

УДК 343.132

Volodymyr Kantsir

Lviv Polytechnic National University,
Doctor of Law, Professor,
Professor of the Department of Criminal Law and Procedure
volodymyr.s.kantsir@lpnu.ua,
ORCID: 0000-0002-3689-4697

Volodymyr Baranyak

Lviv Polytechnic National University,
Candidate of Chemical Sciences, Associate Professor,
Associate Professor of the Department of Criminal Law and Procedure
volodymyr.m.baraniak@lpnu.ua,
ORCID: 0000-0001-6161-7862

Anatoliy Kryzhanovskyi

Lviv Polytechnic National University,
Candidate of Law,
Senior Lecturer of the Department of Criminal Law and Procedure
kriganovskiy@lp.edu.ua,
ORCID: 0000-0002-2432-5286

PROTECTION OF PRIVATE INTERESTS DURING CRIMINAL PROCEEDINGS: COMPARATIVE NARRATIVES

<http://doi.org/10.23939/law2022.36.196>

© *Kantsir V., Baranyak V., Kryzhanovskyi A., 2022*

The article is devoted to the expediency of using foreign legislative experience on the mechanism of protection of personal and family life of a person during criminal proceedings.

Everyone is entitled to the protection of the right to liberty and security of a person, inviolability of private ownership, housing or other property, secrecy of communications, non-interference with privacy, etc.

During criminal proceedings, the court, investigating judge, prosecutor, head of the pre-trial investigation body, coroner, investigator, and other officials of public authorities are obliged to strictly comply with the provisions of the Constitution of Ukraine, the CPC of Ukraine, and international treaties.

The exception applies to those cases provided by law and necessary in a democratic society to ensure the basis of national security, public safety, prevention of offenses against life and health of a person, protection of state secrets, inviolability of state borders, conscription and mobilization, against the established order of military service, against peace, security of mankind and international law and order.

Key words: private; procedural legal interests; guarantees of observance; principles of proceedings; investigative (search) actions; ensuring the basis of national security; legislation of individual foreign states.

Problem statement. In accordance with the Law of Ukraine of April 14, 2022 “On Amendments to the Criminal Procedure Code of Ukraine to Improve the Procedure for Conducting Criminal Proceedings within Martial Law Regime”, Article 7 of the Criminal Procedure Code (CPC) of Ukraine “General

Principles of Criminal Proceedings” has been amended: “The content and form of criminal proceedings under martial law must comply with the general principles of criminal proceedings specified in part one of this article, taking into account the peculiarities of criminal proceedings, defined by section IX⁻¹ of the Code” [1]. Thus, the legislator “additionally marked” its permanent and unambiguous position to undoubtedly value the observance, respect and understanding of personal and procedural legal interests of the participants, even during the declared martial law, except in clearly defined cases, including section IX⁻¹ CPC of Ukraine “Special Regime of Pre-Trial Investigation, Judicial Hearing under Martial Law” [2].

Therefore, everyone is entitled to the protection of the right to liberty and security of a person, inviolability of private ownership, housing or other property, secrecy of communications, non-interference with privacy, etc.

During criminal proceedings, the court, investigating judge, prosecutor, head of the pre-trial investigation body, coroner, investigator, and other officials of public authorities are obliged to strictly comply with the provisions of the Constitution of Ukraine, the CPC of Ukraine, and international treaties. The exception applies to those cases provided by law and necessary in a democratic society to ensure the basis of national security, public safety, prevention of offenses against life and health of a person, protection of state secrets, inviolability of state borders, conscription and mobilization, against the established order of military service, against peace, security of mankind and international law and order.

Analysis of the research problem. The issue of protection, observance of rights, freedoms and legitimate interests during procedural actions, including investigative (search) ones, has been the subject of interest for many scientists, in particular: Yu. Alenin, V. Areshonkov, M. Bahriy, M. Bazhanov, R. Bandurka, R. Barannik, V. Bakhin, V. Veselovskyi, A. Voznyuk, V. Vlasikhin, A. Dubynskyi, V. Halahan, Y. Hroshev, L. Hula, O. Humin, O. Hryza, I. Hlovyuk, A. Ishchenko, T. Ilieva, O. Kaplin, V. Karpenko, I. Kohutych, O. Kuchynska, G. Kutskir, I. Kotyuk, O. Komarnytska, Ya. Yu. Konyushenko, V. Kushpit, V. Lishchenko, L. Loboiko, Yu. Lysyuk, V. Lukashevych, E. Lukyanchikov, V. Malyarenko, O. Maslyuk, M. Mikheenko, S. Minchenko, D. Mirkovets, A. Myshyn, A. Movchan, O. Motlyakh, V. Nazarov, D. Nykyforchuk, V. Nora, O. Omelchenko, V. Ortynskyi, L. Pertsova-Todorova, M. Peshkov, D. Pysmennyi, M. Pohoretskyi, B. Popelyushko, T. Pluhatar, V. Piaskovskyi, A. Samodin, M. Salteviskyi, D. Sergeev, M. Siryi, E. Skulysh, S. Slinko, C. Stakhivskyi, O. Stohova, O. Tatarov, S. Tagiyev, V. Tertyshnyk, L. Udalova, J. Udovenko, V. Farinnyk, T. Fulei, I. Tsylyuryk, A. Chernenko, Y. Chornous, S. Sheifer, V. Shepitko, O. Shylo, M. Shumylo, O. Yanovska and others.

However, many issues of protection of private and procedural legal interests of the participants in today’s proceedings are fragmentarily researched and do not have an unambiguous solution in law enforcement practice.

The aim of the article is to study the positive experience of individual foreign states on the mechanism of protection of private and family life during criminal proceedings.

Presentation of the main material. The right to privacy and family life is difficult to define, as it covers a wide range of not only evaluative concepts but also interrelated rights that protect human freedom as long as a person’s actions do not violate the rights and freedoms of others. The right to privacy and family life is the right to individual independence, which is violated when states intervene, punish or prohibit actions that essentially concern only the individual. The right to privacy and family life includes the right to protection of intimacy, identity, name, sex, honor, dignity, appearance, feelings and sexual orientation and extends to home, family and correspondence.

National legislation stipulates that the personal life of an individual is his or her behavior in the field of personal, family, household, intimate, friendly, professional, business and other relations outside public activities, which is carried out, in particular, while performing the functions of the state or local self-government [3].

Under the influence of various social processes, the understanding of the term “family life” is constantly changing and expanding. The Decision of the Constitutional Court of Ukraine of 20.01.2012. No. 2-пн/2012 clarifies that family life is a personal property and non-property relationship between spouses and other family members, which is carried out on the basis specified in the Family Code (FC) of Ukraine: everyone has the right to respect for their family life (Part 4 of Article 4 of the FC of Ukraine); no one may be interfered with in his or her family life, except in cases established by the Constitution of Ukraine (Part 5 of Article 5 of the FC of Ukraine); regulation of family relations is performed taking into account the right to privacy of their participants, their right to personal freedom and the inadmissibility of arbitrary interference in family life (Part 4 of Article 7 of the FC of Ukraine) [4].

Regarding the case law of the European Court of Human Rights, when considering cases they mainly use the concept of “private life”, which is understood mainly as a person’s behavior in the field of intimate or sexual life [5].

The vast majority of European states have enshrined at the constitutional level the right not to interfere in private and family life. However, not only the norms of the Constitutions regulate the consolidation of this right, but also many provisions of international legal acts, the principal of which being the following: the Universal Declaration of Human Rights of 1948 [6], Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 [7], International Covenant on Civil and Political Rights 1966 [8]. The Vienna Declaration and Program of Action of the World Conference on Human Rights of 25 June 1993 also emphasizes the need for states and international organizations to create favourable conditions at the national, regional and international levels in order to ensure the full and effective enjoyment of human rights. States must eradicate all human rights violations and the reasons causing them, as well as remove obstacles to the exercise of these rights [9]. It should be emphasized that these international instruments enshrine basic principles relating to private life, which in turn allows current legislation to establish legal norms in this area and determine the limits of liability for non-compliance.

The legislation of the United States of America declares the institution to be regulated for the longest period of time, despite the fact that at the constitutional level the right to privacy has not been clearly enshrined. The first 10 amendments to the Constitution, which made up the Bill of Rights, were ratified by the required number of states in 1791, and the act has since entered into force. Amendments IV, V, VI, VIII contained guarantees of the inviolability of the person, which were later reflected in the establishment of certain criminal procedural norms.

Amendment IV consists of two parts. The first part declaratively proclaims the “right of the people” to the inviolability of the person, home, personal documents; unjustified searches and arrests are prohibited. The second part of the amendment is an attempt to formulate practical guarantees of this constitutional right. Analysis of the amendment allows us to conclude that the authors of the Bill of Rights, of course, allowed the possibility of “reasonable”, i. e. lawful, searches and arrests. A search or arrest is lawful when a warrant is issued for their conduct; in turn, the legality of the order is made dependent on the “sufficient grounds”, the existence of which is necessary for the issuance of the order and must be confirmed by an oath or a solemn statement; a search warrant is also valid only if it contains a detailed description of the place of the search, and a warrant for the arrest of a citizen or the seizure of items related to a crime is a detailed description of the person to be arrested or the items to be seized [10]. Many provisions of the federal criminal procedure law trace the impact of this amendment, including the arrest and search.

US law contains a rather interesting provision regarding searches if several families live in the house. In this case, each family occupies separate rooms, but there are also common ones that they share. In such a situation, the search warrant indicates the rooms that will be searched, but where the interests of third parties will not be violated. Otherwise, the police must justify to the magistrate that the search of the sample premises is not effective [11]. We consider such a rule to be quite important and necessary for enshrining in domestic legislation, as searches in communal apartments often lead to difficulties. Usually,

the investigator is constantly in need of a search in the areas adjacent to the house or in common areas, but a search of neighbors is absolutely unacceptable (neighbors can not be personally searched, can not be kept in housing or other property until the search is finished).

The Code of Criminal Procedure of Georgia in the General Part contains universal (general) provisions on ensuring the right to privacy. According to Article 7 “Inviolability of Private Life in Criminal Proceedings” during the investigation, a party has no right to arbitrarily and illegally interfere in the private life of another person. The inviolability of private ownership or other property and private communication carried out in any way is guaranteed by law [12].

The person conducting the procedural actions should not disclose information about someone’s personal life, as well as information of a personal nature, the confidentiality of which is the duty of the person.

Information on the private life of citizens, as well as information of a personal nature, which a person considers necessary to keep secret, shall not be disclosed during any investigative actions. Persons who have been harmed by the illegal disclosure of their personal life or personal data are entitled to full compensation for the damage caused in accordance with the procedure established by the legislation of Georgia.

Personal correspondence and personal communications, personal data may be announced in open court only with the consent of the person to whom they relate. In the absence of such consent, this information may be disclosed only in a partially closed or closed court hearings.

Articles 119-121 of the Criminal Procedure Code of Georgia regulate such investigative actions as seizure and search. If there is a reasonable assumption, seizure and search are carried out in order to identify and remove the necessary items, documents, substances or other objects containing information. The investigator on the basis of a court determination, and in case of urgent need – the investigator’s resolution to conduct a seizure or search, has the right to enter storehouse, parking, premises or other property to identify and seize objects, documents, substances or other objects containing information. Prior to the search or seizure, the investigator is obliged to acquaint the person in respect of whom the seizure or search is performed with the court order, and in case of urgent need - the resolution. The person confirms the fact of acquaintance with the order (resolution) by the signature. During the seizure or search, officials are obliged to take measures to ensure that the circumstances of these investigative actions are not disclosed, as well as the details of personal lives.

In addition, seizures and searches in the building of the diplomatic mission and the diplomatic representative are regulated; conducting searches, seizures and attachments in the premises of mass media, publishing houses, scientific, educational, religious public organizations and political parties; return of the seized object (Articles 122, 123, 124 of the Criminal Procedure Code of Georgia) [12].

The Swiss Constitution (Bundesverfassung der Schweizerischen Eidgenossenschaft) of 18 April 1999 (as amended on 1 January 2016) is a pivotal source of the country's criminal process, as it enshrines basic human rights in the field of justice and determines the structure of the judicial system [13]. R. Hauser and E. Schwer rightly claim that the Swiss Constitution is “rich in the rules of criminal procedural law” [14].

In Switzerland, investigative actions are considered to be the main way of obtaining evidentiary information. The CPC of Switzerland distinguishes between investigative actions and other procedural institutions rather conditionally. Thus, Title 4 of the Code is called “Evidence” and regulates 4 investigative actions aimed at obtaining them, namely: interrogation, identification parade, expert investigation and examination. Title 5 is entitled “Coercive Measures” which, in addition to coercive measures in “our” sense of the category, also contains instructions governing the conduct of other investigative actions: DNA analysis, covert surveillance and criminal registration, collecting handwriting and language samples [15].

The objects and property of the accused or a third party, if they are likely to be needed in the proceedings as evidence or to ensure the payment of procedural costs, damages, criminal or administrative fines are subject to seizures.

An important feature of regulating seizures in Switzerland is that the Code establishes a list of items that are not subject to seizure under any circumstances. This is information on the communication of the accused with his or her defense counsel; on the personal documentation and correspondence of the accused, if his or her interests in the protection of personality outweigh the interests of criminal proceedings; in relation to objects, in particular, documentation and correspondence, which appeared in the process of communication between the accused and persons who have the right to refuse to be witnesses and are not accused in a related case. This rule seems to be quite progressive [15].

It should be noted that the CPC of Switzerland gives individuals not only the right to refuse to testify, but also the right to refuse to issue relevant documents. We consider this approach ambiguous, but in the conditions of humanization and democratization of society, the right to refuse to testify is really, de facto and de jure becoming more complete.

The means of protecting private life are also discussed in the criminal procedural legislation of the Republic of Moldova.

Article 14 of the Criminal Procedure Code of the Republic of Moldova “Secrecy of Correspondence” regulates that the secrecy of letters, telegrams and other postal items, telephone conversations and other lawful communications is provided by the state. In the course of criminal proceedings, no one may be deprived of this right or restricted in it [16].

In the CPC of the Republic of Moldova, privacy is governed by Art. 15. It states that any person enjoys the right to privacy, secrecy of intimate and family life, protection of honor and dignity. During criminal proceedings, no one has the right to arbitrarily and illegally interfere in a person’s intimate life.

In the course of proceedings, information about the private and intimate life of a person whom he or she considers confidential should not be collected unnecessarily. Participants in proceedings at the request of the prosecuting authority and the court, undertake a written commitment not to disclose such data.

Persons from whom the prosecuting authority requires the provision of information on private and intimate life have the right to ensure that this information is necessary for a particular criminal case. A person has no right to refuse to provide information about his or her private or intimate life under the pretext of privacy, however, he or she has the right to demand from the prosecuting authority an explanation of the necessity to obtain such data with the entry of such explanations in the protocol of the relevant procedural action.

It is worth noting that the evidence supporting the information about the private and intimate life of a person is considered in a closed court hearing at his or her request.

Pursuant to Part 9 of Article 128 of the CPC of the Republic of Moldova, in order to keep secret information about the intimate aspects of life of persons involved in the case, the prosecuting authority is obliged to take measures not to disclose the circumstances of intimate life revealed during a search or seizure. Part 4 of Art. 119 of the CPC of the Republic of Moldova also provides a guarantee according to which a person who carries out criminal prosecution may not be present during the examination of a person of the opposite sex if the examination is accompanied by the exposure of the body. In this case, the examination is performed by a doctor [16].

Conclusions. Thus, the study of the experience of individual foreign states has shown that it is important to carry out the protection of private and family life during criminal proceedings in accordance with the requirements of Article 8 of the European Convention on Human Rights.

National legislation should provide appropriate safeguards against intentional abuse of power by officials conducting the proceedings. To comply with this standard, it is advisable to improve legislation, establish an independent and highly legitimized control mechanism that will ensure a “balance” between

human dignity, the right to private and personal life, the effectiveness of criminal investigations and the legitimate public interest in crime prevention.

REFERENCES

1. *Pro vnesennia zmin do Kryminalnoho protsesualnoho kodeksu Ukrainy shchodo udoskonalennia poriadku zdiisnennia kryminalnoho provadzhennia v umovakh voiennoho stanu* [On Amendments to the Criminal Procedure Code of Ukraine to Improve the Procedure of Criminal within Martial Law Regime]: Zakon Ukrainy vid 14 kvitnia 2022. No. 2201-IX. URL: <https://zakon.rada.gov.ua/laws/show/2201-20#n2>. (in Ukrainian).
2. *Kryminalnyi protsesualnyi kodeks Ukrainy* [Criminal Procedure Code]: Zakon Ukrayiny vid 13.04.2012 r. No. 4651-VI. Zakonodavstvo Ukrayiny. URL: <https://zakon.rada.gov.ua/laws/card/4651-17/conv> (in Ukrainian).
3. *Rishennia Konstytutsiinoho Sudu Ukrainy u spravi za konstytutsiinym podanniam Zhashkivskoi raionnoi rady Cherkaskoi oblasti shchodo ofitsiinoho tlumachennia polozhen chastyn pershoi, druhoi statti 32, chastyn druhoi, tretoi statti 34 Konstytutsii Ukrainy* [Decision of the Constitutional Court of Ukraine in the case of the constitutional petition of Zhashkiv District Council of Cherkasy region on the official interpretation of the provisions of parts one, two of Article 32, parts two and three of Article 34 of the Constitution of Ukraine: Decision of the Constitutional Court of Ukraine of 20.01.2012 No. 2-rp/2012]: Rishennia Konstytutsiinoho sudu Ukrainy vid 20.01.2012 No. 2-rp/2012. URL: <https://zakon.rada.gov.ua/laws/show/v002p710-12> (in Ukrainian).
4. *Simeinyi kodeks Ukrainy* [Family Code of Ukraine]: Zakon Ukrainy vid 10.01.2002. No. 2947-III. URL: <https://zakon.rada.gov.ua/laws/show/2947-14> (in Ukrainian).
5. *Case of Norris v. Ireland*. Application No. 10581/83. Strasbourg, 26 October 1988. URL: <https://hudoc.echr.coe.int/eng>.
6. *Zahalna deklaratsiia prav liudyny* [Universal Declaration of Human Rights]: OON; Deklaratsiia, Mizhnarodnyi dokument vid 10.12.1948. URL: https://zakon.rada.gov.ua/laws/show/995_015 (in Ukrainian).
7. *Konventsiiia pro zakhyst prav liudyny i osnovopolozhnykh svobod* [Convention for the Protection of Human Rights and Fundamental Freedoms]: Rada Yevropy; Konventsiiia, Mizhnarodnyi dokument vid 04.11.1950 (Redaktsiia vid 02.10.2013). URL: https://zakon.rada.gov.ua/laws/show/995_004 (in Ukrainian).
8. *Mizhnarodnyi pakt pro hromadianski i politychni prava* [International Covenant on Civil and Political Rights]: OON; Pakt, Mizhnarodnyi dokument vid 16.12.1966 (Ratyfikatsiia vid 19.10.1973). URL: https://zakon.rada.gov.ua/laws/show/995_043 (in Ukrainian).
9. *Videnska deklaratsiia ta Prohrama dii* [Vienna Declaration and Program of Action]: Deklaratsiia, OON, Mizhnarodnyi dokument vid 25.06.1993. URL: https://zakon.rada.gov.ua/laws/show/995_504. [in Ukrainian].
10. Palant B. (2018). *Bill pro prava (praktyka zastosuvannia)* [Bill of Rights (practice)]. Kharkiv: Pravo. 264 s. (in Ukrainian).
11. Zeleniukh O. V., Kantsir V. S. (2020). *Zakhyst osobystoho i simeinoho zhyttia pid chas kryminalnoho provadzhennia: dosvid zakonodavstva okremykh inozemnykh derzhav* [Protection of Personal and Family Life During Criminal Proceedings: the Experience of the Legislation of Individual Foreign States]. *Yevropeiskii perspektyvy*. No. 1. S. 57–62 (in Ukrainian).
12. *Kryminalnyi kodeks Hruzii* [Criminal Code of Georgia]. Pereklad na ukrainsku movu: T. V. Rudenko; pid zah. red. O. V. Korotiuk. K.: OVK, 2021. 254 s. Ugolovno-protsessualnyi kodeks Gruzii: Zakon Gruzii ot 9 oktyabrya 2009 goda. URL: <https://matsne.gov.ge/document/view/90034publication> (in Ukrainian).
13. *Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999* (Stand am 23. September 2018). URL: <https://www.admin.ch/opc/de/classified-compilation/19995395/index.html#a8>.
14. Hauser R., Schweri E. (2002). *Schweizerisches Strafprozessrecht*. Basel.
15. *Swiss Criminal Procedure Code of October 5, 2007* (status as of February 1, 2020). URL: <https://wipo.lex.wipo.int/text/577474>.
16. *Kryminalnyi kodeks Respubliki Moldova* [Criminal Code of the Republic of Moldova]. Stanich V. S. Pid red. V. L. Menchynskoho. Pereklad na ukrainsku movu: T. V. Rudenko. K.: OVK. 2016. 462 s. Ugolovno-protsessualnyi kodeks Respubliki Moldova: Zakon ot 14.03.2003. No. 122-XV. URL: http://base.spinform/show_doc.fwx_rgn=3833 (in Ukrainian).

Дата надходження: 01.11.2022 р.

Володимир Канцір

Національний університет “Львівська політехніка”,
доктор юридичних наук, професор,
професор кафедри кримінального права і процесу
volodymyr.s.kantsir@lpnu.ua,
ORCID: 0000-0002-3689-4697

Володимир Бараняк

Національний університет “Львівська політехніка”,
кандидат хімічних наук, доцент,
доцент кафедри кримінального права і процесу
volodymyr.m.baraniak@lpnu.ua,
ORCID: 0000-0001-6161-7862

Анатолій Крижановський

Національний університет “Львівська політехніка”,
кандидат юридичних наук,
старший викладач кафедри кримінального права і процесу
kriganovskiy@lp.edu.ua,
ORCID: 0000-0002-2432-5286

**ЗАХИСТ ПРИВАТНИХ ІНТЕРЕСІВ ПІД ЧАС КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ:
КОМПАРАТИВІСТСЬКІ НАРАТИВИ**

Розглянуто питання доцільності використання іноземного законодавчого досвіду щодо способів та механізму реалізації захисту особистого і сімейного життя особи під час кримінального провадження.

Суд, слідчий суддя, прокурор, керівник органу досудового розслідування, дізнавач, слідчий, інші службові особи органів державної влади зобов'язані неухильно додержуватися вимог Конституції України, КПК України, міжнародних договорів.

Виняток стосується тих випадків, які передбачені законом і необхідні у демократичному суспільстві для забезпечення основ національної безпеки, громадської безпеки, запобігання правопорушенням проти життя та здоров'я особи, у сфері охорони державної таємниці, недоторканності державних кордонів, забезпечення призову та мобілізації, проти встановленого порядку несення військової служби, проти миру, безпеки людства та міжнародного правопорядку.

Ключові слова: приватні; процесуальні правові інтереси; гарантії дотримання; засади провадження; слідчі (розшукові) дії; забезпечення основ національної безпеки; законодавство окремих іноземних держав.