

The Right To Respect For Family Life: Legal Basis For State Interference

O Direito De Respeitar Pela Vida Familiar: Fundamentos Jurídicos Da Interferência Do Estado

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Abstract

This article is dedicated to a theoretical and legal study of the concept of "the right to respect for family life". It is based on legal analysis of Ukrainian legislation and the case law of the European Court of Human Rights. It has been argued that the legal bases for state interference in family life are: 1) interference committed under the law, 2) interference with the interests of the majority in a democratic society, 3) interference to prevent disorder, crime, health, morality, rights and freedoms of other citizens. Family rights include the right of spouses to divorce, the right to establish biological paternity and the right of parents to know who the child's true parents are, among others. The ECtHR uses a very broad approach to the interpretation of "family life", indicating that family life cannot be limited to conjugal relationships only.

Keywords: family life, private life, European Court of Human Rights, state, grounds for interference.

Resumen

Este artigo é dedicado a um estudo teórico e jurídico do conceito de "direito ao respeito pela vida familiar". Baseia-se na análise jurídica da legislação ucraniana e na jurisprudência do Tribunal Europeu dos Direitos do Homem. Argumentou-se que as bases legais para a interferência do Estado na vida familiar são: 1) interferência cometida com base na lei, 2) interferência nos interesses da maioria em uma sociedade democrática, 3) interferência para prevenir a desordem, o crime, saúde, moralidade, direitos e liberdades de outros cidadãos. Os direitos familiares incluem o direito dos cônjuges ao divórcio, o direito de estabelecer a paternidade biológica e o direito dos pais saberem quem são os verdadeiros pais da criança, entre outros. O TEDH usa uma abordagem bastante ampla para a interpretação da "vida familiar", indicando que a vida familiar não pode se limitar apenas às relações conjugais.

Palabras clave: vida familiar, vida privada, Tribunal Europeu dos Direitos do Homem, estado, motivos de interferência.



Introduction

The COVID-19 pandemic has caused a change in social values, and many people realized the higher importance of health, personal relationships and family life in comparison with career and social status. In recent months, there have been several cases of family separation by quarantine restrictions due to the closure of borders, which demonstrated the peculiarities of the implementation of the right to respect for family life. At the same time, the concept of family life and the permissible limits of state intervention remains the subject of consideration by both national courts and the European Court of Human Rights (hereinafter - the ECHR).

Within the framework of this study, the goal is to analyse the relationship between the concepts of "family life", "private life" and "personal life", to find out the permissible limits of state interference in family life and, based on an analysis of the ECtHR's case law, to summarize the facts of violation of the right to respect for family life.

To achieve this goal, both general scientific and special legal research methods were used, among which the main one is the method of comparative legal analysis, which made it possible to compare the effectiveness of legislative regulation of family legal relations, both at the level of the Ukrainian legal system and at the international level. In addition, methods of analysis, synthesis, analogy, opposition, system-structural analysis and others were used.

The systemic and structural analysis made it possible to identify the levels of implementation of family law in the legal system of Ukraine. The descriptive method allowed the results of the study to be presented in a coherent manner. The integrative method made it possible to study the degree and nature of the integration of family law norms into the international legal space. The totality of the methodological base used made it possible to ensure, in the end, the reliability and validity of the conclusions.

Based on the analysis of the established trends and patterns of legal regulation of the inviolability of family legal relations, the conclusion is drawn about the need to improve the legislative framework of Ukraine in establishing the permissible boundaries of state interference in family relations.

The ratio of the concepts of "private life" "Personal life" and "family life."

According to some scientists, personal life is a set of facts occurring at the moment in the life of a certain person autonomously from the interference of someone, in order to satisfy own private interests

(Breen et al., 2020; Roagna, 2012; Sychenko & Chernyaeva, 2019; Thym, 2008; Wnukiewicz-Kozłowska, 2020). Other scientists, when analysing the concept of "private life", start from the opposition of "public" and "private" life (Hubanov et al., 2018; Katrenko, 2018; Levochkin, 2016; Mykhailov et al., 2020; Reznichenko et al., 2019; Safonchuk et al., 2020). We share the approach of scientists stating that the concept of "personal life" and "private life" are synonymous, and "family life" is a constituent element of private (personal) life.

The substantive distinction between the personal and family life of an individual is reflected in the decision of the Constitutional Court of Ukraine. In particular, in the decision of January 20, 2012, No. 2-RP / 2012, it was established that personal life is one's behaviour in personal, family, household, intimate, friendship sphere, professional, business areas and other relations outside social activities, including the performance by a person of public functions in state or local government bodies. Family life consists of personal non-property and property relations between spouses and other family members, which are carried out on the principles established by the Family Code of Ukraine (Futey, 1997; Khudyk, 2019; Pankevych & Sofinska, 2019; Trochev, 2003; Trochev, 2009; Trykhlub, 2019; Wolczuk, 2002). In addition, the Constitutional Court of Ukraine emphasized the impossibility of determining all types of behaviour of an individual in the spheres of personal and family life, because both personal and family rights are part of natural human rights, and therefore they are inexhaustible and can be realized in various dynamic property and non-property relations, phenomena, events, and the like.

ECHR in its Art. 8 provides for the protection of private and family life. Based on the analysis of case-law, it was established that the ECHR considers "private life" not only as a person's inner world, but also as a relationship with the outside world, and therefore the concept of "family life" is not identical with the concept of "private life", but intersects with it (Isaksson, 2019; Kaya, 2020; Lautenbach, 2013).

In the jurisprudence of the ECtHR, the concept of "private life" is quite broadly outlined, moreover, the Court considers that it is impossible and unnecessary to give an exhaustive definition. The boundaries of private life are not limited to the "internal sphere". Therefore, it is impossible to exclude the outside world, for example, private life may intersect with professional activity, especially in free professions (part 29 of the judgment in the case "Niemiets v. Germany"). In the sphere of private life, the ECtHR also includes personal autonomy and personal development, gender



identity, sexual orientation, sexual life, and the physical and psychological integrity of a person. The following were recognized as interference in the sphere of private life: telephone tapping, encroachment on the physical integrity of a person, lack of legal recognition of transgender rights of a person after gender reassignment, lack of legal right to abortion in case of risk to a woman's health, etc. Thus, the European Court of Human Rights uses a fairly broad approach to understanding private life, including the following areas: the physical and psychological integrity of the person, his legal, social and psychological identification, gender identity, sexual orientation, photographs, relationships with other people, the right to make decisions about one's body, choosing a profession, materials collected about a person by state bodies and others.

The ECtHR also interprets the concept of family life quite broadly. In particular, the concept of "family life" cannot be limited only to marital relations, and includes other "actual family ties", including living together outside of marriage, relations between brothers and sisters, relations associated with divorce, establishing biological paternity and actual family ties and others.

The right to private and family life means the inadmissibility of spying on a person, listening and recording personal conversations, including telephone conversations both at home and in public places, except for cases provided for by law (Bendiksen, 2019; Hanna, 2019).

In the context of the development of information technology, the right to the inviolability of family life also provides for the inviolability of electronic communications, electronic personal and family archives, databases, and so on. Undoubtedly, a person can independently disseminate information of a private nature, including about the events of family life, by posting it for public display, for example, on social networks. If such information is presented as publicly available, then the person independently decides to publicly disseminate information about family life and thereby permits interference in the sphere of family life. At the same time, when placing information in the "limited access" mode, in the case when a person or a certain circle of persons has access to it, such information about family life should be protected from outsiders.

Thus, private and family life are different spheres, which determines the understanding of the right to privacy and the right to family life as independent types of human rights.

Legal grounds of state interference with family life

Part 5 of Art. 5 of the Family Code of Ukraine states that interference into family life is possible in cases established by the Constitution of Ukraine.

Article 32 of the Constitution of Ukraine defines the boundaries of permissible state interference in the sphere of family life, in particular, it is possible to collect, store, use and distribute confidential information about a person's family life in cases determined by law, and if it is necessary for the interests of national security, human rights and economic welfare of the state. The permissible limits of state intervention are also established in Part 2 of Art. 14 of the Law of Ukraine "On the Protection of Personal Data" (Freeland, 2015) and in the decision of the Constitutional Court of Ukraine dated January 20, 2012, No. 2-RP / 2012 (Davies, 2012). ECHR in its par. 2 of Art. 8 establishes the admissible grounds for state interference in family life. Namely, interference is possible: 1) in accordance with the law; 2) in the case when it is necessary for a democratic society; 3) if it is carried out to ensure the interests of national and public security, the economic well-being of the state, or to prevent disorder, crime, protect health, morality, rights and freedoms of other people. When analysing the presence or absence of arbitrary interference in a person's family life, the ECtHR clearly analyses the circumstances of the case in accordance with the criteria established by par. 2 of Art. 8 of the Convention, and constitute the so-called "three-way test".

First of all, the interference in the sphere of family life can be justified when it is determined by law. The interpretation of the term "law" is autonomous, but it includes both written law and the rules that have developed in practice and should be of high quality (accessible and predictable). For example, in the case "Garnaga v. Ukraine", the Court concluded that since various provisions were in force at the time of the events, the issue of changing the patronymic was not clearly defined. The ECtHR also drew attention to the fact that with complete freedom to change the name and surname, a restriction was imposed on changing the patronymic, which is not appropriate and sufficiently motivated in national legislation. The state authorities did not provide a substantiated explanation of the circumstances of the applicant's deprivation of the right to make decisions on such an important aspect of her private and family life as her patronymic, and therefore there has been a violation of Art. 8 of the Convention (par. 41). The requirement of legality implies that the body that makes decisions should be created in the strict accordance with the law, the procedure for considering the issue and making a decision should also be regulated by law and comply with it.

The legitimate aim of interfering with family life is clearly defined in par. 2 of Art. 8 ECHR. The interference with family life cannot be tolerated if it is not necessary for a democratic society. That is, such intervention should be necessary, for example,



when the parents are deprived of the right to live together with the child if they pose a threat to the life and health of the child.

Necessity means that the interference with family life corresponds to a pressing social need and be proportional to the legitimate aim it pursues (paragraph 50 of the *Gnahoré v. France* judgment) (HRCED, 1997). When deciding whether to interfere with family life, the state has sufficient discretion, the border of which is the conscientious behaviour of the participants in family relations. If the principle of proportionality is not respected, the interference cannot be recognized as necessary in a democratic society. In addition, the grounds for interference with family life must be substantial and sufficient.

The ECtHR has repeatedly noted that, despite the main task of Art. 8 of the Convention to protect against arbitrary interference by the state, it may also be entrusted with positive obligations to ensure respect for family life. In particular, if there are family ties, the state should take measures aimed at reuniting parents and children. However, such an obligation is not absolute, since the interests of all, and especially the interests of the child, must be taken into account when considering parent-child reunification, and there must be a fair balance between such interests. For example, public authorities cannot immediately reunite parents and children who have lived with others for some time - preparatory measures must be taken, which depend on the circumstances in each particular case (part 94 of the decision in the case of *Ignaccolo-Zenide v. Romania* ") (Hey & Kessedjian, 2000).

The ECtHR recognizes unlawful interference with family life without justified reasons that lead to the separation of the family. In the Court's opinion, mutual communication between parents and children is the main element of family life, and natural family relations do not end with the transfer of a child to the care of the state, and measures that prevent such communication are a violation of the right guaranteed by Art. 8 of the Convention (paragraph 59 of the judgment in *W. v. The United Kingdom*). Although this provision does not contain clear procedural requirements, the decision-making process that leads to interference must be fair and ensures that the interests are protected by Art. 8 of the Convention (par. 87 "*McMichael v. The United Kingdom*") (McMichael et al., 1979).

Despite the fact that every legislative norm that regulates family relations is already an interference with the sphere of a person's family life, it is necessary to ensure a balance between private and public interests, as well as to protect the rights of participants in family relations. That is why it is a positive obligation of the state to adopt appropriate legal norms that should establish responsibility for

arbitrary interference with family life, including domestic violence. Such means can be of both civil and criminal law or other nature. For example, the Criminal Code of Ukraine establishes responsibility for domestic violence (Article 126-1), child substitution (Article 148), crimes against sexual freedom and immunity (Articles 152-156), disclosure of the secrecy of adoption (Article 168), illegal actions on adoption (Art. 169), violation of privacy (Art. 182) and others aimed at preventing interference with a person's family life.

Failure to fulfil positive obligations and violation of the right to respect for family life (review of the ECtHR's case law and Ukrainian court practice).

Failure by the state to fulfil positive obligations was established by the decision of the ECHR in the case "*Saviny v. Ukraine*", in which the blind spouses had seven children, four of whom were taken into care by the state because of living in improper conditions. In paragraph 57 of the case, the Court noted that the living conditions of the children could have been improved if the family had been provided with targeted financial and social assistance, as well as effective counselling.

The positive obligations of the state in accordance with Art. 8 of ECHR is to provide protection against interference by others, to effectively prevent committing crimes (for example, rape), and, in case of committing, to conduct an effective investigation (*Osman v. The United Kingdom*, para. 128, "*MC v. Bulgaria*", part 150) (Barberić et al., 2015; Berkaw, 2011; Brems, 2005; Coblenz & Warshaw, 1956; Keller, 2005; Kerson, 1961).

The ECtHR also found a violation of the right to respect for family life (*Kurochkin v. Ukraine*), stating that the revocation of adoption and the transfer of the child to the guardianship of the previous adoptive parent are incompatible with the motivation that the applicant is not able to take care of the child (paragraph 54). Annulment of adoption as a sanction for misbehaviour is not a sufficiently substantiated basis, since it led to the separation of the family (par. 56). The state did not take measures to eliminate the shortcomings in the upbringing of the boy proportionately. Therefore, interference with family life was found, which is a violation of Art. 8 of the ECHR (p. 58-60).

In addition, the state should adopt laws that establish the legal status of participants in family relations, guarantee their rights and obligations, as well as legal consequences in the event of their termination, etc. The need for legal certainty to protect various aspects of family life has been repeatedly substantiated in the decisions of the ECHR. For example, in the judgment in the case "*Gözüm v. Turkey*" the court found a violation of

Art. 8 of the Convention because of the lack of a legal framework for recognition of the adoptive single parent's forename in place of that of the natural parent which has led to uncertainty about family life.

If there is a competition between the interests of the citizen and the state, the ECtHR stresses the need to achieve a fair balance. Quite often, non-interference with family life conflicts with the right to freedom of speech and expression of one's views. As an example, consider the case where a famous couple of actors gave the right to first publish their wedding photos to a magazine, but a competing magazine published these photos out of order, thereby violating the agreement, for which the UK court ordered the payment of monetary compensation. A similar approach was taken in the House of Lord's judgment in *Campbell v. MGN Daily Mirror* about the refutation of the information about drug addiction of the famous model (Cherednychenko, 2007).

The national courts of Ukraine adhere to the same position. The Plenum of the Supreme Court of Ukraine, in its Resolution No. 1 of February 27, 2009, noted that a balance must be ensured in court decisions between the constitutional rights to freedom of thought, freedom of speech, free expression of views and beliefs, on the one hand, and the right to respect for human dignity, the right to non-interference with personal and family life, the right to refute inaccurate information - on the other.

It is also a positive obligation of the state to ensure the observance of secrecy in family relations established by law. For example, par. 4 of Art. 7 Criminal Code of Ukraine establishes that it is taking into account the right to privacy of private life that the regulation of family relations should be carried out. The legislator defines the confidentiality of family life as leaving personal (private) life, including information on the results of a medical examination of the spouses (part 4 of article 30 of the Family Code of Ukraine). Such confidentiality is not absolute, in particular, the newlyweds must acquaint each other with the results of the medical examination, and the confidentiality applies to all other citizens.

Conclusion

Thus, the concept of family life is dynamic; it has its own evolution, which is due to both changes in social values and the practice of law enforcement. The ECtHR uses a flexible interpretation, taking into account the development of modern technologies and the diversity of family relations. The state must establish a legal mechanism to protect the individual from arbitrary interference with family life, as well as to ensure the observance of the confidentiality of one's family life. At the

same time, interference with family life is justified when it is carried out in cases established by law, in order to ensure the interests of national security, economic well-being, to prevent disorder and crime, to protect health and morality, and the rights of other individuals.

Research Contribution

It has been established that the ECtHR uses a fairly broad approach to the interpretation of the concept of "family life", indicating that family life cannot be limited only to marital relations, and includes such a concept as "actual family ties", i.e. living together outside of marriage, relations between brothers and sisters. Family rights include the right of spouses to divorce, the right to establish biological paternity, the right of a person to know who his actual parents are, the right of parents to know about the transfer of a child for adoption, and others.

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