



## Privacy and information technology: the experience of the modern legal regulation

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**Abstract:** Institute of privacy acts as the cornerstone of modern democracy, it is one of the most fundamental and complex problems, which face the international community. The central element of the Institute of privacy is the confidential communication with other people with use of means of personal communication. Secrecy of postal and telegraph correspondence, being one of the basic constitutional rights of the person and citizen, at the same time is the most vulnerable and highly complicated in terms of protection. At the moment, we are witnessing a radical change in the pattern of communication between people in the world because of the new information technologies' emergence. However, because human nature does not change, new technologies carry not only unforeseen opportunities for intellectual and technological progress, but also unexpected means and ways of committing crimes. Crime has become much more sophisticated, armed with the information technology, and naturally, the secret services must possess adequate resources to prevent and investigate crimes. At the same time, legislator does not keep pace with the rapid development of new technologies that are difficult to comprehend at once. In general, the situation conceals in itself the new threats to human freedom, primarily the right to access to information and to privacy. It is therefore crucial to understand the essence of information relations in the new environment, development and formulation of new safeguards for the protection of human rights. This resulted in the need to consider the issues of legal regulation of personal information protection in the paper.

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**Key words:** confidentiality of correspondence, telephone conversations secrecy, right to inviolability of privacy, the right to privacy, protection of personal information, means of personal communication, information technology.

### 1. Introduction

Protection of the right to privacy is a top priority of any modern state and the world community as a whole.

This requirement is based on such international legal documents as the Universal Declaration of Human Rights of 1948 [1], the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 [2], and its Protocols, the International Covenant on Civil and Political Rights of 1966 [3], and many others.

However, the increasing dynamics of the information infrastructure both worldwide and in the Republic of Kazakhstan, the continuous improvement of modern information technology have led to the necessity to take a different view on the legal nature and ways to protect the interbranch institute of privacy, integral part of which is the confidential communication with other people with the use of personal communication means.

We believe that advances in

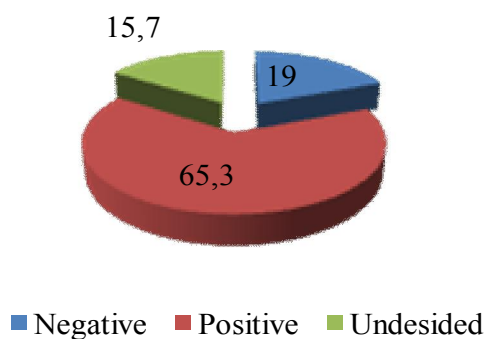
communications technology allow us to speak about the new means of communication, such as electronic mail (e-mail), with its area of protection.

Therefore, under the means of personal communication must be understood correspondence, telegraph, telex, telefax messages, satellite communications, the worldwide computer network "Internet".

Despite the fact that the authority has long ago received its legislative recognition, both in international and national legislations, it is often subject to various kinds of violations.

In particular, in 2013 under Article 143 of the Criminal Code of the Republic of Kazakhstan "The illegal violation of the secrecy of correspondence, telephone conversations, postal, telegraph and other messages" 43 offenses were recorded, in 2012 - 81, in 2011 - 42, in 2010 - 53. These figures show officially registered crimes, however, it must be assumed that the real situation is quite different. [4]

A survey conducted by the Association of Sociologists of Kazakhstan among 1,500 respondents, showed that 19% of respondents gave a negative assessment of the situation in the field of protection of the rights to privacy. 65.3% of respondents gave a positive assessment of the state mechanisms for protection of the rights to privacy. 15.7% of respondents were undecided (Figure 1).



In general, the results of the sociological analysis of the situation with protection of human rights to privacy suggests that state mechanisms for protecting human rights to privacy improved, taking into account Kazakhstan's international obligations in the field of human rights, except for certain violations of law and human rights by individual officials, others [5].

The foregoing justifies the need to address this issue within the framework of a scientific article, using the works of various authors in this area: F. M. Rudinsky [6], G. B. Romanovsky [7], M. Wugmeister [8], W. Steinmuller [9], A. Westin [10], Louis D. Brandeis, S. Warren [11].

## 2. Materials and Methods

Methodological framework of this research were general scientific methods of knowledge (dialectical, logical-formal, structural and functional) and special (historical-legal, comparative legal) methods.

## 3. Results and Discussion

The Universal Declaration of Human Rights of 1948 is the document to secure the list of civil, political, economic, social and cultural rights and freedoms for the first time. For example, Article 7 of the Universal Declaration states that "all persons are equal before the law and are entitled to equal protection of the law, without any discrimination" [1], and Article 12 of the Declaration states that "no one shall be subjected to arbitrary interference with his privacy, family, random attacks on the

inviolability of his home, correspondence" [1]. European Convention defines the limits of the law much more clearly. Article 8 (2) states:

"There shall be no interference of state bodies in the exercise of this right except when provided by law and necessary in a democratic society in the interests of national security, public safety or the economic welfare of the country, to maintain order and prevent crime, for protection of health and morality, or protection of rights and freedoms of others" [2].

Thus, according to the European Convention on Human Rights, all persons have the right to confidentiality of correspondence, but it is possible to limit the right "in accordance with the law" and if it is "necessary in a democratic society". [2]

The Article 18 of the Constitution of the Republic of Kazakhstan of 1995 allocated the independent right to secrecy of correspondence, telephone conversations, postal, telegraph and other messages [12]. This constitutional provision is reproduced and specified in Article 24 of the Law of the Republic of Kazakhstan "On Communications" from 18.05.1999 [13]. Consequently, the current legislation provides for the protection of personal communication secrecy of Kazakhstan citizens. In addition, the Supreme Court of the Republic of Kazakhstan adopted a regulatory decision "On the judicial protection of the rights, freedoms of man and citizen in criminal proceedings" [14], providing privacy and confidentiality of correspondence in judicial practice. This regulatory decision is designed for uniform interpretation and application in the jurisprudence of the constitutional norms and laws, guaranteeing personal freedom, privacy, personal and family privacy, confidentiality of correspondence, telephone conversations, postal, telegraph and other communications, as well as to improve the efficiency of their judicial protection.

However, the development of new information technologies, the formation of a unified multi-level personal database, the embodiment of the idea of building e-government emphasize the need to establish an effective mechanism to ensure the inviolability of the private life of human, guaranteeing secrecy of individual messages, transmitted both through telecommunications networks and without those.

The complexity of information technology is constantly growing. New opportunities emerge for collecting, analyzing and disseminating information about individuals and impel to the urgent enactment of the relevant legislation. New research in the field of medicine and health care, telecommunications, opportunities of transportation and movement of funds have significantly increased the amount of

information available on every person. Powerful computers connected through high-speed lines, can be used to produce a detailed dossier on every member of society, and no longer require a single central computer to do so. New technologies originally developed for the defense needs are being adopted in the law enforcement, government agencies and private firms.

As follows from the opinion polls, people in many countries are now more afraid of violation of privacy than it has ever been in recent history. Entire groups of people in different countries express their concern over an invasion of their privacy, and this causes the growing number of states to adopt laws especially designed to protect privacy.

Today it is clear that information technology is developing at a tremendous speed. The possibility of invasion of privacy - or at least the potential opportunities - is also increasing.

The technological devices, based on the latest technologies, appearing at the market of Kazakhstan confirm this. These are all kinds of recorders, miniature video eyes, means of transmission and recording of audio and video, etc. They are all designed and manufactured for household purposes and are intended to facilitate our life. However, the goals, pursued using such equipment can be different, including the illegal acquisition of secret information. Thus, technical progress determined the birth of a new, currently actively used term - technical devices of dual use (hereinafter - TDDU).

The Government order for the legal regulation of TDDU № 1247 of 26.09.2001 has not given sufficient results.

In some countries of the Commonwealth of Independent States in the early 90s was formed and gained turnover an uncontrolled market of special technical equipment, previous production and use of which has been the exclusive prerogative of the state. [15].

Besides these obvious aspects, there is also a number of important factors affecting the privacy violations: *globality*, i.e. the disappearance of the geographical boundaries for the data stream; *convergence*, i.e. the elimination of technological barriers between the systems, *multimedia*, i.e. modern forms of data and images presentation; information presented in one format, can be easily converted to other formats.

All this confirms the need to strengthen safeguards for the protection of the explored authority.

The right to privacy of correspondence is defined as guaranteed by the state opportunity to freely share personal information without fear that it

will be available to third parties.

Constitutional recognition of the inviolability of personal means of communication provides, in turn, the legal protection of privacy, as communication through the use of means of communication, is one of the essential parts of privacy.

For the first time secrecy of correspondence received legislative recognition in the Constitution of the USSR in 1936 [16]. And thereafter the concept of the right to privacy of correspondence was developed in the Soviet state-legal literature, mainly in textbooks and manuals.

Most thorough study of the right to privacy of correspondence was conducted by F.M. Rudinsky. He proceeded from the fact that the right to privacy of correspondence – is a constitutional right of citizens to state protection of their correspondence or other written information of a personal nature. In its content, based on the general structure of a subjective right, the author singled out the four basic elements (authorities) of the citizen:

1) the right to control the distribution of personal information among others;

2) the right to demand from government agencies and officials, nongovernmental organizations and individual citizens to avoid illegal and unwarranted unsealing of their correspondence, acquaintance and disclosure of its contents;

3) the right to demand from officials and civil servants, producing legal seizure of the post and telegraph correspondence, not to disclose personal information contained in its contents;

4) the right to protection of the above authorities through complaints and petitions addressed to the investigating authorities, prosecutors and agencies.

According to F.M. Rudinsky, the right to privacy of correspondence provides social benefits such as honor, dignity and inviolability of individual, intimate aspects of a person's spiritual life. Ability of an individual to control the spread of information, concerning him, enhances the prestige, guarding the dignity of the individual [6].

In the USSR Constitution of 1977, this right of citizens was extended. In particular, Art. 56 established that the confidentiality of correspondence, telephone conversations and telegraphic communications is protected by law [17].

Thus, in contrast to the wording in the Soviet legislation, the new Constitution of the Republic of Kazakhstan establishes integrity of "other posts".

Thus, under the protected information is to be understood not only correspondence, but telegraph conversations, postal and telegraph messages, as well

as all other sorts of information, including messages submitted by fax, telex, radio, space (satellite) connection, using other technical communication channels.

As we can see this right has a long history and the total control over the individual is possible through its stint.

Wiretapping was first recognized in the USSR legislation in 1990, when the Law "On Amendments and Additions to the Basic Principles of Criminal Procedure of the USSR and the Union Republics" [18]. Previously tapping had been regulated through secret instructions. Later, the right to listening was secured for the bodies of internal affairs and the National security committee in the law of the Republic of Kazakhstan "On Operational-Investigative Activity" dated September 15, 1994 [19].

The law of the Republic of Kazakhstan "On Operational-Investigative Activity" does not establish any procedural form for carrying out investigative actions, but at the same time allows the use of the obtained data as evidence in criminal cases after their procedural execution (a feature of documented evidence).

Evidence – is the actual data (information), underlying a procedure provided by law – establishing the presence or absence of a criminal act, the guilt of the person who committed it, and other circumstances that are important for the proper resolution of the case. Methods of obtaining evidence are statutory investigations. Among them are the inspections, searches, seizures.

And only due to changes introduced to the Criminal Procedure Code of the Republic of Kazakhstan [20] the question on the use of results of operational-investigative activity in proving criminal cases became regulated. The need to specify the procedure of applying the results of operational-search activity in proving criminal cases in Article 130 of the Criminal Procedure Code of the Republic of Kazakhstan was long overdue, because the reference to Articles 125-128 of the Criminal Procedure Code of the Republic of Kazakhstan is not entirely justified, since the mentioned articles regulate the procedure of collection, consolidation and evaluation of the evidence, collected through the investigative and judicial means in a greater degree. But often prosecutors and investigators required reclaiming materials, that reflect the results of the operational-investigative activity, and therefore the relevance of such fixation in the Criminal Procedure Code of the Republic of Kazakhstan is justified.

The Law of the Republic of Kazakhstan "On Operational-Investigative Activities" does not specify when the bodies, producing operational search

actions, acquire the right on wiretapping, monitoring of mail, etc. Listening is performed to detect crimes (Article 12, paragraph 4 of the Law of the Republic of Kazakhstan "On Operational-Investigative Activities") [19] and to obtain information about the "signs" of a prepared offense when "there is no sufficient data to address the issue of a criminal case". This means that at the first stage the listening is unaddressed, random and in absence of a specific person under suspicion which clearly contradicts Article 18 of the RK Constitution.

No less interesting is Section 7, Article 12 of the Law of the Republic of Kazakhstan "On operative-investigative activity" [19] that allows wiretapping with notification of the prosecutor and subsequent receiving of sanctions within 24 hours. But what if the prosecutor, finding the grounds insufficient, refuses to issue sanctions? Unfortunately, this question is not regulated anywhere.

According to the Article 18 of the Constitution of the Republic of Kazakhstan the secrecy is uncovered when the form or contents of the message sent, the identity of the sender, recipient or the methods of delivery are reported, whether accidentally or intentionally telephone conversations are overheard or recorded.

Law of the Republic of Kazakhstan "On communication" emphasizes that telecom operators provide guaranteed by the Constitution of the Republic of Kazakhstan privacy of correspondence, telephone conversations, postal, telegraph and other messages transmitted through telecommunications networks, except restrictions on this right in cases and order directly established by legislation. Operators are responsible for violation of the communications secrecy [13].

Law enforcement authorities can initiate restriction of communications secrecy, in accordance with two laws: the Criminal Procedure Code and Law of the Republic of Kazakhstan "On Operational-Investigative Activities".

It is noteworthy that the criminal procedure legislation of Kazakhstan has "recognized" such investigative action as listening and recording of telephone conversations. The first experience in procedural regulation of wiretapping in Kazakhstan was the abovementioned law "On Amendments and Additions to the Basic Principles of Criminal Procedure of the USSR and the Union Republics". In accordance with the law interception was permitted in the presence of a number of conditions.

Later, after formation of the Commonwealth of Independent States, for a long time the scientific literature was occupied with discussion on the applicability of Article 35-1 of the Act. Prior to

adoption of the Criminal Procedure Code of the Republic of Kazakhstan there was not similar regulation in our state.

Article 237 of the Criminal Procedure Code of the Republic of Kazakhstan allows wiretapping and recording of conversations through telephones and other communication devices. Thus, the Criminal Procedure Code of the Republic of Kazakhstan does not limit investigations with only one form of communication.

Terms of such events are the following grounds:

- The presence of the criminal case on the grave or gravest crime;
- The issue of a reasoned decision by the investigator in order to obtain prosecutor's warrants. The law imposes certain requirements to the content of the regulation (Part 2 of Art. 237 of the Criminal Procedure Code of the Republic of Kazakhstan);
- Limited range of the wiretapping subjects;
- The suspect, the accused and other persons who have information about a crime.

An exception to the general rule is provided: "If there are threats of violence, extortion and other criminal acts against the victim, witness or their families, then wiretapping and recording of conversations over the phone or other devices is conducted in accordance with the resolution of the investigator, authorized by the prosecutor with their consent" [20].

Monitoring and recording of telephone and other conversations are limited to six-month period.

Investigator may demand from the authority, conducting technical listening, the soundtrack for an inspection and listening at any time of the entire period set in the decision.

The novelty is that after the observations and listening of the soundtrack the investigator draws a protocol, in which witnesses and, if necessary – a specialist are involved. Participants of the listening and record are warned about the liability for disclosure of information.

Due to the fact that the investigative action is related to the limitation of the constitutional right to confidentiality of telephone conversations, we believe it is appropriate to introduce mandatory judicial control over the restriction of privacy.

Introduction of the judicial control to the Republic of Kazakhstan is necessary for the following reasons:

- Current bringing of national legislation in line with the ratified international legal norms and implementation of the constitutional establishment of the judicial authority as a guarantor of the rights and freedoms of citizens;

- Separation of powers between the legislative, executive and judicial, which is a testament to the task of laying protection of the rights of a person and citizen on the courts;

- Legislator, introducing the constitutional powers of the court during the preliminary investigation, assumed that the judicial power would be a barrier to the abuse of the criminal prosecution bodies, as the court is not responsible for crime detection and the quality of the investigation, is not associated with the purpose of the indictment and narrow departmental interests;

- Ensuring the availability of judicial protection to citizens during the preliminary investigation and, therefore, the possibility of rapid and effective restitution.

In favor of improving the judicial protection of the right to privacy in Kazakhstan through the expansion of judicial supervision states the experience of foreign countries. Foreign experience is very diverse, but one thing is in common: the court is seen as the main guarantee of the rights and freedoms of the individual.

In this regard, it seems advisable to follow the path of expansion of the judicial supervision and role of the judicial power in Kazakhstan, which will significantly contribute to the progress in building a legal state.

Many Western lawyers, guided by the principles of a lawful state, express objections to interception, mailings monitoring, taking information from technical communication channels. From their perspective, a free individuality, its dignity – is the highest value of the constitutional order. Referring to the experience of foreign countries, we can see that there are clear grounds for the consolidation of eavesdropping (specific list of offenses). Moreover, the legislation of foreign states outlines the information having probative value, and requires the destruction of materials that are not related to criminal cases under investigation. Also there is a practice of determining the list of subjects for which there may be limitations. In addition, application of operational and investigative activities is possible only in absence of other ways of acquisition of the necessary data.

#### 4. Conclusions

Given the positive experience of foreign countries, as well as accumulated practices in the protection of privacy in Kazakhstan, the government needs to think about creating a more effective legislative protection mechanism of the considered powers, which will focus and strengthen the guarantees:

– The use of the personal cards or files that contain personal data, where the purpose and amount of information are different and are used for different purposes. Data collection systems can be directed to the fight against extremism or terrorism, or just be part of national registration systems;

– Biometrics, i.e. the process of collecting, processing and storing data on the physical characteristics of a person for the purpose of identification. The most popular biometric systems are retinal scan, hand geometry investigation, fingerprinting, voice recognition and digital (stored in electronic form) photo;

– Monitoring of communications, as in almost all countries there is possibility of telephone, telex and facsimile messages control;

– Interception of Internet messages and mail. Internet becomes an integral part of modern life, which must be protected from intrusion and control by the authorities;

– Video surveillance. In virtually all countries, the streets are covered with a network of cameras; each of them has the potential pan, zoom in and out and infrared imaging. Such systems are based on complex technology, including night vision, computer control and motion sensors.

Kazakhstan's legislation contains a number of provisions relating to the protection of privacy. However, these legal norms are not enough to guarantee compliance with this law by all state agencies, individuals and organizations.

In this connection, in order to bring Kazakhstan's legislation in line with international standards for the protection of the right to privacy it is necessary to adopt special legislation that would guarantee the protection both from illegal and arbitrary interference.

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