the Convention covers the systematic observation and collection of private information by the authorities, as well as the further preservation of such information in the form of a file (Rotaru v. Romania,³² Benedik v. Slovenia,³³ P.G. and J.H. v. United Kingdom³⁴). The dynamic development of information technologies has led to the spread of cybercrimes, which has caused the need to establish the boundaries of private life in the online space. The Court concluded that Article 8 of the Convention covers information related to specific dynamic IP addresses, which, in principle, constitutes personal data that cannot be publicly disclosed.³⁵

Therefore, as can be seen from the ECHR practice, the right to respect for private life is the right to privacy, the right to live as everyone wants and to be protected from the disclosure of the facts of private life, and it covers:

- personal data;
- some aspects of a person’s physical and social self. For example, in Mikulić v. Croatia the applicant claimed that the failure of national courts to rule on her case caused uncertainty about her origins;
- establishing and maintaining relations with other people and the outside world. For example, in Burghartz v. Switzerland the husband was unable to

31 Case of Palomo Sánchez and Others v. Spain (Applications Nº 28955/06, 28957/06, 28959/06, 28964/06).

32 Case of Rotaru v. Romania (Application Nº 28341/95).

33 Case of Benedik v. Slovenia (Application Nº 62357/14).

34 Case of P.G. and J.H. v. United Kingdom (Application Nº 44787/98).

35 Case of Eweida and Others v. United Kingdom (Applications Nº 48420/10, 59842/10, 51671/10, 36516/10).

- use his right to use his own surname before his wife's, although the Swiss Civil Code did not officially prohibit this, in *Nimitz v. Germany*³⁶ the legality of the search in the office of local political party head was disputed;
- peculiarities regarding the possibility of changing and writing the name and surname of a person. For example, in *Garnaga v. Ukraine*³⁷ the applicant wanted to change her patronymic, and state institutions did not have the opportunity to ensure the realization of this right;
 - appearance of the person;
 - determination of personal identity: choice of name, way of dressing, sexual identity. For example, the decision in *B. v. France*³⁸, in which the transsexual Norber (now Mrs. Lin Antoinette) was refused a replacement of the birth certificate, which resulted in the actual refusal to accept the person's true gender was found to be a violation of Article 8 of the Convention. In *Dudgeon v. United Kingdom*³⁹ it was held that the legal prohibition of private consensual homosexual relations between males over the age of 21 violates the applicant's right to respect for private life under Article 8 of the Convention;
 - the right of a person to form and develop relationships with other people, including relationships of a professional or business nature (*C. v. Belgium*⁴⁰);
 - the right to personal development and the right to form and develop relationships with other people and the surrounding world (*Pretty v. United Kingdom*);
 - the right to determine one's private life and the possibility of familiarizing others with it. For example, in *Peck v. United Kingdom*⁴¹ the applicant disputed the fact of providing video footage of an incident that happened to the applicant to the media, as a result of which a photo with his image was repeatedly published in the press, and the video material itself was openly shown on television;
 - the right to access information related to the person and the determination of his or her legal status. For example, in *Gaskin v. United Kingdom*⁴² the applicant, who was under the care of the state until he came of age, wanted

36 Case of *Niemietz v. Germany* (Application no. 13710/88).

37 Case of *Garnaga v. Ukraine* (Application no. 20390/07).

38 Case of *B. v. France* (Application no. 13343/87).

39 Case of *Dudgeon v. United Kingdom* (Application no. 7525/76).

40 Case of *C. v. Belgium* (Application no. 21794/93).

41 Case of *Peck v. United Kingdom* (Application no. 44647/98).

42 Case of *Graham Gaskin v. United Kingdom* (Application No. 10454/83).

to get access to materials that contained information about personal aspects of the applicant's childhood, his development and past life. In *Odièvre v. France*,⁴³ the applicant sought access to materials that revealed the facts of her birth, biological parents and other relatives;

- human health, medical intervention. For example, in *Glass v. United Kingdom*⁴⁴ the decision to prescribe appropriate treatment to a child without his mother's consent was found to be an interference with his right to respect for private life, including the right to physical integrity;
- free disposal of your body. For example, in *Christina Goodwin v. United Kingdom*⁴⁵ the applicant contested the lack of legal recognition of her post-operative status, and the same lack of legal regulation of the status of transsexuals in general;
- collection of medical data, compilation of medical history, confidentiality of medical data. In *Panteleyenko v. Ukraine*,⁴⁶ the applicant filed a complaint on the illegal search of his office and the disclosure at a court hearing of confidential information about his mental health and psychiatric;
- the right of a person to physical and moral (mental) integrity;
- the right to personal development;
- the right of a person to a safe environment. For example, in *Lopez Ostra v. Spain*⁴⁷ the applicant, together with her family, suffered from the effects of a water treatment plant, and the Court recognized the inability of the state to maintain the necessary balance between the economic interests of the city of Lorca – to have a treatment plant – and effective by the plaintiff's exercise of her right to respect for housing and for personal and family life;
- the right to private space, etc.

According to the ECHR practice, any justified interference in private life must be based on the law. In particular, it must be accessible to those who are affected, as well as the consequences of its application must be predictable and such legislation must comply with the principle of the rule of law. The expression "according to the law" not only means that the possibility of intervention is provided for by the law, but also that it

43 *Case of Odièvre v. France (Application no. 42326/98)*.

44 *Case of Glass v. United Kingdom (Application no. 61827/00)*.

45 *Case of Christine Goodwin v. United Kingdom (Application no. 28957/95)*.

46 *Case of Panteleyenko v. Ukraine (Application no. 11901/02)*.

47 *Case of López Ostra v. Spain (Application no. 16798/90)*.

is available, the consequences of its application are predictable, the law is not arbitrary and contains clear discretionary powers of the subject-limiter.

The Court interprets the restriction “according to the law” broadly, including the following parameters: predictability of the restriction, compliance with the procedure established by national law, clarity of discretionary powers regarding the restriction of rights, and insufficient evidence base of the Court decision, which harms the predictability of the application of the law. An interference is deemed “necessary in a democratic society” if it passes the test of the proportionality of the interference. In a number of decisions, the ECHR specified the criteria for balancing the interests of the state and the individual.

Therefore, the right to private life consists of a set of spheres of life that are dynamic and closely related to each other, while one of the primary tasks of the state is the formation of a balanced state policy that should harmoniously correlate public and individual interests, and in each in an individual case, make a balanced decision to give preference to one of them. Therefore, although the text of the Convention is unchanged, the meanings laid down in its articles expand every year, which is why when interpreting the articles, it is necessary to apply an expanding interpretation and, based on the idea laid down in the article, to impose them on the current realities.

IV. PROTECTION OF PERSONAL DATA AS AN ELEMENT OF THE RIGHT TO RESPECT FOR PRIVATE LIFE

For a long time, there was no adequate protection of personal data in Ukraine. Until 2010, when the Law of Ukraine “On Personal Data Protection”⁴⁸ was adopted, there were no practical norms that would regulate relations in this matter. However, even after the adoption of the mentioned law, there was no proper implementation of its provisions.

Currently, the main problem in the field of personal data protection in Ukraine is the lack of legislative acts that would ensure an adequate level of personal data protection in accordance with updated international standards in this field. In particular, the Ukrainian legislation on the protection of personal data consists of more than twenty normative legal acts, which do not have a clear and correlated definition of personal data with European legislation. In turn, the lack of legislation that would meet modern

⁴⁸ Law of Ukraine on June 1, 2010 № 2297-VI On Personal Data Protection. Available at: <https://tinyurl.com/4dszc66a>

international standards in this area and the level of technological development not only leads to an unsatisfactory level of protection of the constitutional right to respect for private life in Ukraine, but will also further lead to Ukraine being recognized at the international level as a state that does not provide an adequate level of personal data protection.

By signing the Association Agreement with the European Union, Ukraine agreed to cooperate with the European Union in order to ensure an adequate level of personal data protection in accordance with the highest European and international standards, in particular relevant documents of the Council of Europe, as provided for in Article 15 of the Agreement. Thus, according to Article 11 of the Agreement on cooperation between Ukraine and the European Organization for Justice,⁴⁹ each of its parties guarantees a level of protection of personal data provided by the other party, at least equivalent to that resulting from the application of the principles contained in the Council of Europe Convention on the Protection of Persons in Communication in connection with the automated processing of personal data from January 28, 1981,⁵⁰ and subsequent amendments to it, as well as the principles laid down in the Eurojust Decision and the Eurojust Regulation on data protection.

As it is widely known, the adopted in 2016 General Data Protection Regulation (GDPR), which entered into force on May 25, 2018⁵¹ not only significantly raised the level of personal data protection in the European Union member states, but also provided for the possibility of applying the sanctions established by it to businesses outside the European Union, including Ukrainian ones. That is, despite the fact that Ukraine is not a member state of the European Union, the rules established in the GDPR may apply directly to subjects belonging to its jurisdiction.

Since according to Article 3 of the GDPR the territorial scope of the GDPR has an extraterritorial effect, so its rules apply not only to European Union member states, but also to individuals and legal entities of other countries in specific cases provided for by the GDPR. The main provisions of the GDPR, in particular, are: ensuring legal, fair and transparent processing of personal data; limitation of purposes of data processing, their volume and storage; availability of broad rights of personal data subjects; establishment of requirements regarding the clarity of consent to the processing of personal data; provision of organizational and technical mechanisms for the protection

49 European Union Agency for Criminal Justice Cooperation. *Agreement on Cooperation between Eurojust and Ukraine of 27.06.2016*. Available at: <https://tinyurl.com/2yshuxw4>

50 Council of Europe. *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of January 28, 1981*. Available at: <https://tinyurl.com/mrn-r8wvf>

51 General Data Protection Regulation. Available at: <https://gdpr-info.eu/>

of personal data during the development of new systems and processes; the need to perform a procedure for assessing the impact of certain actions or changes on the protection of personal data; establishing the responsibility of the personal data controller for ensuring the protection of personal data and compliance with GDPR requirements, even if the data is processed by a third party; appointment of a data protection officer; informing employees about GDPR requirements, etc. Those principles are not implemented in the Ukrainian legislation on personal data protection so far.

Taking into account the above mentioned, one of the main tasks of Ukraine at this stage of development is the determination of directions of legal regulation and the creation of legal guarantees in the information sphere.⁵² For this purpose, it is necessary to systematize and codify national legislation in accordance with the European legislation and international law; to develop a single normative legal act that would regulate the collection, processing, protection and transfer of information at the legislative level based on the example of the GDPR; bring the conceptual apparatus into compliance with international legislation; provide for mandatory information protection certification; develop cryptography/encoding technologies; strengthen responsibility for violations of information protection on personal data.⁵³

Considering the experience of the European Union, Ukraine should bring national legislation into line with international standards, create a system of independent administrative, law enforcement, advisory and supervisory bodies that will ensure compliance with the right to personal data protection in both private and public spheres. The current state of protection of personal data of Ukrainian citizens is unsatisfactory and threatening.

However, it should be noted that certain actions have already been taken to resolve the raised issue. Thus, in 2022, the draft Law on Personal Data Protection⁵⁴ was elaborated, which aims to fulfill Ukraine's obligations under the Association Agreement between the European Union and Ukraine to bring Ukrainian legislation into line with the European Union standards (including GDPR); increasing investor confidence and attracting investments to the Ukrainian economy, especially in the IT sector.

Most of the provisions of the project are based on the provisions of the GDPR, as well as individual Court decisions and European Union best practices. The positive

52 Katerina Nekt, Denis Kolodin, Valentyn Fedorov. *Personal Data Protection and Liability for Damage in the Field of the Internet of Things*. JURIDICAL TRIBUNE, vol. 10, no. 1. 2020. P. 80-93.

53 О. В. Легка. *Актуальні питання захисту персональних даних: вітчизняний та міжнародний досвід*. [Actual Issues of Personal Data Protection: Domestic and International Experience]. *Правова позиція*, vol. 2, no. 31. 2021. P. 74-79.

54 Draft Law of Ukraine on June 2, 2021 № 5628 On Personal Data Protection.

features of the project are: detailing of definitions and procedures; orientation to the approaches of the ECHR; introduction of the principle “protection of personal data by design and by default”; the rights of the subjects of personal data and the duties of the controller and operator are defined quite specifically; actions of the controller in case of data leaks (data breach) are well regulated; the signs of consent, the question of the purposes of data processing are detailed. Nonetheless, as of the end of 2023, the draft law is still under consideration.

Nowadays, the basis of legal protection of personal data in Ukraine are, first of all, constitutional provisions, namely:

1. on ensuring information security, including protection of personal data, which is one of the most important tasks of the state (Article 17);
2. on the secrecy of correspondence, telephone conversations, telegraphic and other correspondence, which often contain personal data of individuals, as well as on the possibility of the Court exclusively establishing exceptions to this general rule in cases provided for by law, in order to prevent a crime or to find out the truth under during the investigation of a criminal case, if it is impossible to obtain information by other means (Article 31);
3. on respect for personal and family life, the impossibility of interfering with it apart from the exceptions provided for by the Constitution, as well as on the impossibility of collecting, storing, using and distributing confidential information about a person without his or her consent, except in cases specified by law, and only in the interests of the national security, economic well-being and human rights (Article 32);
4. on the right to get acquainted with information about oneself, which is not a state or other secret protected by law (Article 32);
5. on judicial protection of the right to refute false information about oneself and members of one’s family and compensation for the damage caused thereby (Article 32).

Personal data is also in the sphere of regulation of the Civil Code of Ukraine, which provides the right to protect personal data as part of personal non-property rights (on the secret of personal life, secret of correspondence, etc.). At the same time, the current state of development of special legislation in this area and advanced European legal practice give reasons to believe that the right to protect personal data is an independent right or at least an element of the right to personal data, which includes the right to access it, protect it, etc.

The main purpose of the Civil Code of Ukraine with regard to personal data protection is: 1) determination of the nature of the right to personal data protection; 2) enshrining the right to personal data protection as an element of personal non-property rights, and therefore extending to it the general rules for the implementation and protection of personal non-property rights; 3) determination of special methods of judicial protection of the right to personal data protection; 4) establishment of general legal terms for personal data protection.

The central element of the system of legal acts aimed to provide personal data protection is the mentioned earlier special Law "On Personal Data Protection", adopted in 2010. Article 2 of the mentioned law defines its main terms: regulation of databases of personal data, consent of the subject of personal data to their processing, depersonalization of personal data, etc. According to the law, personal data is information or a set of information about a natural person who is identified or can be specifically identified. Since personal data and confidential information about a person are different categories of information, based on the legal definition it is difficult to distinguish between them, which is a drawback of the existing legal provision.

Article 4 of the law provides a list of the subjects of relevant legal relations: the subject of personal data, the owner and manager of personal data, a third party, the Human Rights Commissioner. Article 5 of the law indicates what can and cannot be classified as the object of protection of this law. Article 6 establishes general, and Article 7 establishes special requirements for processing personal data, namely the prohibition of processing personal data about racial or ethnic origin, political, religious or ideological beliefs, etc., and exceptions to this rule.

Article 8 of the law defines the rights of the subject of personal data (to know about the sources of collection, the location of their personal data, the purpose of their processing, to access their personal data, to receive information about terms for providing access to personal data, etc.), while Article 10 defines the specifics and general rules for the use of personal data, and Article 11 defines the grounds for their processing. Articles 12-15 of the law regulate individual stages of personal data processing (collection, storage, etc.), and Article 16 determines the procedure for accessing them.

The main purpose of the Law "On Personal Data Protection" is: 1) formation of a special mechanism for ensuring personal data protection, which takes into account the maximum specificity of this area; 2) clarification of constitutional and civil legal norms on personal data protection; 3) elimination of conflicts, "white spots", inaccuracies in the legislation on personal data protection, existing before the adoption of this law; 4) systematization of personal data protection norms and rules.

One more element of personal data protection are the protective norms that establish responsibility for violations of the legislation on personal data protection: 1) administrative responsibility (Articles 188-39 of the Code of Ukraine on Administrative Offenses⁵⁵), and 2) criminal liability (Article 181 of the Criminal Code of Ukraine). The main purpose of administrative and criminal legal protection of personal data is to: 1) ensure the effectiveness of the legislation in this area; 2) ensuring compliance with laws on personal data protection; 3) prevention of offenses in the field of personal data processing; 4) punishment for violations.

Considering the Law of Ukraine “On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights”, according to which courts must apply the Convention and the practice of the Court as a source of law, the ECHR practice on personal data protection is of particular importance⁵⁶.

Over the years of its existence, the ECHR has developed a wide range of positions on personal data protection. Thus, for the first time, the ECHR noted the need to protect personal data as a means of ensuring respect for private life in *Leander v. Sweden*⁵⁷: the storage and disclosure of information about a person’s private life by a state, in particular, a law enforcement agency, can be considered an interference with the right to respect for private life, guaranteed by Article 8 of the Convention.

In *Amann v. Switzerland*⁵⁸ the ECHR brought the concept of personal data closer to information about private life, which is subject to autonomous interpretation and may include, in particular, professional activity and communication. The entire practice of the ECHR in this area emphasizes the need to comply with the “three-fold test” of legality of state intervention in the sphere of personal data: 1) in accordance with the law; 2) in accordance with a legitimate purpose; 3) proportional means. In *Leander v. Sweden*, *Rotaru v. Romania*, *Catt v. United Kingdom*,⁵⁹ and in *S. & Marper v. United Kingdom*⁶⁰ the ECHR formulated a number of its key positions:

- the legal processing of personal data must be preceded by the determination of the specific legitimate purposes of such processing;

55 Code of Ukraine on Administrative Offenses (December 7, 1984). Available at: <https://tinyurl.com/5bmcsdx>

56 Law of Ukraine on June 23, 2006 № 3477-IV On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights. Available at: <https://tinyurl.com/5n847eve>

57 Case of *Leander v. Sweden* (Application № 9248/81).

58 Case of *Amann v. Switzerland* (Application № 27798/95).

59 Case of *Catt v. United Kingdom* (Application № 43514/15).

60 Case of *S. & Marper v. United Kingdom* (Applications № 30562/04; 30566/04).

- in the absence of grounds provided for by the laws of the countries, the third party is not entitled to process the personal data of the person;
- the existence of a legal basis for carrying out transactions with personal data and their clear regulation by special legislation and regulations that correspond to the rule of law and the quality criterion of the law, in particular;
- admissibility of periodic updating of personal data only in the case of their natural change at the request of the subject of personal data;
- adequacy of personal data processing and protection measures and their proportionality to the purposes of such processing and protection;
- the duration of personal data processing should not exceed the period necessary to achieve the goals of such processing.

V. CONCLUSIONS

1. The right to respect for private life is enshrined in Ukrainian legislation at the level of the Constitution, but the understanding of its essence and constituent elements needs improvement. In particular, the Constitution of Ukraine implements provisions on non-interference in a person's personal and family life, while the concepts of "private life" and privacy are established in the world practice. The Ukrainian approach can be explained by the position of the Soviet times, when there was a consistent denial of everything "private". As a result, even at the level of the Constitution of independent Ukraine, the concept of "personal" life instead of "private" life was enshrined. This approach needs to be revised taking into account European practice and the scope of the notion "private life". Therefore, it is necessary to introduce the concepts of "private life" and privacy as integral constitutional human rights into Ukrainian legislation, which will bring it into line with international standards.

2. During the improvement of the legal regulation of relations regarding private life, it is necessary to take into account the concept of private life, which was formed in the practice of the ECHR. Namely, it is necessary to take into account such components of the right to privacy, as: informational, which includes the dissemination of information about a person, collection and processing of personal data; physical, which implies the protection of the physical integrity of a person; communicative, which includes the security and privacy of correspondence, e-mail, telephone conversations and other types of private communications; spatial, which includes the concept of home, workplace, etc. The practice of the ECHR is a dynamic source of law and contributes to the formation of the unity of judicial practice in the context the rights and freedoms protection. Article 8 of the Convention not only enshrines one of the fundamental rights

of a person and protects against its violation by the state, but also creates and develops the most effective field for the protection of rights, which would take preventively into account the existing practice of the Court.

In its practice, the ECHR has developed unanimity in the interpretation of the most important components of the content of Article 8 of the Convention, such as “dwelling”, “correspondence”, “private life”, “family life”, which is a great achievement not only for the application of its provisions by the Court, but also for the enforcement of the Convention principles by the Member States. Currently, taking into account the relevant practice and legal positions of the Court, most countries can actively introduce into national legislation new principles, concepts, criteria for defining offenses, methods of protection and restoration of violated rights, establish positive and negative obligations of the state towards individuals and apply relevant practice of the ECHR, improving their legal systems.

3. One of the most important components of the right to respect for private life is the right to protect personal data. As of today, the legal protection of personal data in Ukraine has an extensive system, represented by the norms of the Constitution of Ukraine, the Civil Code of Ukraine, the Law of Ukraine “On Personal Data Protection”, and other legislative acts, subordinate regulatory legal acts, international treaties, special regulations in the field of personal data protection. However, the current approach to ensuring the personal data protection in Ukraine is unsatisfactory.

An important source of legal support for personal data protection is the ECHR practice, within which the protection of personal data is considered as an element of the right to respect for private life, and therefore, interference in the sphere of personal data must meet the three-fold test formulated in Part 2 of Article 8 of the European Convention on Human Rights. The Court has developed a wide list of positions regarding individual aspects of personal data protection.

At the current stage of the development of Ukrainian legislation, the following ways of improving legal protection in this area can be distinguished: a) improvement of the legislative definition of the concept of “personal data” in accordance with the GDPR; b) enshrining the principles of personal data protection in a specific provision of a special law; c) establishment of special requirements for protection, processing of “sensitive data”; d) regulating the collection of cookies that contain personal data; e) establishing the priority of personal data protection over the interest of the subject of service provision, which corresponds to the practice of the ECHR.

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