Right to privacy: a review of international and national legislation

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Article info

Zhetpisov, S.K., Esimkhanova, G. B., Baidildina, A.Ye. (2019). Right to privacy: a review of international and national legislation. Fundamental and applied researches in practice of leading scientific schools, 31 (1), 260–266.

Accepted 28.02.2019

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The article explores the role and importance of confidential information in the life of modern society, focuses on the problems of ensuring the legal protection of confidential information. The degree of personal freedom in the state, democracy and humanity of the political regime depends on how guaranteed the confidentiality of information is, the secrets of the private life of citizens, how deeply a state can penetrate the content of these secrets. As a result of the study, theoretical statements were formulated proving the existence of the institution of confidential information, its significance in the development of communicative relations was determined, a classification of existing types of confidential information in the legal system of the Republic of Kazakhstan was proposed with substantiation of its practical significance, the definition of secrecy in legislation was outlined, characteristics. Many of these problems have not been previously studied independently or are not sufficiently developed or require rethinking in relation to the new conditions of life in the country.

Recently, there have been positive developments in terms of overcoming the previously established stereotypes of the secrecy cult. Many information barriers have been eliminated; methods of administrative-command management of information flows are eliminated. The general civilization process of creating the global information space implies greater openness of states. At the same time, the formation of a new statehood based on the principles of democracy, legality, the desire for more active cooperation with foreign countries based on the openness of the parties does not exclude the need to maintain state secrets and other types of confidential information.

Keywords: confidential information; secrecy; state secrets, immunity.

Introduction

The gradual loss of autonomy of a single human life, caused by the desire of the authorities, private individuals to strengthen their own positions, created a real threat to the realization of the rights and freedoms of the individual. The Institute of Confidential Information is one of the most important institutions that determine the balance of interests of an individual, society and the state, private and public law, the basis and limits of state intervention in the non-state sphere, the degree of information security.

Excessive inconsistency and inconsistency, diversity of regulatory documents, the presence of a large number of legal and technical errors, the lack of a single conceptual apparatus leads to confusion in the legislative array itself, to the uncertainty of lawmaking guidelines in the information sphere, to the polarity of interpretations of the limits of secrets protected by law and, as a final result, to a violation consistency of the legislative process as a whole.

The Republic of Kazakhstan has no legal act that contains a list or classification of confidential information. Although in recent years there have been several attempts to

streamline and systematize disparate kinds of secrets. This confusion is observed in many laws, where references "to other protected secrets", "other secrets protected by law" imply the continuation of the list of types of information with limited access and make it open. In the absence of clear definitions of the types of information with limited access (with the exception of state secrets) and the established relationship between them, there is a certain contradiction between the laws and their implementation is even more difficult. In order to overcome the unjustified differences in terminology, clarity and accuracy of the language of the law, to ensure a uniform understanding of the terminology used in various branches of law, it is necessary to develop and adopt the Law on Confidential Information, which should classify all types of secrets existing today and establish their legal regime, which will eliminate possible confusion in dealing with various issues related to the institution of secrecy.

In this regard, there is a need: to study the legislative regulation of various types of confidential information, enshrined in Kazakhstan and foreign legislation; to conduct a comparative legal analysis of trends in the development of the institution of confidential information in foreign legislation and law enforcement practice; find out the normative regulation of the activities of judicial and law enforcement agencies to ensure the institution of confidential information; analyze the judicial practice of the application of criminal law to protect confidential information; develop and justify proposals for improving the current legislation in the field of legal protection of confidential information.

Theoretical Bases Of Research

The presented article is based on the approach of the materialist dialectic to the analysis of the subject of research - as a universal method of cognition of reality in its natural-historical development. The consideration of the problem was also carried out on the basis of a set ofgnoseological methods and techniques, including a comprehensive analysis, general scientific and privately - scientific methods of cognition, comparative, concrete sociological methods. In addition, the study of theoretical research questions occurred in comparison with practical realities on the examples of specific cases considered by the courts.

The analysis of scientific research allows us to state that there is a sufficient research base in the formation of the concept of legal protection of the secrecy institution.

Among the major monographic works, we believe it is impossible not to note the work of A.A. Fatyanova "Mystery and Law" (1999) [1]. The work covers the main systems of restriction on access to information - formed or formed secret institutions (state, service, commercial, professional, personal data institute, etc.). Their legal nature is revealed, an analysis of the current level of legal regulation is given. Similar laws of some foreign countries are also affected.

The closest to our work on the issues under consideration should include the dissertation:

A.R. Shegebaeva "Ensuring the right to privacy in the criminal law policy of Kazakhstan" (2016) [2] addresses the problem of ensuring the right to privacy in the criminal law

policy of the Republic of Kazakhstan, with the development of measures to further improve the criminal law.

R.K. Kurumbaev "Institute of Immunity: Theory Issues" (2018) [3], in which he notes that when classifying the institute of immunity by objects, among them are testimony, namely: either the right to refuse to testify (for example, witness immunity of close relatives), or the obligation to give them only under strictly observed conditions. For example, the conditions are also detailed with respect to information constituting state, notarial, banking, medical, and other secrets.

Foreign authors pay special attention to the concept of various types of secrets, and also consider in detail the issues of their protection against unlawful use by third

parties. There are special monographs on the protection of the legal institution of secrecy. One of the last, most complete and detailed works on problematic aspects:

- protection of commercial secrets: Schlötter R. "Der Schutz von Betriebs- und Geschäftsgeheimnissen von Arbeitnehmern." Eine rechtsvergleichende Untersuchung des englischen, französischen und deutschen Rechts" (Köln, 1997) [4]; Maier A. "Der Schutz von Betriebs- und Geschäftsgeheimnissen im schwedischen, englischen und deutschen Recht" (Köln, 1998) [5];

- tax secrets: Weber M. "Berufsgeheimnis im Steuerrecht und Steuergeheimnis" (Zuerich, 1982) [6]; Holzapfel H.J. "Steuergeheimnis, Verfassung und Offenbarungsbefugnis". Dissertation. (Muenchen, 1972) [7].

- religious secrets: Bullis R.K., Mazur C.S. "Legal Issues and Religious Counseling" (Kentucky, USA, 1993) [37]; Anglim C.T. "Encyclopedia of Religion and the Law in America." Second Edition "(NY, USA, 2009) [8].

- bank secrecy: Jack A. Blum, Michael Levi, R. Thomas Naylor, Phil Williams. "Financial Havens, Banking Secrecy And Money Laundering," (2002) [9]; Micheloud & Co "What does bank secrecy cover?" (2001) [10].

- advocacy secrecy: Rena A. Gorlin "Codes of professional responsibility" (Washington, 1998) [11].

Recognizing the importance of the contribution of scientists to the development of issues of legal protection of an interdisciplinary institution of secrecy, their legal guarantees, it should be noted that they require further study of the multifaceted problems of the institution in the context of the emergence of a democratic civil society and the rule of law in accordance with international legal acts protecting human rights.

Results and Discussion

Confidentiality (from lat. *Confidentia* - trust) - the need to prevent disclosure, leakage of any information. Confidential information - information that is confidential, that is, "confidential, not subject to public, secret"; this concept is equivalent to the concepts of secret or secret [12, p. 559].

International law has established a fairly high standard of understanding of what the content of the right to confidentiality should be. Approximation of the legislation of the Republic of Kazakhstan and its practice to this standard occurs under rather difficult conditions for the implementation of legal reform and the gradual awareness

of the real values of the rights of the individual. As world experience shows, such a process can be

quite lengthy. In turn, the corresponding reform of national legislation occurs not only as a result of the implementation of international legal norms.

Thus, our state is in such an international legal situation that requires the speedy resolution of a number of theoretical and practical problems related to the implementation of the international legal norm on the protection of various kinds of secrets. In addition, in contemporary international legal doctrine, the question of the content of the right to confidentiality remains debatable. At the same time, there is a need to clarify the scope of this right, which arises from international legal treaties and international judicial practice, which are subject to national implementation in the Republic of Kazakhstan. Conflicts of the Convention on the right to confidentiality with the national legislation of Kazakhstan persist, which requires an in-depth additional study of ways to solve them.

With the development of information technology, the problem of confidentiality and confidential information becomes more significant. And in different areas and different countries confidentiality and information relating to confidential is determined differently. International legislation also has not developed a uniform approach on this issue. International legal acts do not contain either a specific notion of the right to confidentiality or its specific content. In the bulk, international legal norms use the terms "confidential information", "personal data", "privacy secrets", etc.

Article 12 of the Universal Declaration of Human Rights (adopted and proclaimed by General Assembly resolution 217 A (III) of December 10, 1948) states: "No one may be subjected to arbitrary interference with his personal and family life, arbitrary attacks on the inviolability of his home, his secret correspondence or on his honor and reputation. Everyone has the right to the protection of the law against such interference or such encroachments." [13]

The UN General Assembly Resolution No. A / RES / 68/167 of December 18, 2013, "The Right to Privacy in the Digital Age" [14], expressed deep concern about the negative impact of online mass surveillance. The General Assembly reaffirmed that human rights must be respected online and offline and called on all states to respect and protect the right to privacy in the digital environment. The General Assembly called on all States to review procedures, practices and legislation regarding online surveillance, interception and collection of personal data.

In Article 17 of the International Covenant on Civil and Political Rights (New York, December 19, 1966) this wording was expanded in terms of unlawful interventions and harassment and it sounds like this: "No one can be subjected to arbitrary or unlawful interference with his personal and family life, arbitrary or unlawful encroachment on the

inviolability of his home or the secrecy of his correspondence or unlawful encroachment on his honor and reputation. Everyone has the right to the protection of the law against such interference or such encroachments." [15] This pact was ratified by the Law of the Republic of Kazakhstan dated November 28, 2005 No. 91-III, entered into force on April 24, 2006 [16] and takes precedence over

its laws (paragraph 3 of Article 4 of the Constitution of the Republic of Kazakhstan).

Expanding the capabilities of computer technology allowed us to create fundamentally new forms of collecting, storing and sharing personal data. International basic principles of data protection were developed, including obligations for: fair and lawful acquisition of personal information; limit the scope of its use to the originally defined purpose; ensure that its processing is appropriate, appropriate and non-excessive; ensure its accuracy; safety assurance; its destruction if there is no need for it; giving individuals the right to access information about them and theright to apply for corrections. The UN Human Rights Committee in its general comment No. 16 clearly stated that these principles are related to the right to confidentiality, but data protection also begins to stand out as a separate human right or fundamental right. In some countries, data protection was even recognized as a constitutional right, and therefore its importance as an element of democratic societies was emphasized.

Regulation (EC) No 2016/679 of the European Parliament and of the Council on the Protection of Individuals in Processing Personal Data and on the Free Circulation of Such Data [17] and Directive of the European Parliament and of the Council of Europe 2002/58 / EC of July 12, 2002 [18] relate to the protection of personal data and the protection of personal data in the electronic communication sector, regulate the use of personal data and provide guarantees of its integrity in the field of telecommunications. In these documents, the basic rules-principles of organizing the processing of personal data and ensuring the right of citizens to protect such data were defined.

Compliance of the national legislation with the requirements of these documents is a prerequisite for the full participation of states in the international information exchange, in particular the export of information to third countries and to the countries of the European Union. Regulation (EC) No 2016/679 of the European Parliament and of the Council of the EU "On the protection of individuals in the processing of personal data and on the free circulation of such data" defines the framework conditions for the relative level of access and the possibility of transmitting information. If countries do not provide an adequate level of protection, the export of information to these countries is prohibited.

Initially, the Organization for Economic Cooperation and Development (OECD) addressed the issue of legal regulation of transboundary movement of personal information at the international level, adopting the Basic Provisions on the protection of privacy and international exchanges of personal data of September 23, 1980 [19]. The norms of this act were of advisory nature and were intended to become a tool for unifying the relevant national legislation of OECD member countries in terms of preventing the blocking of international data exchanges.

The adoption of the Council of Europe's Convention for the Protection of Individuals with Automatic Processing of Personal Data (entered into force on October 1, 1985) [20], chapter III of which deals with this issue, became the next stage in the legal regulation of cross-border transfer of personal data. In addition, the preamble of the Convention

contains a direct reference to an increase in the cross-border flow of personal data undergoing automated processing as the basis for its acceptance and strengthening the protection of the rights and fundamental freedoms of each person.

Later, the principle of equivalent (adequate) protection of personal data when moving across state borders was enshrined in Regulation (EC) No 2016/679 of the European Parliament and Council of the EU "On the protection of individuals in the processing of personal data and on the free circulation of such data", which established the rule, according to which European Union member states will neither restrict nor prohibit the free flow of data between them. At the same time, as emphasized in the Regulations, the convergence of national legislation should not cause any reduction in the degree of protection of fundamental rights and freedoms provided by each country, in particular the right to privacy, recognized by the general principles of Community legislation, striving to ensure its high level of protection.

The regulation, in essence, is a legal standard that is binding on the application only by the member states of the European Union, but in practice it has also become a world standard implemented by non-European countries. The latter is due not only to the universality of its norms, but also to the fact that the ideas embodied in it were the result of an analysis of the accumulated practical experience of European countries applying the principles established by previously signed international documents.

The Privacy and Electronic Communications Directive established specific requirements for the Internet (storing data, the use of cookies, and the inclusion of personal data in directories for general use).

It should also be noted that in January 2012, the European Commission proposed a reform of the EU personal data protection rules, "to make them suitable for the 21st century". But this project is still being discussed by the EU legislative bodies.

Although in the European Union the level of personal data protection is much higher than in Kazakhstan, the results of research and reports on the protection of personal data in the European space show that there are problems in Europe that need to be solved and which should be taken into account. Thus, according to the Eurobarometer No. 359, implemented in 2011, about citizens' attitude to data protection and electronic identification, three out of four Europeans disclose personal data in their daily activities, but at the same time they are concerned about how companies, including search engines and social networks, use information containing their personal data.

In the Republic of Kazakhstan, the regulatory framework for the protection of personal data is poorly represented. Although there are rules for handling personal data, there is no clear mechanism for their protection. The generally accepted international standards on the protection of personal data do not apply. The legislation on the protection of personal data in the Republic of Kazakhstan is represented by the Law of May 21, 2013 No. 94-V "On personal data and their protection" [21].

The lack of adequate mechanisms for the protection of personal data affects the prevalence of offenses in this area. The particular importance of restrictions on the collection of information is due to the fact that, due to the rapid

development of technical means, there are unlimited possibilities for the illegal interception of confidential information. This demonstrates the feasibility of preparing a draft law "On Confidential Information", in which it is necessary to classify all types of secrets existing today and establish their legal regime.

In general, the right to confidentiality is not only a basic human right, but also such a human right from which other human rights arise and form the basic principles of any democratic society.

Confidential information - the most important national resource

Currently, the majority of states in the world pay significant attention to the legal regulation of information affecting the fundamental public interests, the illegal disclosure of which can cause appreciable damage, lead to significant financial and economic losses, and have a negative impact on the existing constitutional and legal institutions. The main task of the legislator in this aspect is to develop an optimal approach that ensures a balance of public and private interests, which allows finding the "golden mean" between unjustifiably lowering the threshold of legal regulation of state secrets and classifying too much information [23, p. 3]

Strictly thinking about this or that information, few people thought about what economic and social consequences this entails, for safety is paramount. Guided by an interdepartmental or departmental list, the contractor and the person signing the document easily and easily installed the specific level of secrecy contained in it, without worrying about what would have to be declassified. The situation was exacerbated by the fact that excessive secrecy was not considered an offense, it was sometimes even a special gloss. Another thing is not to classify what needs to be coded - here the consequences could be very severe and come immediately. In a somewhat modernized form, this system migrated to the modern time period [24].

Information is the most important national resource that the modern state owns and which it should cherish above all. State secrets are a legal institution of a modern state, allowing it to pursue an independent policy, to defend its interests, to have the ability to influence the behavior of other states and the course of international events in a desirable direction.

The Western countries and China, taking into account the qualitatively new importance of information in the formation of a new world order, prioritize the tasks of information security, obtaining and integrating data from all possible sources, taking advantage of superior awareness in their own interests, which may not coincide with the interests of Central Asia, due to close connection with the Russian Federation, and even contradict them. This is confirmed by the fact that, despite statements about the end of the Cold War, foreign special services not only do not weaken interest in the CIS countries as an object of intelligence, but also strengthen it. Here are some examples. In 2016, more than 3 thousand violations of regulations in the field of protection of state secrets were revealed. The KNB prevented four attempts to get secret information from foreign special agencies. In 2014, the East Kazakhstan

Regional Court for treason was sentenced to 11 years of imprisonment in a strict regime colony, with the confiscation of property a former prosecutor and a former officer of the Armed Forces of the Republic of Kazakhstan, who transferred to the Chinese intelligence agent secret samples and documents. In 2011, Kazakhstan's police officer Sharkov A.V. was extradited to Kazakhstan from Russia and was accused of fraud and disclosing state secrets in his homeland. According to the General Prosecutor's Office of the Republic of Kazakhstan, Sharkova was charged with "illegally obtaining and disclosing state secrets" [25].

Foreign states continue to modernize their intelligence services, improve technical intelligence, increase its capabilities, multifunctional space, ground, air, sea systems and complexes with global intelligence capabilities. At the same time, the process of creating and deploying new intelligence systems, improving the means and methods of collecting information continues. The main attention of the intelligence services of foreign countries is given to the process of the formation of the former USSR countries as independent states in the structure of the world community, their internal and external reference points, military policy and ways to implement it, ongoing economic transformations, scientific research and technical experiments, market assessment. Issues of technology, finance, trade, and resources are increasingly involved in intelligence.

In the USSR, there was no law on the protection of state secrets, although within the framework of the administrative-legal regime, there was a practice of protecting state secrets that was quite effective for its time, and was governed by subordinate legal acts. The list of information classified as state secret was a secret document [26, p. 88].

With the development of the state and the transition to a market economy, there was an urgent need to change the very principle of secrecy, which for more than seventy years was based on the usual notion of a "besieged fortress". The state secret covered a huge amount of information: from the health of the leaders of the CPSU to the recipe for sausage. In the 80s. USSR losses from excessively classified information reached several tens of billions of rubles. Such a list was provided for in the resolution of the Council of Ministers of the USSR of January 28, 1956 "On the establishment of a list of information constituting a state secret, the disclosure of which is punishable by law" [27, p. 97].

In the present reality, another extreme has begun to manifest itself - excessive informational openness, which damages the security of the Republic of Kazakhstan. A certain part of the information should have limits on the distribution, due to the interests of national security, the economic benefits of the country, military considerations, and finally, ethical standards.

Unfortunately, the public consciousness of the Republic of Kazakhstan has not yet achieved an understanding of the role and place of information in the modern world, an understanding of the fact that the means and systems of informatization of a country, the policy of using information resources largely determine both our defense potential and the success of economic reform, achieving material wealth, the possibility of revival and development of society. The development and optimal functioning of the entire society is

unthinkable without the full protection of national interests, including through reliable protection of state secrets.

In recent years in Kazakhstan, a number of cases of disclosure of state secrets by high-ranking officials have been identified, which suggests that the problem is systematic.

For example, in December 2016, several Kazakhstani officials became defendants in a criminal case on the fact of disclosing information that is a state secret. The official Internet portal of the National Security Committee of the Republic of Kazakhstan reported that a prompt investigation was carried out, as a result of which N.N. Dutbaev, N.B.Khasen, E.S. Nurtayev were detained. on suspicion of committing unlawful actions under Article 185 and Article 362 of the Criminal Code of the Republic of Kazakhstan [28]. In January 2017, the deputy head and employee of the presidential administration, B. Mailybaev, and N. Galikhin, were detained for disclosing state secrets [29].

The previously existing state secret protection system, created on the basis of the principle of totalitarian closeness, has ceased to satisfy the economic and political realities of today. In the situation of radical changes in the socio-political and economic structure of the Republic of Kazakhstan, the previously developed mechanisms for protecting state secrets, the rules for admitting to it, have ceased to conform to the new conditions and have largely lost their effectiveness.

So, a state secret is a legal institution of a sovereign democratic state, which determines the range of information, the dissemination of which can cause damage to the external security of the Republic of Kazakhstan, on fundamentally new information security fundamentals.

Conclusions

The conducted studies allow us to draw certain conclusions:

1. The inter-sectoral institute of confidentiality is one of the most important institutions determining the balance of interests of an individual, society and state, private and public law, the basis and limits of state intervention in the non-state sphere, the degree of information security in the Republic of Kazakhstan.

In Kazakhstan, over the years of modernization of the legal system, many laws have been adopted to protect various types of confidential information, but all of them are limited to the area of legal relations from which it is necessary to protect a particular secret. In general, the formation of the legal framework for the regulation and protection of various types of secrets is in its infancy. Despite the fact that the number of regulations governing certain aspects of various types of confidential information, it cannot be said that the legal framework for protecting secrets meets the needs of modern Kazakhstani society.

2. The existing shortcomings in the mechanism for the protection of personal data affect the widespread occurrence of offenses in this area. Due to the intensive development of technical means, unlimited possibilities have appeared for the illegal interception of confidential information. This demonstrates the feasibility of preparing a draft law "On Confidential Information", in which it is necessary to classify all types of secrets existing today and establish their legal

regime. This will eliminate possible confusion in dealing with various issues related to the institution of secrecy.

3. Despite the fact of recognition of fragmentary knowledge, little-studied and sufficient controversy of many legal aspects of secrets, a comprehensive general legal study of this phenomenon has not yet been conducted. In addition, in legal literature, there is no generally accepted definition of a secret, which would be based on the essential characteristics of the phenomenon under investigation, reflecting its nature and being universal for the whole variety of manifestations of secrets.

In our opinion, the following can be attributed to the essential characteristics of the secret: secret, this information, information; the secret must be known or entrusted to a narrow circle of persons, due to their professional or professional activities, family and marriage relations, the implementation of certain tasks; the secret is not subject to disclosure (publicity), otherwise it entails the onset of negative consequences; owners of secrets must keep it; legal disclosure is established for disclosing secrets.

4. The interdisciplinary institution of confidential information combines information that is rather diverse in content and character, which for various reasons became the subject of a particular secret. In our opinion, depending on the grounds of appearance and on the information owner, all secrets that exist and that have legal significance can be classified as follows:

Private secrets - information containing purely personal and family secrets (the secret of the home, the secret of personal records, the secrecy of postal correspondence, the secret of voting) and confidential information about the person obtained by the subject in connection with his professional activity (secret of adoption, secret confession, medical, banking secrets).

Secrets of organizations, enterprises, institutions - information constituting official secrets (secrecy of the investigation and legal proceedings, including the secrecy of the meeting of judges, the secrecy of internal administrative records management), as well as information relating to trade secrets.

State secrets - information of a military, economic, political or other nature, the disclosure or loss of which causes or may damage the national security of the Republic of Kazakhstan.

Mixed secrets - information containing professional and trusted personal secrets.

The classification proposed by us makes it possible to single out a set of identical, possessing similar features of information into a separate group in order to establish a uniform regime of legal protection of such information. Each independent, possessing only inherent features of confidentiality is governed by the legal regulations of the sectoral legislation regarding the use of protected information and measures of legal liability for violation of the established regime. All legal relations arising in the field of ensuring the protection of secret or confidential information constitute a single interdisciplinary legal institution of secrecy.

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