



Inviolability of the home: problems and prospects of legal regulation

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Abstract: A legal state recognizes certain freedom of an individual, unattainable for government intervention. Proportionality of the interference in the private life of citizens – is a recognized principle of assessing the correctness of actions, peculiar only to the rule of law. One of the most important aspects of a comprehensive institution of privacy, which at the same time, is the most vulnerable and very complicated in terms of protection – is the right to inviolability of the home. This is demonstrated by the jurisprudence of the European Court of Human Rights (ECHR). The need for legal protection and defence of the right to inviolability of the home is tempting to conduct a comprehensive study, as considered authority has its own special content that has outer and inner side. The inner side of the right's content delimits citizen's behavior in his own home. The outer side of the right serves as a legal protection of the citizen from the invasion of housing (and thus, privacy) by third parties (1). In addition, the home hosts a variety of investigative activities: search and seizure; inspection of the scene; investigative experiment; personal searches; the measures of procedural coercion are applied: detention of the suspect; arrest; house arrest.

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1. Introduction

The right to inviolability of the home is an essential component of privacy, which was enshrined in international instruments and national legislation in many countries. So, according to Article 12 of the Universal Declaration of Human Rights of 1948, “no one shall be subjected to arbitrary interference with his ... home...” (2). CIS Convention on Human Rights and Fundamental Freedoms of 26 May 1995 provides that “there shall be no interference by a public authority with the exercise of this right...” (3). According to Article 17 of the International Covenant on Civil and Political Rights, “no one shall be subjected to arbitrary or unlawful interference with his ... home...” (4). The right to inviolability of the home is enshrined in paragraph 1 of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which states: “Everyone has the right to respect for his ... home...” (5).

These norms of international legal acts formed the basis of the national legislation in many countries, including the Republic of Kazakhstan (RK).

Thus, the Constitution of the Netherlands (Article 12) indicates that the penetration of the home against the will of its occupants is only permitted in the cases established by Act of Parliament or any other act issued on the basis

thereof, and respecting a number of specific conditions and requirements (6). The Portuguese Constitution specifically proclaims the inviolability of the home and privacy of correspondence (Article 34) (7). The Russian Constitution states, inviolability of the home implies that nobody has the right to enter a home against the will of the persons living there (article 25) (8).

Article 25 of the RK Constitution, guaranteeing citizens with inviolability of the home, establishes that penetration into a housing, its inspection and search shall be permitted only in the cases and in the manner prescribed by law (9). This means that nobody has the right, without lawful grounds, to enter a home against the will of the occupants. Nevertheless, the official statistics show that the number of crimes violating the inviolability of the home increases. If in 2010, there were 566 crimes committed under Article 145 of the Criminal Code “trespassing”, in 2011 the number increased to 805, in 2012 to 1265, and in 2014, the number of reported crimes was 1083 (10).

Growth dynamics of crimes infringing the inviolability of the home confirms the thesis of increasing relevance, and allows to identify the causes of this negative phenomenon and to seek the best ways to eliminate them.

Considerable material on the problems

associated with the implementation and protection of the right to inviolability of the home has been accumulated in the legal literature. These are the works of such scholars as: I.L. Petrukhnina (11), L.O. Krasavchikova (12), G.B. Romanovsky (13), O.E. Kutafin (14), M. Wugmeister (15), W. Steinmuller (16), A. Westin (17), Louis D. Brandeis, S. Warren (18).

2. Materials and methods

Methodological basis of the research is established on the traditional methods of the objective reality cognition. During the study, the statistical, comparative-legal and formal-logical methods have been used widely.

3. Results and discussion

Totalitarian and authoritarian regimes tend to control the state and private (individual) human life to some extent, limiting its spatial and territorial freedom. In a civil society and a truly democratic state, a person is autonomous and independently decides the issues of his private life, not allowing offhand interference of the state power. Normal human activity depends not only on the physical protection of his personality, but also on providing the conditions necessary to meet their material and spiritual needs. In this sense, the legal protection of the individual includes both his personal physical (life, health, honor, dignity) security and contributing to this welfare factor, including the inviolability of property as well. Among the tangible property belonging to a person, housing stands out for its practical significance and legal status. The problem of ensuring the inviolability of housing occupies an important place in international law and interstate legislation.

A very interesting fact is that in the USA and Britain the norm about invasion of residence is not specifically protected, but the protection of residence is connected to the protection of other social relations (e.g., theft, burglary, etc.).

The Criminal Code of Germany, as well as the Russian Criminal Code criminalizes attacks on the inviolability of the home (19).

Since the term “home” is not clearly defined in the laws of states and questions about the definition of “home” often rise in the jurisprudence, we quite naturally wonder what is meant by “home”.

Home is a collective (generic) concept. It combines all the facilities that serve as residence for one or more persons, usually family, or are used for this purpose. Within the meaning of this provision this concept covers the rooms in hotels, boats, trailers and camping tents, i.e. those “homes”, which are designed for temporary accommodation of people (19).

Note that the premises range, protected in Art. 25 of the Constitution of the Republic of

Kazakhstan, is extensive. In addition to houses and apartments, this includes “homes on wheels”, building cabins, hotel rooms, yacht cabins etc., if there live people authorized not to allow strangers into the place of their private lives. In certain cases, this term may be used for premises used for professional purposes.

Therefore, the relationship between the two concepts of “home” and “accommodation” is often questioned in theory and practice: are they the same in substance and content?

Relationship of legal categories of “home” and “accommodation” is undisputable. At first glance, they are equal, defined as synonyms, but in practice it causes difficulties and various disputes. Therefore, a clear definition of these two concepts is of great importance for the proper use in the work of theorists and practitioners.

According to the Law of the Republic of Kazakhstan “On Housing Relations” (article 2), a home is an independent living unit (detached house, flat, dorm room), designed and used for permanent residence that meets the established technical, sanitary and other mandatory requirements; and accommodation (apartment) is a separate room, designed and used for permanent residence, including both residential and non-residential areas of the home. Based on this, we can conclude that these concepts are ambiguous, and the concept of “home” is broader than the concept of “accommodation” (20).

The legislator uses the term “home” not only in the Constitution, civil and housing legislation, but also in criminal and criminal procedural law. Under housing, in accordance with paragraph 42 of Article 7 of the Criminal Procedure Code of the Republic of Kazakhstan (the CPC), is meant a building or structure for temporary or permanent residence of one or more persons, including their own or rented apartment, house, garden house, hotel room, cabin; directly adjacent thereto verandas, terraces, galleries, balconies, basement and attic residential buildings, except apartment building, as well as a river or sea vessel (21). Criminal legal concept of accommodation is interpreted broadly. It includes not only real estate, but also movable material objects that meet the criteria set in the law. Even jurisprudence is ambiguous on the semantic content issue of the concept “home”. According to the Pavlodar regional court, assignment of a cabin to housing is wrong, as well as river and sea vessel, because they are vehicles like train.

At the same time Aktobe regional court considers that vehicles can be equated to the home: a train compartment, steamer cabin, as well as private garages, outbuildings and land adjacent to the house, as they are associated with the place where the citizen exists (lives) at each time point.

Aktobe and Kostanay oblast courts believe

that under the housing should be understood not only the location (it is characterized as a permanent or primary residence of its occupants), but also a place of stay – official and temporary (hospital, hotel, resort, holiday house, camping, guest houses and other similar institutions) (22).

In the judgment, Nimitz against Germany, the European Court formulated and justified the doctrine of a broad interpretation of the term «home». The decision emphasizes that the word «home» also applies to premises. The Court noted that such interpretation is fully in tune with the French version of the text, as word «domicile» has even wider implications than «home», and can spread to a business office of a lawyer-type) (23).

To summarize, we believe that under the housing must be understood:

- Houses, apartments and other premises that are directly targeted for human habitation;
- Premises or buildings designed for temporary accommodation: hotel rooms, rooms in hostels, guest houses, holiday homes;
- Premises or buildings intended to stay in-season: cottages with surrounding areas, tourist tents, summer houses in the recreation areas, etc.;
- All household buildings related to the main housing by various factors, including garage, summer kitchen, barns, etc.;
- Place of temporary nature: car, train compartment, marine vessel cabin, etc.;
- Territory – a land belonging to the housing.

This is not an exhaustive list and it is possible to understand other legal ownership under housing.

Current legislation of the RK acknowledges that home is inviolable, but at the same time allows insight into its limits against the will of the persons living there. In this regard, general requirements were developed that apply to any action of the penetration of the home against the will of the occupants.

Paragraph 1 article 39 of the Constitution states: “The rights and freedoms of a person and citizen can be restricted only by law and only to the extent, necessary in order to protect the constitutional order, public safety, human rights and freedoms, health and morals” (9). Based on this provision, the possibility of using legislation to restrict the rights and freedoms of citizens is excluded. The constitutional principle of “inviolability of the home” means prohibition to anyone entering a home against the will of the people living there.

The right to inviolability of the home belongs only to authorized persons. Proof of this are the documents confirming the right of a person to use current location as a place of residence or stay (documents proving ownership, lease agreement, etc.).

Entry, even forced, of one of the eligible persons, in case of disagreement or obstruction of other citizens living there, cannot be qualified as violation of immunity of residence.

Penetration into a home, its inspection and search shall be permitted only in the cases and in the manner prescribed by law. Who, and on what basis is granted this right?

The right of unimpeded entry into residential premises belongs to law enforcement officers in the manner and in the cases provided by law. The right to inviolability of the home is legally limited during a criminal case under such procedural investigative measures as search and seizure, which grounds and procedure are in detail regulated in the CPC. Inspection of a living accommodation is made only with the consent of the adult persons living there or with the sanction of a prosecutor. If the occupants are under age or obviously suffer from mental or other serious illness or oppose the inspection, the inspector shall order the compulsory inspection, which must be authorized by a prosecutor. In case of denial of prosecutor's sanctions the inspection is not performed.

If the living accommodation is the place of the incident, and its inspection cannot be delayed, the inspection of residential premises may be made by resolution of the investigator, but with the subsequent notification of the prosecutor in the daily period of the produced inspection in order to verify its legitimacy. After receiving such notice, the prosecutor verifies the legality of produced inspection and issues an order on its legality or illegality. If the decision on the illegality of the produced inspection is made, the action cannot be admitted as evidence in the case (Article 222 of the CPC RK).

In cases provided by law, the right to enter a home belongs to the judicial executors in the production of inspection and seizure of property of the debtor; rescuers for the work on liquidation of emergency situations, etc.

Placement of special technical devices of audiovisual observation without the knowledge of the persons living in the home should be considered trespassing along with entering the home.

In regard to placement of special technical devices in a home a situation from the U.S. jurisprudence is interesting. In 1967, in judgment in the case Katz against the United States the Supreme Court of America canceled an old law recognizing eavesdropping without a “physical intrusion” to be legal (24). FBI agents, without a warrant, attached a listening device outside the public phone booth, which allowed them to record incriminating conversations of Katz with his accomplices in gambling. In his appeal, Katz argued that the telephone booth was a

“constitutionally protected area” and that the placement of a listening device on the roof of the cabin violated his privacy.

As the result, the guilty verdict of Katz was canceled. The court ruling stated that any person no matter where he was: in a business office, friend’s apartment, in a taxi or in a phone booth – can rely on the protection of the IV amendment. A person closing the door of a phone booth and pronouncing the words into the phone never addresses them all around.

Thus, a new interpretation of IV Amendment was born and eavesdropping in its legal consequences was regarded as search and seizure, and became illegal without a warrant issued accordingly.

Despite the fact that there exists a fairly wide range of law enforcement activities to penetrate the housing in order to prevent danger, it is necessary to keep in mind and remember that the principle of proportionality of the applicable rules with the gravity of the alleged offense or the upcoming danger must be complied with.

When assessing the legality of entry into a housing, inspection and search the courts should be guided by the provisions of Articles 25 of the Constitution and 17 of the CPC RK on the inviolability of the home, therefore producing the above actions could take place only in the cases and in the manner prescribed by law. The need for strict compliance with the procedural arrangements for such actions, stipulated by Articles 201-203, 221, 222, 227, 230, 232 and 234 of the CPC RK, should not be seen only as fulfillment of the requirements of the law, but also as a mechanism of protection of the inviolability of the home and protection of privacy, personal and family secrets, guaranteed by law.

Since the restriction of a citizen’s right to privacy, home, correspondence, telephone conversations, postal, telegraph and other communications shall be permitted only in cases and in accordance with the procedure directly established by law (paragraphs 1 and 2 of Article 18, paragraph 1 of Article 25 and Article 39 of the Constitution), courts should proceed from the fact that investigative measures that restrict the constitutional rights of these citizens may be conducted only under the conditions specified in Article 12 of the Law “On Operational-Investigative Activities” (25). The results of these search operations can be used as evidence in cases only after their inclusion in the criminal proceedings in the manner provided by Article 130 of the Criminal Procedure Code.

If the search operations have been conducted in violation of the rules established by law or authorities were not given the right to conduct them, all the resulting materials would be invalidating evidence.

The above provisions of the Criminal Procedure Law were primarily carried out, but irregularities were admitted.

Here are a few examples from the jurisprudence of Kazakhstan:

- In criminal proceedings against Lavrova L., justified by the court № 2 of Ust-Kamenogorsk for the lack of evidence of the charges, it was found that the search of an apartment house, registered as a crime scene examination, has been performed without a prosecutor’s warrant and without his further notice about the search conducted;

- The supervisory board of the Supreme Court of the Republic of Kazakhstan recognized unacceptable use of the operative crime detection activity materials as evidence, on the basis of which Konoplitsky prosecution was built. In particular, it was proved that in this case the operative crime detection activities (inspection, search and seizure) have been carried out in violation of the Articles 10, 12 of the Law “On the operative crime detection activities”;

- When considering the criminal case against V. Kuhar under Article 259, part 1 and Article 251, part 1 of the Criminal Code it was revealed that an unauthorized search of the apartment has been performed with the purpose of detection and seizure of items relevant to the case, however, the procedural action was formalized as a home inspection;

- In the criminal case against S. Popova, convicted by the court № 2 of Pavlodar city under par. “b”, part 4, Article 259 of the Criminal Code, operatives of the inquiry agencies first entered the house by breaking the window glasses, and then took the consent to inspection from the adults living there. In fact, in this criminal case the search was conducted, but the procedural action has been formalized as a home inspection and the sanction of the prosecutor has not been received, there was no further notice of the prosecutor either.

- Operatives Chukubasov and Zhandarov of the Department of Internal Affairs base station of the Auezov district had invaded apartment of Buslaeva through a window, searched the apartment, found nothing, then have planted a packet of heroin in a sofa, forced Buslaeva to give consent to the inspection of the apartment, and then called the investigation team (26).

The above cases of gross violations of the constitutional rights of a person and citizen, demonstrate the need for firm measures to prevent such actions.

The most interesting is that according to the statistics a few persons were convicted for trespassing (article 145 of the Criminal Code) in 2007 – 62, in 2008 – 46, in 6 months of 2009 – 39 (27). However, from a total of convicts there is no single person that would have been sentenced for

illegal invasion into housing by using his official position, that is, under part 3 of Article 145 of the Criminal Code. Thus, the facts of bringing the workers of law enforcement or other government authorities under the specified regulation of the criminal law over the study period are not available.

The question of how to act, if in the result of inspection or search the doors were broken, disorder arranged, etc.; Who should put the room back in order is considered to be open. Who will compensate for the damage caused as a result of the considered proceedings?

Given this situation, there is a need, to develop a new attitude to the right to inviolability of the home.

We believe it expedient to propose criteria to legitimacy of the search in the home, involving a series of consecutive actions of the competent authorities. The criteria for the legality of a search in the home are: a) the presence of actual and procedural grounds; b) the presence of the criminal case, and the court decision to conduct a search in the home or existence of circumstances of urgency; c) the presence of persons residing in the house during the search, on condition of their adulthood and acquaintance with the search warrant, or of representatives of housing organization or local government; d) respect for the property located in the home. It is necessary to combine the legality of the investigative actions in the house with the constitutional rights: personal, family and social.

4. Conclusions

Mechanism for the implementation of the principle of inviolability of the home in criminal proceedings should be considered inseparable from the housing, civil and family law. Analysis of domestic and foreign legal acts identified key trends to ensure the principle of inviolability of the home. The basic problems have been considered that arise in practice of preliminary and subsequent implementation of judicial control at conducting investigations in the residence. Priority of observance of human rights and freedoms in our country must continue the evolution, therefore legislation on the rights and freedoms of a person and citizen needs to be reformed and optimized.

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