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## DIGITAL TECHNOLOGIES IN LITIGATION VS DIGITAL HUMAN RIGHTS

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# DIGITAL TECHNOLOGIES IN LITIGATION VS DIGITAL HUMAN RIGHTS

**Liudmyla OSTAFIICHUK**[1]

**Abstract**

*The article is devoted to the study of human rights in terms of data available to an indefinite number of persons in the electronic services of the site Judiciary of Ukraine. It is established that along with the availability of the Internet the protection of fundamental human rights should be developed in any information environment. It is proved that the possibility of litigation online is combined not only with the availability of the Internet of a person - a participant in the process but also the current technical inability of a significant number of courts to onduct high-quality court hearings. The main obstacle is the poor quality of communication infrastructure and the lack of knowledge and skills of using digital technologies of the majority of the population. These obstacles must be removed by the State which has a duty to provide the basis for the dignified treatment of every member of society. It has been found that the openness of court decisions affects access to justice and does not promote respect for the rights of individuals to the confidentiality of personal data private and family life. It is substantiated that the indefinite storage of electronic copies of court decisions violates the human right to be forgotten. In order to overcome the identified gaps in the regulation of the use of digital technologies in the judiciary it was concluded that a clear regulatory environment should be created to achieve a balance of interests of the state and society and protect fundamental human rights in the digital age because the essence of man and changes.*

**Keywords:**

*Court; Digital Technology; Human Rights; Digital Human Rights.*

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## I. Introduction

Different peoples have different meanings in the concept of human rights. However in their recognition and provision by the state is one of the important conditions for the development of society in general and each individual in particular. It is well known that society cannot exist without people just as man cannot be outside society. Society and man are interconnected by law and scientific progress inevitably affects this connection. Aspects of the relationship between man and the state are changing. On the one hand the democratization of social processes leads to the recognition of the need to expand the freedom of the individual and strengthen its legal protection and on the other - the development of multilevel information technology allows to capture various aspects of human life and interfere in human freedom. We can say that the 21st century should be considered a digital age. This is confirmed by the appearance in 2012 of the term **digital rights** in the world, which will eventually take shape in the **fourth generation of human rights**. We also do not consciously become participants in this process. Because the introduction of information technology in all spheres of life is to some extent sanctioned by the state: it is electronic databases, e-government, e-litigation, etc., which takes place against our will. Digital rights - human rights which are the right of people to access, use, create and publish digital works (information), access and use of computers and other electronic devices as well as communication networks in particular the Internet. Along with progress and simplification of procedures, these "technological developments pose very serious risks to human dignity autonomy and confidentiality as well as to the enjoyment of human rights in general if not managed with great care" (Office of the High Commissioner for Human Rights, 2018). These trends cannot go beyond the regulation of existing law. Also it should be borne in mind that the human rights of the first generation have not been abolished and when using digital technologies it is necessary to take into account.

Centuries of experience in the development of democracies show that the most reliable means in the system of protection of human rights in case of their violation is the court. The judiciary is a guardian of constitutional principles as an objective impartial and independent subject of justice which provides equal protection to everyone regardless of their social and property status, race and political beliefs. The main function of the judiciary is the judicial protection of human and civil rights and freedoms. The court must embody true law, true justice. However how should the court itself adhere to these principles and rules in the digital age? How does a person's lack of simple skills in using electronic devices and computer technology affect his or her access to justice? How does the digitization of court cases the course of court

proceedings, the coverage of information on the status of proceedings, the publication of court decisions on the Internet, etc. affect the personal rights of individuals? These and other issues need to be studied and understood which are the objectives of this study which aims to identify gaps in the regulation of the use of digital technologies in litigation in the context of protection of digital and private human rights.

## II. Main material presentation

The realization of human rights on the Internet is an important issue. Noting that the rapid pace of technological development allows people around the world to use new information and communication technologies, on July 5, 2012, the UN Human Rights Council adopted a resolution "On the promotion protection and implementation of human rights on the Internet." Recognition of the global and open nature of the Internet is one of the main messages of the resolution. This means that all human rights offline should be equally protected online, and states should encourage and facilitate access to the Internet and develop the protection and enforcement of human rights on the Internet and other technological environments (Human Rights Council, 2012). However there are currently very few tools in the digital sphere to protect the greatest achievement of human civilization - the concept of human rights. On the one hand, the Internet simplifies the realization of a number of human rights, and on the other hand, it has brought new challenges to these rights, which are proposed for consideration.

### *II.1. Electronic proceedings and the right of access to the Internet.*

The possibility of online litigation using modern technical means is one of the main tasks of the Unified Judicial Information and Telecommunication System, the large-scale modernization of which began with the adoption in 2017 of new versions of the Procedural Codes of Ukraine. The system provides for electronic court records, secure storage automated analytical and statistical processing of information appointment of judges to hear specific cases selection of juries maintenance of the Unified State Register of Court Decisions etc. The principle of building a Unified Judicial Information and Telecommunication System - cloud technologies that provide remote processing and storage of data and provide Internet users with access to computing resources and software.

Special software has also been developed for out-of-court hearings. Although video conferencing has not yet become a full-fledged substitute for offline trials, it is used quite actively as an element of hearings and judges' meetings.

To participate in the meeting by video conference you must pre-register using an electronic signature on the official web portal of the judiciary www.court.gov.ua. Then - no later than 5 days before the court hearing - the party must file an application indicating: the name of the court; case number; the date and time of the meeting in which he wishes to participate in the videoconference; last name, first name and patronymic; your status in a court case; the e-mail address used for registration in the system; court telephone number. Copies of the application must be sent by the initiator to other participants in the process within the same timeframe. On the day of receipt the application for participation in the court hearing by videoconference outside the court will be registered in the automated document management system. It will also be handed over to the presiding judge who will decide on the possibility of holding a hearing by video conference "provided that the court has the necessary technical capabilities." And such opportunities unfortunately are not yet available in all courts not to mention the direct participants in the trial. Problematic issues include: lack of Internet access significant cost of Internet service providers, slow data transfer, lack of full network coverage, outdated computer equipment, etc.). In addition the introduction of e-litigation has been hampered by a lack of knowledge and skills of the majority of the population using digital technologies. Therefore both participants in the process and officials of Themis are reluctant to use the possibilities of electronic justice.

Access to online information and knowledge is crucial for personal development and the development of society. In 2007 the Committee of Ministers of the Council of Europe in its "Recommendations on enhancing the value of the Internet as a public service" emphasized that "access to, access to and capacity for the Internet should be seen as integral components of the full enjoyment of human rights and fundamental freedoms in the information society" (Council of Europe, Committee of Ministers, 2007). Frank La Rue (2011) considers access to the Internet as a catalyst for other human rights and distinguishes between access to Internet content and physical access through existing infrastructure (La Rue, 2011). In paragraph 52 of the judgment the Court emphasized that "Internet access is increasingly perceived as a right, and therefore calls have already been made to develop effective policies to ensure universal access to the network in order to bridge the digital divide" (Case of Kalda v. Estonia, no. 17429/10, 2016). International human rights bodies have repeatedly stressed the importance of real not formal access to justice. The right of access to a court of the ECtHR means that the person concerned should be able to have his or her case heard in court and should not be hindered by excessive legal or organizational obstacles, which should be facilitated by States (Case of Kalda v. Estonia, no. 17429/10, 2016).

Thus "access to the Internet is necessary to maintain respect for other rights of individuals such as the right to education" (Joint Declaration on Freedom of Expression and the Internet, 2011) which imposes obligations on states to promote universal access to the Internet. This obliges states to take all reasonable steps to ensure that their citizens have maximum access to the Internet. For example develop and implement specific and effective policies to ensure that the Internet is widely available open and affordable for all groups. Special forms of assistance can be extended to the poor and people with disabilities. In addition the conditions for the full realization of this right by citizens are also access to information about technology and digital literacy - the opportunity to gain knowledge and skills in using the Internet to meet their needs. Therefore the right to access the Internet is combined with the principles of inclusiveness and non-discrimination, net neutrality, Internet security, quality of service, etc., which should provide the basis for decent treatment of every member of society. The right to dignity is the basis of other human rights. Dignity is the recognition by society of social value the uniqueness of a particular person the importance of each as part of the human community. The rights that belong to a person in order to ensure his human dignity have no effect in time. This idea is embodied in the preamble to the Universal Declaration of Human Rights. Human dignity is the source of his rights and freedoms.

### *II.2. Openness of court decisions VS right to access to justice.*

The next issue that deserves attention and study is the functioning of the Unified State Register of Court Decisions and its "interference" in the private sphere. New technologies make it possible to predict what decision a court may make in a particular case in a particular court and by a particular judge. With the help of open databases on court decisions and taking into account the acquired knowledge about the practice of resolving such disputes we can obtain the appropriate evidence base and prepare an ideal procedural document. And what to do if our case does not fall under standard case law? The issue is obviously debatable. And the answer to it will be unexpected. Because the results of the trial will depend on the judge to whom the case will be assigned. If the judge is a highly educated specialist who puts the dispute on the merits in the first place on the basis of the evidence provided by the parties we will get a fair decision. If the judge perceives the trial as a normal job it is useless to hope that the court decision in the case will suit us. Such a judge will seek a solution not in the submitted evidence and legislation but in the practice of consideration of similar (but not identical) cases by higher instances. This is facilitated by current legislation.

The Law of Ukraine "On Access to Judgments" defines the procedure for access to judgments in order to ensure openness of courts of general

jurisdiction predictability of court decisions and promote equal application of legislation (Sudova vlada Ukrayiny, 2005). Parts 5, 6 of Art. 13 of the Law of Ukraine "On the Judiciary and the Status of Judges" stipulates that the conclusions on the application of the law set out in the Supreme Court are binding on all subjects of power who apply in their activities a legal act containing the relevant rule of law and are taken into account by other courts when applying such rules of law (Sudova vlada Ukrayiny, 2016). Provisions of Part 5 of Art. 242 of the Code of Administrative Procedure of Ukraine, Part 4 of Art. 263 of the Civil Procedure Code of Ukraine, Part 4 of Art. 236 of the Commercial Procedural Code of Ukraine determine that when choosing and applying the rule of law to the disputed legal relationship the court takes into account the conclusions on the application of the law set out in the decisions of the Supreme Court (Sudova vlada Ukrayiny, 2005; 2003; Commercial and Procedural Code of Ukraine, 1991).

In practice all these rules mean that the main task of the courts of first and appellate instances is not to resolve the dispute on the merits with a detailed investigation of all the circumstances of the case and proper reasoning of the court decision, but to search the Unified State Register of Judgments his legal positions in the consideration or appellate review of the case.

Can we consider justice accessible in such circumstances? Can we speak with confidence about the real independence of a judge in such cases given the independence of legal conclusions on the application of the rule of law in such legal relations? Obviously answering these questions is not easy because in most cases the above procedural rules will force the referee to resolve the dispute in accordance with the rules of the game and not to seek the truth and justice in a particular case. In practice this is exactly what happens - in most court decisions of the courts of first appellate and cassation instances there are references to the legal positions of the Supreme Court on similar issues. Is that true? No. Because the requirements of procedural law to the content of the court decision do not include the obligation of the court to indicate them in the text of the court decision as opposed to establishing the relevant circumstances of the case with appropriate admissible reliable and sufficient evidence their reasoned assessment or rejection; as well as instructions on the rule of law the reasons for its application or non-application.

In a civilized society the court has a central place in the entire legal system. It is the court that embodies true law, true justice. The higher the role and authority of the court and justice in general the greater the independence and autonomy of the court even in internal relations the higher the level of law and democracy in the country the more reliably protected from any encroachment on the rights and freedoms of citizens. Judicial proceedings which have a clear detailed procedural form are indeed the best way to resolve

disputes and establish the truth. However the application of this method is possible only when the court is guaranteed real independence when it makes a court decision based on the rule of law on the basis of evidence examined in the course of the case in its own opinion conscientiously and fairly what pressure from outside including from the Supreme Court and its legal positions. Only in such conditions does the court act as a reliable guarantor of human rights and freedoms and is accessible.

### *II.3. Openness of court decisions VS the right of a person to the confidentiality of personal data.*

A lot of information is collected and used from the public database of court decisions which makes it possible to consider this part of cyberspace as a public place. Although current practice and existing physical limitations limit the degree of access to personal data in court documents, new technologies are on the verge of changing this reality.

Lawsuits may include medical histories, mental health data, tax returns and financial information, marital status, place of residence and place of work, salary and so on.

For example in a normal civil claim for damages in a car accident the plaintiff must provide complete medical information about his or her health including any pre-existing conditions that may affect his or her current health. These data may even include information about the mental state of the person. To determine the amount of damages the plaintiff must also disclose details of his lifestyle, activities and employment. If this information is contained in a document submitted to a court or mentioned in a court hearing or in court it could potentially become available to the public if such information is not protected by law.

In addition to plaintiffs in many cases defendants are also forced to provide personal information. This also applies to witnesses and other persons involved in court proceedings who may be affected by private data if these data are subsequently disclosed in court documents. The same applies to jurors as their names, addresses, professions, and place of work (Lutsk City District Court of Volyn Region, n.d.) are fully published on the courts' websites which may later become part of the court record.

Therefore before placing a judgment in the information databases available on the Internet the persons directly affected by the judgment should also be informed that acquaintance with such a judgment by a wide range of users or other use in practical or research work - may potentially affect their right to privacy or confidentiality of personal information collectionuse, transfer and storage of their data. Only obtaining the consent of these persons to disclose their personal data in court decisions will ensure compliance with their rights.

### *II.4. The right to privacy and privacy VS electronic databases in litigation.*

The right to inviolability and secrecy of private and family life means giving a person a state-guaranteed opportunity to control information about himself to prevent the disclosure of personal intimate information. The content of this right should include the protection of the secrecy of all aspects of the private life of an individual the disclosure of which he considers undesirable for his own reasons. Privacy can also be defined as the presumption that an individual will determine the scope of interaction with the state government agencies and other individuals. The protection of this right is not limited to a person's home and also extends to the digital environment, for example to the collection of information about a person who is available on social networks in the public domain. It is clear that in social networks a person to some extent decides what information to publish about himself. However the placement of information about a person on the websites of the subjects of power is against his will. For example on the website of the Judiciary of Ukraine knowing the name and surname of a person you can find which cases and in which court are considered in relation to him (Website Judiciary of Ukraine, n.d.). Article 7 of the Law of Ukraine "On Access to Judgments" (Sudova vlada Ukrayiny, 2005) prohibits the disclosure of information in the texts of judgments that are open to the public which make it possible to identify an individual. At the same time knowing the case number from the database "Status of cases" on the site "Judiciary of Ukraine" we can clearly identify all parties to the case. Given that litigation is stressful for everyone and information on divorce division of property administrative or criminal offenses is absolutely undesirable for disclosure to third parties I consider the availability of such information a violation of the human right to privacy and secrecy of private and family life. First of all such extraction of information should not be arbitrary. "Public dissemination of information does not deprive it of its content" (Seibert-Fohr, 2018) so such information cannot be available to anyone who simply knows how to use a computer and search for information in relevant databases. Therefore the information should be provided only to the registered user of the relevant database and exclusively for the stated purpose (lawyer - for defense, prosecutor - to support the accusation person as a direct participant in the process). Secondly any interference must comply with the principles of legality necessity and proportionality as information relating to for example advocacy requires a higher standard of protection. The principle of confidentiality of advocacy covers even the client's appeal to a lawyer for legal assistance while the database "Status of cases" on the site "Judiciary of Ukraine" allows you to find out which lawyer is involved in the case and who is directly defending. The authorization procedure for

access to and use of such information must be defined by law. As the digital extraction of such information is carried out in secret without the permission of the person and the lawyer it is necessary that the law governing such permission be transparent and give each potentially injured person the right to defend himself.

### *II.5. Indefinite storage in the Register of electronic copies of court decisions VS the right to be forgotten.*

The right to protection of honor and goodwill imposes on all citizens and officials the obligation to refrain from interfering with the will of a person in his private life to demand from the competent authorities to stop unlawful encroachments on honor and reputation. In continuation of the previous topic you can view the information databases "Status of cases" (Website Judiciary of Ukraine, n.d.), "Online broadcast of court hearings" (Sudova vlada Ukrayiny, n.d.) of the site "Judiciary of Ukraine" in violation of human rights. Due to the lack of regulations for working with this information, there is no fixation of the time limit for storage of such data and information networks. For example a criminal case against a person is closed due to the absence of an event or corpus delicti. The term of such a case in court is three years and electronic databases contain information from 2008 in the original case in paper form has been destroyed for nine years and all information is stored in electronic form. Electronic copies of court decisions are stored in the Register indefinitely. Accordingly the storage of data beyond the permitted period in accordance with the current List of court cases and documents generated by the court indicating the retention period (State Judicial Administration of Ukraine, 2017) - is unacceptable because it will affect the good reputation and honor of man. In addition it is a violation of the right to forget (European Parliament, 2016). Therefore the specified normative act is not sufficient. In order to prevent the intrusion into the private sphere of a person who is made possible by new technologies it is necessary to extend its effect to the destruction of relevant information about cases in electronic databases of the site Judiciary of Ukraine.

## III. Conclusions

The opportunities and risks of information technology affect and correlate with the fundamental values of freedom dignity and equality, as well as with specific human rights such as privacy or freedom of expression.

The content of basic digital human rights consists of: the right to access the electronic network the right to communicate and express one's opinion freely on the Internet the right to privacy. The latter is the most vulnerable because the introduction of digital technologies weakens the protection of a person's privacy in general. In the age of digitalization, the

implementation of the principle of publicity and openness at all levels including the judiciary is by default. We have shown four examples in which it is described how the openness of information about court cases and the publicity of court decisions affect the dignity honor goodwill and privacy of the individual. This means that under current law trial and access to court decisions and information on court proceedings are initially open as the court has the ability to promptly disclose certain data without the consent of the individual. And only in some cases a person can initiate consideration of the case in a closed court session. Which however does not mean complete secrecy for other users of electronic databases of other information about this case and its participants. This requires personal activity to keep other information private to other users. That is the understanding of fundamental rights as subjective gives a person the opportunity to demand their observance by the court but at the same time assumes that they will be provided only in the case of active harassment of subjects, ie point.

Such activities raise doubts about its compliance with applicable international standards and norms (including rules on limited data collection, non-redundancy, goal setting, destruction or depersonalization of data at the appropriate time, provision of guarantees for the data subject).

In light of rapid technological development and failures the problems in creating a clear regulatory environment are obvious. Giovanni Sartor (2017) notes that human rights can become "beacons" for the regulation of information and communication technologies, indicating what goals must be achieved and what harm must be averted in accordance with the principle of proportionality (Sartor, 2017, p. 434). Roger Brownsword, Eloise Scotford and Karen Yeung (2017) note that it is human rights that can become a "unifying purposive perspective" in defining attitudes towards different technologies which involves analyzing whether or not their use is in line with fundamental human rights such as dignity, private life, equality, freedom (Brownsword et al., 2017). Therefore further research should focus on achieving a balance of state interests and protecting fundamental human rights in the digital age.

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