

The right to privacy as a fundamental principle of the European community

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The article is devoted to the scientific study of the topical issue of the legal essence and validity of the application in international legal relations and in the national judicial system of the main provisions of Art. 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. This norm guarantees the steadfastness of a person's right to personal freedom, in other words, the right to privacy. In this sense, the activity of the European Court of Human Rights is analyzed, which, at the level of its precedent decisions, conducts the legal application of the rule of Part 1 of Art. 8 and in this way evaluates the legality of certain acts committed in the sphere of privacy. It is emphasized that the decision of the ECtHR in a specific case is of decisive importance not only for the parties to the dispute, but also for all the signatory states precisely because of its precedential nature. The multifaceted concept of "private life" is studied as a set of specific spheres of activity that a person does not want to disclose. Because of the Convention in Art. 8 does not give a clear definition of the concept of "right to respect for private life", a set of concrete decisions of the ECtHR is examined, which specify and detail the content of the general norm, which occurs when considering specific cases of violation of the right to privacy. On separate examples regarding the position of the ECtHR, it is clarified that the private life of each individual includes the secrecy of information transmission, including the secrecy of access to the Internet, the inviolability of family ties, housing, communication, and includes elements related to a person's right to his image, as well as various aspects of a person's physical and psychological integrity. The concept of "private life" can also cover certain aspects of professional or business activities. In general, according to the approach of the Court, the concept of "private life" cannot be interpreted in a restrictive sense; it cannot be given an exhaustive definition. In the work, a certain differentiation of methods of protecting privacy as a general category and protection of personal data of a person as one of its elements is carried out. Special attention is paid to special approaches to the protection of private life in various spheres of public relations developed by the Court. Proposals were made to improve Ukrainian law enforcement practice in the researched area, taking into account the experience of the ECtHR.

Право на недоторканність особистого життя як засадничий принцип існування європейської спільноти

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Стаття присвячена науковому дослідженню актуального питання про юридичну сутність та обґрунтованість застосування у міжнародно-правових відносинах та у національній системі судівництва основних положень ст. 8 Європейської конвенції про захист прав людини і основоположних свобод. Ця норма гарантує непохитність права на особисту свободу людини, інакше кажучи, права на приватність. В цьому сенсі аналізується діяльність Європейського суду з прав людини, який на рівні своїх прецедентних рішень проводить правове застосування правила ч. 1 ст. 8 і в такий спосіб оцінює правомірність тих чи інших діянь, вчинених у сфері недоторканності приватного життя. Наголошується на тому, що рішення ЄСПЛ у конкретній справі має вирішальне значення не лише для учасників спору, але й для всіх держав-підписантів саме з огляду на його прецедентний характер. Вивчається багатоманітність поняття «приватне життя» як сукупність специфічних сфер діяльності, які людина не бажає розголошувати. Позаяк Конвенція у ст. 8 не дає чіткого визначення поняття «право на повагу приватного життя», досліджується комплекс конкретних рішень ЄСПЛ, у яких надаються конкретизація та деталізація змісту загальної норми, що відбувається під час розгляду конкретних справ про порушення права на недоторканність особистого життя. На окремих прикладах щодо позиції ЄСПЛ з'ясовано, що приватне життя кожної особистості включає таємницю передачі інформації, в тому числі таємницю доступу до Інтернету, недоторканність сімейних зв'язків, житла, спілкування, а також елементи, які стосуються права людини на своє зображення, різні аспекти фізичної та психологічної недоторканності особи. Поняття «приватне життя» також може охоплювати окремі сторони діяльності професійного чи ділового характеру. Загалом, за підходом Суду поняття «приватне життя» не може тлумачитися в обмежувальному значенні, йому неможливо дати вичерпне визначення. В роботі проведено певну диференціацію способів захисту приватності як загальної категорії та охорони персональних даних особи як одного з її елементів. Особлива увага приділена спеціальним підходам до охорони приватного життя у різних сферах суспільних відносин, напрацьованим Судом. Зроблено пропозиції щодо поліпшення української правозастосовної практики у досліджуваній царині з урахуванням досвіду ЄСПЛ.

Introduction. The right to privacy is one of the components of the complex of fundamental rights and freedoms. With the development of social relations over a long period of time, humanity and political elites gradually became more and more aware of the need to form a legal institution of privacy as a means for a person to exercise his capabilities

regarding the inviolability of his personal space. Indeed, ensuring confidentiality is one of the qualitative indicators of protection of the right to privacy. This makes it possible to guarantee the effectiveness and efficiency of a person's fundamental right to the protection of his private sphere and information about it, which corresponds to the aspirations

and interests of each individual. After all, the ever-increasing intensity and complexity of life made it necessary to acquire a certain refuge from this world, and a person under the influence of culture became more sensitive to glasnost. Due to this, seclusion and privacy of life became even more necessary for the individual [1, p. 1].

At the same time, it should be noted that in modern society there are often cases when the confidentiality of the private sphere is not ensured, the inviolability of a person's personal space is limited. This is especially telling in the context of the significant spread of automated computer processing of information about individuals, their lifestyle, and nature of relationships with other people, etc. Actually, this issue has both general philosophical and legal aspects. Her meticulous research began with the rapid development of photography and printing, when in 1890 the article "The Right to Privacy" was published in the Harvard Law Review. Its authors, Samuel D. Warren and Louis D. Brandeis, harshly criticized the obsessive activity of journalists. The authors first introduced the concept of "the right to be left alone", which is based on the principle of the inviolability of the individual [2], and which, in the further development of the relevant European legislation, acquired the wording "the right to be forgotten". Therefore, the issue of legal support for the realization of a person's right to the inviolability of private life, personal and family secrets becomes very relevant.

Presenting main material. Privacy issues were also enshrined in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention introduced a new institution – the European Court of Human Rights, which, at the level of its precedent decisions, carries out the legal application of the rule of Part 1 of Art. 8 and in this way evaluates the legality of certain acts committed in the sphere of privacy. At the same time, it is important that the decision of the ECtHR in a specific case is of decisive importance not only for the parties to the dispute, but also for all the signatory states precisely because of its precedential nature. Private life can be defined as a set of specific spheres of life that a person does not want to disclose. These can be family and household relations, communication with others, religious preferences, extracurricular activities, personal relationships, recreation, etc. Due to its multifacetedness, heterogeneity, and due to the possibility to subjectively evaluate certain factors of influence in different ways, all rights to respect for private and family life can acquire certainty and specific meaning only on the basis of established and detailed judicial practice. In this regard, the importance, which is difficult to overestimate, is given to judicial discretion and, in particular, to the extended interpretation of the prescription of Art.

8 of the Convention implemented by the European Court of Human Rights.

When considering cases on the protection of a person's personal space, a problem arises regarding the relationship between the concepts of "right to trial" and the concept of "right to a fair trial". For example, the Ukrainian judiciary does not always equate them, believing that the literal meaning of the provision of Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms covers only the procedure of judicial proceedings itself and has obvious procedural features that manifest themselves after the start of the case and before its conclusion. In view of the importance of this issue, the ECtHR at one time gave a specific interpretation of the meaning of the concept of the right to a fair trial, and it is currently adhered to in numerous decisions. In particular, in the case of *Hornsby v. Greece*, the Court stated that, in accordance with established case law, Article 6 § 1 guarantees everyone the right to go to court or arbitration with a claim in respect of any of his civil rights and obligations. Thus, this article proclaims the "right to a court", one of the aspects of which is the right of access, that is, the right to file a lawsuit on civil law issues in court [3, § 40]. Therefore, the concept of the right to a fair trial covers the content of the right to a fair trial and is a somewhat broader concept with a complex structure. According to the above, it contains as an element the right to a court, and as a sub-element – the right to access to a court. And, although the literal understanding of the wording of the corresponding article of the 1950 Convention does not include the establishment of access to court as a component of the right to a fair trial, this does not mean that this right excludes or does not take into account such an important category as access to court.

Convention in Art. 8 do not give a clear definition of the term "right to respect for private life", so it is declarative in nature. But this does not prevent the control bodies, by virtue of the given competence, to specify and detail the content of this legal norm when considering cases of violation of the right to privacy. In one such decision, it was, in particular, indicated that for many Anglo-Saxon and French authors, the right to respect for private life is the right to privacy, the right to live as one wishes, to be protected from publicity. But the right to respect is not limited to this. It also includes, to a certain level, the right to establish and develop relationships with other people, especially in the emotional sphere, for the development and realization of a person's personality [4, p. 10].

The rights guaranteed by Article 8 of the Convention refer to the personal life of a person, which allows separating the mechanism of its implementation from similar acts, for example, those designed

to protect the honor and dignity of a person. There are also certain differences in the legal regulation of the protection of private life as a general phenomenon and the protection of personal data as its element. The right to inviolability of privacy involves the protection of information about personal life, while the protection of personal data consists in ensuring their proper and legal processing in various fields of use. When protecting private life, it is the object of protection, and in the case of personal data protection, it is any information that contains information about the private life of a certain natural person. And, although it is directly related to a person's privacy, personal information must be recorded on a physical medium, and information constituting the secret of a person's private life does not require such recording [5, p. 217–218].

The European Court of Human Rights has repeatedly indicated that the protection of personal data is of the utmost importance for a person's ability to exercise the right to inviolability of private and family life [6, § 41]. The private life of each individual includes the secrecy of information transmission, which includes the security and confidentiality of postal, telephone, electronic and other forms of information transmission; and information privacy, which may include Internet access privacy. For example, the ECtHR found that monitoring the applicant with the help of a global positioning and processing system and using the information obtained in this way was an interference with his exercise of his right to privacy [7, §§ 59–60].

Closely related to this protection is the right of a person to personal data, as well as other similar relationships regarding the inviolability of family ties, housing, and communication. It is also covered by the legal regime of privacy. Therefore, the European body called to carry out interpretation and law enforcement in the field of protection of relevant human rights indicates that the concept of "private life" cannot be interpreted in a restrictive sense; it cannot be given an exhaustive definition. In particular, respect for private life implies the right to personal development, establishing and developing relationships with other people and the outside world [8, § 45]. In addition, there is no principled reason to believe that the concept of "private life" cannot cover activities of a professional or business nature, since after all, during their professional life, most people have a significant, if not the greatest, opportunity to develop relations with the outside world. This point of view is supported by the fact that it is not always possible to clearly distinguish which activities of a person are part of his professional or business life and which are not. Therefore, especially in the case of a person practicing a liberal profession, work in this context can form an integral part of life to such

an extent that it becomes impossible to know to what extent it acts at a certain moment in time [9, § 29].

The concept of private life also includes elements related to a person's right to his image [10, § 29]. This means that photographs or video clips that contain an image of a person fall within the scope of Article 8. This provision should be especially taken into account when placing photographs on public or social sites on the Internet. The ECHR also notes that recording a person's voice for further analysis is an interference with the exercise of the right to privacy. This principle covers the possibilities of recording and publicizing facts from personal life in other ways. Thus, the publication of material obtained in public places by means of measures which go beyond those which can normally be foreseen may also extend the scope of Article 8 § 1 to the relevant recorded information or material relating to disclosure to the media for the purpose of broadcasting video recording of the applicant, made in a public place [11, § 60–62].

The court also reminds that private life covers the physical and psychological integrity of a person. In particular, it is emphasized that the human body concerns the most intimate aspect of private life. Thus, compulsory medical intervention, even if it is of minor importance, is an interference with this right. However, the ECtHR sometimes makes certain reservations regarding the possibility of absolutizing the right to private life. This refers, for example, to the ability to lead one's own life in one's own way and of one's choice, which may include the possibility of carrying out activities that would be physically or morally harmful or dangerous to the person concerned (for example, in relation to the right to euthanasia). The extent to which the state can use coercive powers or criminal law to protect people from the consequences of their chosen lifestyles has long been a topic of moral and jurisprudential debate, and the fact that the intervention is often seen as an intrusion into the private and personal sphere only adds to debate energy. However, where such conduct constitutes a danger to health and where it is vital, the precedent practice of the Court is of the position that the imposition by the State of compulsory or criminal measures affecting the private life of the applicant within the meaning of Article 8 of the Convention may be justified from the point of view of the second paragraph of this norm [12, § 62].

The right to privacy can also include various aspects of a person's physical and social self-identification. After all, the concept of "family life" in Convention Article 8 is not limited exclusively to those related to marriage, but can also cover other de facto "family" where there is sufficient permanence of ties. Private life, according to the Court, includes the physical and psychological integrity of a person and can sometimes encompass aspects of a person's physical

and social identity. “Private life” also includes, to a certain extent, the right to establish relations with other human beings. For example, a fundamental question arises as to why the concept of “private life” should exclude the determination of the legal force of the relationship between a child born out of wedlock and its natural father. The court recognized that respect for private life involves the possibility to establish the details of one’s identity as an individual, and such information, to which a person has the right, is very important for the formation of an individual [13, §§ 51, 53, 54].

The right to privacy includes such elements as, for example, assigning oneself to a certain gender, as well as sexual orientation and sex life, etc. They also belong to the private sphere, which is protected by Article 8 of the Convention. In addition to general information such as a person’s name, residential address, etc., private and family life may include other means of self-identification and maintaining family ties. For example, the fact that there may be a public interest in the regulation of the use of names is insufficient to remove the question of a person’s name from the sphere of private and family life, which is interpreted as including to one degree or another the right to establish relations with other people [14, § 42]. Information about a person’s health is also an important component of the content of private life.

The court also developed special approaches to the protection of private life in various spheres of social relations. In particular, in the field of protection of the right to education and the rights of parents regarding education, the Court points out that the norm contained in Part 1 of Art. 8 does not in it guarantee these rights. At the same time, it is not excluded that the measures applied in the field of education may affect or encroach on the right to respect for personal and family life; the case will be the same, for example, when they have such consequences of disruption of personal or family life as separation of children from their parents. Private life, according to the Court, includes the physical and psychological integrity of a person; therefore the guarantees provided by Article 8 of the Convention are aimed at ensuring the development of each person’s personality without external interference in relations with other people [15, § 32].

Violation of a person’s right to privacy is particularly sensitive when such actions are committed within the framework of criminal proceedings. In this sense, the rule on the need for adequate compensation when the interference was arbitrary, which is also covered by the principle of respect for private life, seems important. Similar examples of the attention of the European Court of Human Rights are largely characteristic of cases against Ukraine. For example,

in the case of Volodymyr Polishchuk and Svitlana Polishchuk v. Ukraine, the applicants filed a lawsuit in the local court of Zaporizhzhia region against the police department, the prosecutor’s office of Zaporizhzhia region, and the Main Department of the State Treasury of Ukraine in Zaporizhzhia region, demanding that the search of their apartment be declared groundless and illegal. The applicant additionally demanded compensation for moral damage caused by such illegal actions. The trial court considered the applicants’ claims and found that the apartment was searched two months after the crime was committed and that there was no good reason to believe that evidence could have been found in the applicant’s apartment. Accordingly, the court satisfied the applicant’s claims and ruled that the search was groundless and illegal. As for the claims for compensation, the court noted that since the search was conducted only in connection with the suspicion of the applicant, the applicant does not have the right to claim compensation for the damage caused by the procedural actions concerning another person. On these grounds, the court rejected the applicant’s claims. Subsequently, the courts of appeal and cassation instance annulled the decision of the local court in the positive part for the applicants, and left it unchanged regarding the refusal to compensate for moral damage, given that the applicant did not have the right to demand compensation for damage, since the search concerned only the applicant, who was a suspect in within the limits of criminal proceedings. Considering the relevant case, the ECtHR noted, in particular, that, as follows from the submitted materials, the search was conducted in the presence of the applicant and guests invited to the birthday celebration of the applicants’ son. And, although the national authorities recognized the search as illegal and brought the police officers to disciplinary action, they did not offer the applicant any compensation. Therefore, the Court considers that, since the applicant was not awarded damages, she can be considered a victim of a violation of Article 8 of the Convention, since the said intervention did not meet the requirement of legality. It follows that there was a violation of the convention provision [16, § 46–48].

In another case, “Feldman v. Ukraine” (No. 2), a person’s statement about the illegality of the investigator’s refusal to stage the convicted applicant in the city of Dnipropetrovsk so that he could participate in his father’s funeral was considered. On August 11, 2000, the investigator denied the request on the grounds that domestic law does not provide for the escorting of suspects for such purposes. In considering this complaint, the Court applied its established position, according to which any interference with a person’s right to respect for his private and family life would constitute a violation of Article 8 of the Convention,

if it was not carried out in accordance with the law, did not pursue a legitimate aim and was necessary in the democratic society in the sense that it was proportionate to the goals to be achieved. According to the practice of the Court, Article 8 of the Convention does not guarantee a person in custody the unconditional right to obtain permission to attend the funeral of a relative. At the same time, the Court emphasizes that even if the nature of the situation of a person in custody involves the application of various restrictions on rights and freedoms, each of such restrictions must nevertheless be justified as necessary in a democratic society. The state can deny a person the right to participate in the funeral of his parents only if there are good reasons for this and if no alternative solution can be found. In the present case, the applicant's personal situation had not been assessed by the domestic authorities at all, and he had been denied the right to attend his father's funeral solely on the grounds that domestic law did not provide for such a possibility. In the opinion of the Court, such unconditional refusal to the applicant of temporary release due to family circumstances and the absence of any other decision that would enable him to attend his father's funeral does not correspond to the state's obligation to evaluate each individual request on the merits and to prove that restricting a person's right to attend

a relative's funeral was "necessary in a democratic society". In light of the above, the Court concluded that there had been a violation of Article 8 of the Convention [17, § 33–36].

Certain **conclusions** can be drawn from the research carried out so far. The right to privacy is one of the defining human rights and is protected by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In Ukraine, the detailed regulation of the rules for the protection and protection of this personal and public value is still not given much attention. Specific legal mechanisms for the realization of this right by its bearer, as well as safeguards for deterring illegal and arbitrary interference with it by means of legal tools, have not been developed. The concept of "private life" is mostly used by legislators and law enforcement agencies in a very narrow sense, while it inherently covers family, professional, and to a large extent personal relationships of a person. For the further development of the state of Ukraine in the direction of the movement of democratic societies in this area, it is necessary to take advantage of the important developments made by European legislators and the ECtHR. Judicial practice must be developed regarding the definition of the concepts "legitimate goals" and "necessity in a democratic society".

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