

INFORMATION PRIVACY: A CONCEPTUAL APPROACH

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Summary

The paper attempts to expose the basic concepts of informational privacy reflected in Western jurisprudence, as well as to outline the author's vision of the content and scope of informational privacy, to distinguish the relevant powers from which this right consists, to reveal its place and role from the standpoint of system-structural approach.

It is noted that in the modern scientific literature, dedicated to ensuring the privacy and respect for his / her privacy, clearly distinguishes two main approaches to understanding the informational advantage - broad and narrow. Proponents of the narrow approach consider the primes solely in the informational aspect, and other constituents (physical, visual, phonetic privacy, etc.) tend to relate to the content of other fundamental rights. However, one group of authors interprets information privacy as the right of the person to control their personal data, while the second group considers it more rational and efficient to consider information pricing as the right of ownership of personal data. Attempting to unite both camps of supporters of a narrow interpretation of the information front is the Restricted Access / Limited Control (RALC) theory.

Proponents of the broad-based approach view information primacy as important, but only one of the many substantive elements of constitutional law in favor. At the same time, the authors' exit beyond the information sphere when considering the content of the precedence can be considered progressive and more consistent with the essence of this right and its purpose in ensuring personal freedom and autonomy.

In view of the author, revealing the content of the right to privacy, it should be borne in mind that the object of this right includes several areas (aspects), in each of which a person may be in different states of privacy, and the privacy itself has certain measurements. On this basis, information is regarded by the author as an element of the constitutional right of privacy, distinguished by the aspects of privacy and the form (method) of its objectification.

Unlike other aspects of privacy, the informational aspect is detached from the physical body of the individual and exists independently, and relevant information continues to exist even after the death of the individual. Therefore, even the death of a person does not make sense of the information associated with that person, and sometimes even enhances its value and significance. It is noted that unlike other aspects of the case, information privacy has no states (such as loneliness, intimacy, anonymity, etc.); it merely provides information protection for such states and does not allow them to be disclosed without the consent of the entity itself.

Key words: human rights; privacy; information privacy; personal information; privacy types.

1. Introduction

Modern society, traditionally known as information society, has radically changed the system of values and priorities of human develop-

ment. Nowadays, it is not the one who has the money or the power rules the world, but the one who has the information, because by having the information it is quite easy to get both money

and power. It is not surprising that many thinkers have been focused on the problems of building an information society and human's being in such a society since the last third of the XX century. We are quite sure that jurisprudence is not an exception, where the relevant issue is being mostly discussed within the framework of the triangle Human Being – Civil Society – State. However, the problems of guaranteeing human rights are increasingly being highlighted considering the “human dimension” of the domestic and foreign policies of the states. The concept of privacy has also undergone significant changes in this context, or, to put it more adaptably for post-Soviet jurisprudence, the protection of personal privacy.

It is appropriate to pay attention to an interesting detail: the problem of protecting the privacy over the last hundred years has made a certain circle, returning, in fact, to its origins, but already at a new, higher quality stage of social and state development. It should be reminded that the privacy as one of the basic human rights was recognized and received constitutional consolidation within the information aspect – in the form of prohibition of unauthorized disclosure of information about the facts of the citizens' private life.

We should remind that the privacy is one of the most technological human rights: it was formed under the influence of the latest achievements of science and technology, the emergence of which no longer allowed a person to hide his private life under the protection of the walls of his apartment and, accordingly, the phrase «my house is my fortress» lost its relevance. The well-known formula of the privacy as the right to be left alone, suggested by L. Brandeis and S. Warren, envisaged journalists, photographers, editors of tabloid publications as counterparties, to whom the demand was addressed, because operative photography and the tabloid press were considered as the main threat to the privacy at the change of the XIX and XX centuries (Warren & Brandeis, 1890). One hundred years later, the privacy having filled its scope with such aspects as spatial, corporeal, visual, phonetic and even odorological, was again updated within the information aspect at the change of XX and XXI centuries, but now as the challenges of the information society and information and communi-

cation technologies. According to H.V. Presnyakova, who rightly notes on this occasion, the right to personal privacy is «one of the most affected and vulnerable in the information age» (Presnyakova, 2010).

The world legal opinion over the last thirty-four years has accumulated a significant amount of theoretical and empirical material focused on the information privacy. However, the level of scientific understanding of this political and legal phenomenon still does not meet the challenges of the present time: the rapid pace of the development of information and communication technologies is creating new threats for the privacy and forcing the scientific community to respond to them promptly. One of the key problems in this area is the lack of unified approaches to the understanding of the information privacy, its content and correlation with other aspects of this right. Western legal doctrine, is not traditionally inclined to make clear legal definitions, it is focused on finding effective ways to protect the information privacy from unlawful encroachments, but scientific debate is doomed to scholasticism and irrelevance without a clear understanding of the content and scope of this right, its place and systemic relations with other aspects of the privacy.

As a supporter of the systematic and structural approach to the study of the content and scope of the privacy (as well as other constitutional human rights), we have tried in our previous studies, to reveal all aspects of the privacy step by step, leaving the information aspect to the point. Such considerations were based on the hypothesis of the comprehensiveness, the complex nature of the information privacy and its key role within the current systematic and structural model of the privacy in general. Nowadays, when all other aspects of the privacy have been revealed and characterized both in theory and in the empirical experience of normative consolidation and right-realization (Serohin, 2010, 2013, 2014), we have sufficient doctrinal basis to substantiate our own concept of the information privacy.

Structurally, our research will consist of two sections: first, we will try to highlight the basic concepts of the information privacy, reflected in the Western jurisprudence, and during the second one, to outline our own vision of

the content and scope of the information privacy and to distinguish the relevant powers, which constitute this right, to reveal its place and role from the standpoint of systematic and structural approach.

2. Modern concepts of information privacy

The modern scientific literature, focused on ensuring personal privacy and respect for one's private life, clearly distinguish two main approaches to understanding the information privacy – the broad and narrow ones.

Proponents of the narrow approach consider the privacy solely within the informational aspect, and other components (physical, visual, phonetic privacy, etc.) tend to relate to the content of other fundamental rights. For example, one of the apologists of the Western doctrine of the privacy A. Westin has defined the privacy as «claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is communicated to others» (Westin, 1967). However, there is a certain «dinarchy» in the camp of supporters of the narrow approach: one group of authors interprets the information privacy as the right of a person to control their personal data (Moore, 2007), while the second group assumes it more rational and efficient to consider the information privacy as the right to own personal data (Westin, 1967; Laudon, 1996; Varian, 2002). However, the difference between these approaches in a more careful study, is insignificant, since both of them talk about the protection of personal data (Orito & Murata, 2007; Guarda, 2008; Banisar, 2011).

It is worth noting that the legislation of many world countries has chosen this way (mostly those belonging to the Anglo-Saxon legal system), where laws under the name “Privacy Act” are limited only to the information sphere. Examples of this are the American Privacy Act of 1974 and the Electronic Communications Privacy Act of 1986, the Canadian Privacy Act of 1983, the Australian Privacy Amendment (Private Sector) Act of 2000, the New Zealand Privacy Act of 1993 and others.

However, this approach is not correct enough, because, on the one hand, not all personal data is covered by the concept of «infor-

mation privacy», and on the other – the information privacy is not limited to personal data. For example, information about a person's party affiliation is his or her personal information, but is not covered by the concept of «information privacy», since it is related to a person's public life, but not private one. In turn, impersonal data about a person's gastronomic preferences obtained by analyzing the purchases at the supermarket over a certain period of time is related to private life, and do not fall into the category of personal data, unless the person can be identified by its help. Besides, many other aspects of private life that are «not covered» by other constitutional rights remain devoid of legal protection within the narrow approach.

Restricted Access/Limited Control (RALC) theory is attempted to unite both camps of supporters of the narrow interpretation of the information privacy. This theory emphasizes that the privacy and control are interrelated, but still different concepts. According to H. Tavani and J. Moor, «privacy is fundamentally about protection from intrusion and information gathering by others. Individual control of personal information, on the other hand, is part of the justification of privacy and plays a role in the management of privacy» (Tavani & Moor, 2001).

In this approach, a person's privacy is ascertained when it is protected from invasion, interference and access to information by other people. On the one hand, the RALC, as well as the theory of restricted access, emphasizes the importance of creating such zones for the person that will allow to reliably restrict other people's access to the information, on the other hand – it also admits the importance of individual control over the movement of personal information, as well as the control theory. This approach does not incorporate the notion of control into the privacy's definition, and does not require people to have full or absolute control over their personal information in order to have the privacy. Only limited management elements are required to control own information privacy. In other words, the RALC assumes that a person has control over his or her choice, consent and correction, and therefore must be able to make the right and conscious choice in situations that allow him or her to choose the desired level of access. This includes, for example, the ability to

waive the right to restrict others from accessing certain types of information about yourself, as well as being able to access and correct your information if needed.

Proponents of the broad approach view the information privacy as an important, but only one of the many substantive elements of constitutional right to privacy.

In particular, the aforementioned H. Tawani notes the information privacy along with three other types of the privacy; «*Accessibility privacy*, also called *physical privacy*, is freedom from intrusion into one's physical space. *Decisional privacy* is freedom from interference with one's choices. *Psychological privacy*, also known as *mental privacy*, is the freedom of intrusion upon and interference with one's thoughts and personal identity. Finally, *informational privacy* is having control over and being able to limit access to one's personal information» (Tavani, 2007, 2008). D. McMenemy while saying that «privacy thus relates to what we say, what we do, and perhaps even what we feel», also draws attention to the complex, multi-element nature of the privacy (MacMenemy, 2016).

R. Clarke was the first privacy scholar of whom we are aware to have categorised the types of privacy in a logical, structured, coherent way. Clarke's four categories of privacy include privacy of the person, privacy of personal data, privacy of personal behaviour and privacy of personal communication (Clarke, 1997). M. Friedewald, R. Finn, and D. Wright, based on R. Clarke's approach and creatively developing it, distinguish seven types of the privacy. These include privacy of the person, privacy of behaviour and action, privacy of data and image, privacy of communication, privacy of thoughts and feelings, privacy of location and space, and privacy of association (including group privacy) (Friedewald, Finn & Wright, 2013). It is worth noting that the chosen objects to be protected by means of the privacy rather than aspects of private life or ways of existence were the criterion for the classification in both cases. Then the information aspect of this right appeared to be «vanished» among other types. However, the very fact that authors went beyond the information sphere while considering the content of the privacy, can be considered progressive and consistent to a greater extent with the essence of

this right and its purpose in ensuring personal freedom and autonomy.

3. The concept and content of the information privacy.

In our previous works, we have already been able to cover our own concept of the content and scope of the privacy (Serohin, 2010, 2013, 2014), then let's only outline it in general terms. To our point of view, revealing the content of the right to personal privacy (privacy), it should be borne in mind that the object of this right includes several areas (aspects), where a person may be in different forms of privacy in each of them, and the privacy itself has certain dimensions. In particular, we have distinguished the following powers in terms of the private life,: the right to physical (physical, tactile) privacy; the right to phonetic (sound) privacy; the right to visual (optical) privacy; the right to odorological (scent) privacy; the right to geographical (dislocation) privacy; the right to information privacy. In this regard, we consider the information privacy as an element of the constitutional right to privacy, distinguished by the aspects of private life and the form (method) of its objectification.

The fact is that the information privacy is a certain «imprint» of a person's private life in the form of certain information (data). It is information about the relevant facts, phenomena, events that relate to a person's private life, and therefore this information is a priori confidential, and the access mode can only be changed (weakened) by itself.

Comparison of the information privacy with other aspects of the privacy makes it possible to state that the information privacy has a number of specific features. First of all, it should be noted that all other competences are directly related to the physical existence (being) of a person and, accordingly, make sense only during his life. Instead, information is a special form of substance being that does not have a firm «attachment» to a person's physical being; it has certain autonomy and self-worth compared to a human being. Unlike other aspects of the privacy, the information aspect is detached from the physical body of a person and exists independently, and the relevant information continues to exist even after the death of that person.

Therefore, even the death of a person does not make the information pointless that is related to that person, and sometimes even enhances its value and significance.

Besides, it should be borne in mind that a person's private life, its existence in a private space, leaves behind many traces and consequences that, in terms of cognitive activity, are sources of information about that person. Moreover, the information component of a person's private life is not limited to specific information about that person: it also includes information about those who make up the private communication, the content and forms of communication between them, the environment, where the communication took place, etc. Unlike other aspects of the privacy, encroachments on the information component of this right does not require direct contact of the offender with the subject of this right; it is quite often the offender has enough contact with sources of confidential information. Of course, the degree of the relevance of particular data to one's private life is also different, but all of them are important in terms of completeness and excellence of person's private life.

Information is an indication of the content received from the outside world in the process of our adaptation to it and the adaptation of our senses. Accordingly, information is a characteristic of the relationship between the message and its consumer, but not of a message. Without a consumer, at least potential, there is no point in talking about the information. It should be borne in mind that the same information message (newspaper's article, announcement, letter, sms, reference, drawing, etc.) may contain different amount of information for different people – depending on their previous knowledge, level of understanding of this message and interest in it. Therefore, the presumption of a «zero» level of consumer awareness of the content of the message should be basic for the legal qualification of the relevant information legal relations, whereas the actual level of such awareness may affect the degree of punishment for the offender of the information privacy.

We should remember that the information privacy is not, in fact, a person's right to introduce limited access to certain types of data about himself, but rather the right to protect information about all those aspects of human

being that make up his or her private life, characterize it in a certain way, provide uniqueness and special value. In other words, the content of the information privacy is made up of such powers that enable a person to keep confidential information about those facts, phenomena and events that make up the content of all other aspects of the privacy (physical, phonetic, odorological, etc.). Accordingly, this may be information not only about the person himself, but also about his premises, the transport (personal or public) he uses, the people who communicate with him, the educational institutions, where he studied and the enterprises, where he worked, about private activities, where he participated, etc. Considering this, we can surely state that the transition of the problem of protecting the information privacy into the plane of protecting personal data is not only an unjustified narrowing and simplification of this problem, but also harms the comprehensive and complex protection of the privacy in all its aspects.

If the privacy is the ability of an individual to determine himself the way (character) of his private life and is aimed at meeting own needs and interests in privacy and private communication, then *the information privacy* is the ability of an individual to independently determine the scope and mode of access to information about the way of his private life. Private life refers to the sphere of human activity, which is a set of phenomena that characterize the existence and define the development of an individual as a private (ordinary) person, that are applied only to him, not related to the performance of public functions and removed from the public view.

Structurally, the information privacy consists of several powers, in particular:

- the right to determine voluntarily the mode of access to information about one's private life;
- the right to prevent third parties from accessing confidential information about the private life;
- the right to knowingly misrepresent information about one's private life in dealing with third parties;
- the right to demand the immediate termination of actions aimed at disclosing confidential information about one's private life;

- the right to study information about his or her private life stored in public authorities, public formations, at enterprises, institutions and organizations;
- the right to request to delete data on his or her private life, if the data do not correspond to reality, were collected in violation of the established procedure or did not meet the purpose of the collection;
- the right to voluntarily disclose information about his or her private life (if this information relates to private life of others, such disclosure is allowed only with the consent of those persons or in case of the impersonation of the relevant data).

On the other hand, the information privacy means the inadmissibility of any information activity (collection, storage, distribution, use) regarding data relating to a person's private life without his or her consent. In practice, this is often accompanied by discussions about the classification or non-classification of certain data to the category of «related to» the person's private life, but determining the *extent* to which particular facts relate to private life is a matter of a particular fact, which should be established by the jurisdictional agency in case of the dispute, taking into account all the circumstances of the case on the basis of the principles of legality and the highest social value of the person.

Unlike other aspects of the privacy, the information privacy has no forms (such as loneliness, intimacy, anonymity, etc.); it merely provides information protection for such forms and does not allow them to be disclosed (divuligation) without the consent of the subject himself.

All aspects of the privacy have a systemic nature, and the violation of at least one of its aspects inevitably harms many other aspects. For example, paparazzi, trying to get a photo of a movie star in a private setting, often violate not only information and visual, but also geographical (dislocation) privacy, and a drunk person, trying to "take selfie" with an outstanding athlete, violates not only his information, but also physical (body) and odorological (odor) privacy.

Providing public information about private life does not mean that it ceases to be such in the future, since its content is not changed, it still contains information about private life, but the number of people who have the potential to get

acquainted with such information is changed (Krotov, 2015).

Some categories of information, such as health status, sexual orientation, financial position, party and ethnicity, etc. are classified into a specific category of «sensitive information». Summarizing the views expressed in the specific literature on the specificity of «sensitive information», we can distinguish several specific features of such data. (First, sensitive information can lead to significant forms of harm. Second, sensitive information is the kind that exposes the data subject to a high probability of such harm. Third, sensitive information often is information transmitted in a confidential setting. Fourth, sensitive information tends to involve harms that apply to the majority of data subjects) (Ohm, 2015).

There have been already repeated attempts in the constitutional science to rank sensitive information, but that seems unpromising from theoretical point of view, since the measure of the «sensitivity» of certain data is variable depending on specific historical, socio-political, socio-economic, spiritual, economic and even technological conditions of the development of society. For example, the less acute for the society is the issue of state-confessional and inter-denominational relations, the less sensitive is the information about a person's religion. And on the contrary, the rapid development of information and communication technologies makes one say that «we need to create new sensitive information laws and broaden our current laws at least to cover precise geolocation and some forms of metadata but also to go further.... to do this to respond to a growing threat of harm stemming from advances in technology and evolving business models, forces that create a significant threat of a global database of ruin» (Ohm, 2015). Another thing is that the degree of sensitivity of data related to the information privacy is different, and this should be taken into account while developing the relevant legislation.

4. Conclusions

Information privacy is an individual's ability to determine the volume and mode of access to information about own personal life.

The narrow understanding of the information privacy, which adequately reflected the es-

sence and content of this right in the early XX century and is still preserved in certain laws of the states of the Anglo-Saxon legal system, is no longer able to reflect the full range of the protection of private life, required from the states, and therefore must be reviewed. It should be replaced by the broad understanding that implies the interpretation of information privacy within the systematic and structural terms, as one of the elements (powers) of the constitutional right to privacy, distinguished by the aspects of private life and the form (method) of their objectification. At the same time, the information privacy itself has its structure and consists of a number of powers of the «second level».

Unlike other aspects of privacy, the informational aspect is detached from the physical body of an individual and exists independently, and the relevant information continues to exist even after the death of that individual. Therefore, even the death of a person does not make the information pointless that is related to that person, and sometimes even enhances its value and significance. Information privacy, unlike other aspects of privacy, has no forms (such as loneliness, intimacy, anonymity, etc.); it merely provides information protection for such forms and does not allow them to be disclosed (divulgence) without the consent of the subject himself. The so-called sensitive information is distinguished out of the types of information that are protected by the information right. Its content and volume depends on the specific historical and socio-cultural context.

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ІНФОРМАЦІЙНЕ ПРАЙВЕСІ: КОНЦЕПТУАЛЬНИЙ ПІДХІД

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Анотація

У статті здійснено спробу висвітлити основні концепції інформаційного прайвесі, відображені в західній юриспруденції, а також викласти авторське бачення змісту й обсягу інформаційного прайвесі, виокремити відповідні правомочності, з яких це право складається, розкрити його місце й роль з позицій системно-структурного підходу.

*Відзначено, що в сучасній науковій літературі, присвяченій забезпеченню недоторканності приватного життя та поваги до нього, чітко вирізняються два основні підходи до розуміння інформаційного прайвесі – широкий і вузький. Прибічники вузького підходу розглядають прайвесі виключно в інформаційному аспекті, а інші складові (фізичне, візуальне, фонетичне прайвесі тощо) схильні відносити до змісту інших фундаментальних прав. При цьому одна група авторів тлумачить інформаційне прайвесі як право особи на контроль за своїми персональними даними, тоді як друга група вважає більш раціональним та ефективним розглядати інформаційне прайвесі як право власності на персональні дані. Спробою об'єднати обидва табори прихильників вузького тлумачення інформаційного прайвесі є *Restricted Access/Limited Control (RALC) theory*.*

Прихильники широкого підходу розглядають інформаційне прайвесі як важливий, але лише один із багатьох змістовних елементів конституційного права на прайвесі. При цьому вихід авторів за межі інформаційної сфери при розгляді змісту прайвесі можна вважати прогресивним і таким, що більшою мірою відповідає сутності даного права та його призначення в забезпеченні особистої свободи й автономії.

На погляд автора, розкриваючи зміст права на недоторканність приватного життя (прайвесі), необхідно враховувати, що об'єкт даного права включає в себе декілька сфер (аспектів), у кожній з яких особа може перебувати в різних станах приватності, а сама приватність має певні виміри. Виходячи з цього, інформаційне прайвесі розглядається автором як елемент конституційного права на прайвесі, що виокремлюється за аспектами приватного життя та формою (способом) його об'єктивізації.

На відміну від інших аспектів прайвесі інформаційний аспект відірваний від фізичного тіла особи й існує самостійно, а відповідні відомості продовжують існувати й після смерті самої особи. Відтак, навіть смерть людини не позбавляє сенсу інформацію, пов'язану з цією людиною, а іноді – навіть посилює її цінність і значення. Відзначено, що на відміну від інших аспектів прайвесі, інформаційна приватність не має станів (як-от усамітненість, інтимність, анонімність тощо); вона лише передбачає інформаційний захист таких станів і не допускає їх розкриття (оприлюднення) без згоди самого суб'єкта.

Ключові слова: *права людини; прайвесі; інформаційне прайвесі; особиста інформація; типи прайвесі.*