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Comparative Legal Analysis of International and National Legal Norms Regulating the Protection of Personal Data

The research aims to summarize the development of national norms by analyzing international standards that lawfully regulate the protection of personal data, one of the issues in safeguarding the rights and freedoms of individual. It emphasizes the importance of Kazakhstan's accession to international instruments protecting personal data. The relevance of the research is determined by the problem of ensuring data security, which at the present stage has become a priority issue. The law has revealed instances that pose risks, particularly due to the absence of the clear provisions regulating the storage of citizen's personal data. The authors highlight that with the rapid development of digitalization in Kazakhstan, cases of personal data dissemination have increased, underscoring the necessity of improving national legal norms. Furthermore, the research raises issues of exercising control over the use of personal data and strengthening liability in cases of unlawful dissemination. Due to the weakness of the current legal mechanism for the protection of personal data, cybercrime is gaining momentum in society, negatively affecting citizens. One of the solutions to the problem is the improvement of national legislation that lawfully regulates the protection of personal data. Within the scope of the study, the authors formulated proposals for the establishing legal mechanisms in the current legislation to regulate the procedures for processing, storing, and destroying personal data, as well as for addressing actions related cto their preservation.

Keywords: personal data, collection, processing, and storage of personal data, protection of personal data, comparative legal analysis, directive, convention, European Union, USA, international legal norms, GDPR.

Introduction

The Constitution of the Republic of Kazakhstan, adopted by national referendum on 30 August, 1995, became a fundamental step in building a democratic state governed by the rule of law, where the rights and freedoms of individual and the citizen must be especially protected. The provisions enshrined in the Basic Law of Kazakhstan testify to a categorical rejection of the totalitarian approach to the "individual-state" problem. Under the constitutional system, the state is created to resolve vital issues of ensuring existence, while the individual becomes the main factor forming the essence of the state.

The new Kazakhstani statehood radically changes the nature of the relations between the individual and the state. "Not the individual for the state, but the state for individual" — this is the fundamental formula of their interaction. The priority of the individual over the state allows us to determine the place of the person in civil society. This place is not defined by the state, it is inherent to the person from the outset and is realized through their abilities and initiative. Thus, the content of Chapter 2 of the Constitution of the Republic of Kazakhstan is subordinated to the main principle: the rights and freedoms of the individual and the citizen are the highest value of the state. Consequently, all branches of power and all parts of the state mechanism serve the main purpose, which is to ensure and protect the rights and freedoms of the individual and the citizen, as well as their legal status.

The foundation of the legal status of the individual and the citizen consists of personal (civil) rights and freedoms. Most of them are absolute in nature, that is, they are not only inalienable, but also not subject to restriction (the right to life, freedom of nationality, freedom of conscience and religion, etc.). Along with this, certain rights and freedoms (e.g., the right to the protection of personal data) may be restricted by the state, which makes their legal protection especially relevant and significant.

The modern system of international law in the field of personal data, as well as the basic national laws, relies on a number of international documents. These acts are closely interconnected through the methods of

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regulating the protection of personal data and make it possible to examine the stages of the formation of international standards in this area.

The purpose of the research is to develop proposals aimed at improving national legislation on personal data protection by conducting a comparative legal analysis of international and national norms that lawfully regulate the protection of personal data.

Methods and materials

In the process of writing the article, general and general scientific methods (induction and deduction, analysis, systematization), special scientific methods (the historical method, generalization), as well as specific methods (comparative legal analysis, the formal legal method) were used.

The research was carried out through the analysis of international legal norms regulating the protection of personal data, as enshrined in such documents as the Universal Declaration of Human Rights adopted by the United Nations General Assembly, the International Covenant on Civil and Political Rights, the Convention for the Protection of Individuals with regard to the Automated Processing of Personal Data (ETS No.108, Strasbourg), as well as the General Data Protection Regulation of the European Union of 2016 (GDPR—General Data Protection Regulation). In addition, a comparative legal analysis of national norms enshrined in the legislation of states was conducted.

Results

The adoption of the Universal Declaration of Human Rights by the United Nations General Assembly on 10 December 1948 fundamentally changed the situation. Article 12 of the Universal Declaration of Human Rights states that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks" [1].

This right is also enshrined in Article 17 of the International Covenant on Civil and Political Rights [2], Article 16 of the Convention on the Rights of the Child [3], as well as in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [4].

The inability of the state to guarantee the right to the protection of personal data undermines the safeguarding of other rights and freedoms associated with it: freedom of expression, the right to peaceful assembly, the right to free access to information, the principle of non-discrimination, and ultimately the stability of constitutional democracy. For this reason, Article 17 of the International Covenant on Civil and Political Rights (New York, 19 December 1966) elaborates broadly on the inadmissibility of unlawful interference and formulates it as follows: "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks" [2]. According to it, everyone has the right to be protected from such attacks.

A major step in the development of the international system of personal data protection was the adoption of the Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data by the Council of Europe on 28 January 1981 (ETS No. 108, Strasbourg). This Convention entered into force on 1 October 1985 and is the first binding international instrument designed to protect individuals from abuses arising from the collection and processing of data [5]. In addition, the Convention regulates the transborder flow of personal data.

The Convention not only provides guarantees in the collection and processing of personal data, but also prohibits such collection and processing if national legislation cannot provide the necessary safeguards for certain "sensitive" data, such as information about a person's race, political opinions, health status, religious beliefs, or sexual life. Furthermore, the Convention grants individuals the right to be informed in due time about the collection of data relating to them and, if necessary, to request its rectification. The rights set out in the Convention may only be restricted in cases of threats to common interests, such as the protection of public order and the security of society and the state.

The Convention also imposes restrictions on regard to the transborder flow of personal data. In particular, it limits the transfer of data to states that do not ensure an adequate level of protection. The main reason for the development of the Convention was the need to harmonize the national legislation of European countries in the field of personal data. In this regard, in 1981, the European Commission published recommendations for European Union member states concerning the conclusion of appropriate agreements on the implementation of the Convention. Currently, more than 45 European countries are parties to it.

It should be noted that Kazakhstan is not a party to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108, Strasbourg, January 28, 1981) [6]. Nevertheless, the approaches and principles enshrined in national legislation are close in content to the provisions of the aforementioned Convention. Kazakhstan's accession to this international document would be of great importance, as it would allow investigations into violations of the rights of our citizens in the field of personal data protection jointly with authorities of the participating countries.

The main purpose of the Convention is to ensure respect for the rights and fundamental freedoms of every individual, regardless of nationality or residence, within the territory of the participating states, in particular the right to privacy in relation to the automatic processing of personal data ("data protection").

In 1995, the European Parliament and the Council of the European Union adopted the Directive on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data (No. 95/46/EC) [7]. The main purpose of the Directive is to implement Article 100a of the Treaty establishing the European Economic Community, which provided for the creation of a single internal market. Directive 95/46/EC on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data was repealed in accordance with Article 94 of Regulation No. 2016/679 of the European Parliament and of the Council of the European Union [8].

On 11 March 1996, the Directive on the Legal Protection of Databases (No. 96/9/EC) [9] was adopted, the main purpose of which was to form a uniform character of database protection in the European Union member states.

These directives of the European Union oblige the member states to ensure the proper quality of the information collected and processed (the collection and processing of data must be defined by law and carried out strictly in accordance with its provisions), as well as to guarantee the protection of information and to establish appropriate supervisory and control authorities. Particular attention in the directives is paid to the means of ensuring the confidentiality of personal data and the rules for their cross-border transfer.

Along with the above-mentioned documents, the European Union has adopted several directives aimed at regulating the protection of personal data in various fields. In particular, in the field of electronic communications, the Directive on Privacy and Electronic Communications (No. 2002/58/EC) was adopted, which establishes requirements for the processing of personal data and the protection of privacy [10]. The purpose of this Directive is to harmonize national regulations necessary to guarantee an adequate level of protection of fundamental rights and freedoms.

One of the most important steps in the development of personal data protection was the adoption of the General Data Protection Regulation (GDPR) by the European Union in 2016 [11]. The adoption of this act contributed to the formation of a culture of ensuring data confidentiality by every individual and also became a driving force for further strengthening digital human rights. Violations related to the collection, processing and storage of personal data damage not only the reputation of public authorities and private companies, but also undermine the trust of consumers of these services. Therefore, according to the new regulation, the protection of personal data has become not merely another task for the European Union, but also a new approach to shaping a culture of thinking and behavior within each organization and among individuals.

The Regulation established stricter requirements for the consent of personal data subjects, increased transparency with regard to how and for what purpose data are collected, processed, transmitted or destroyed. According to many researchers, the GDPR became an important step in the field of personal data protection for a number of reasons. First, the Regulation definitively changed the approaches to the processing of personal data in all sectors of the European Union. Second, its provisions increased the knowledge of specialists and individuals on issues of personal data. Third, the Regulation granted individuals broad powers to control the use of their data. Fourth, citizens of the European Union became more informed and aware of their rights to personal data protection. These conclusions are confirmed by the results of a survey conducted in 2019 within the framework of the Eurobarometer project [12]: 67 % surveyed citizens of the European Union indicated that they are familiar with the Regulations, 36 % know the consequences of non-compliance with the Regulations may entail, and 57 % are aware that each country has a specialized authority responsible for the protection of personal data [13].

At present, almost all European Union member states recognize the effect of the General Data Protection Regulation (GDPR) and have brought their national legislation into compliance with its requirements. For example, Sweden adopted the Personal Data ACT (Personuppgiftslagen), while in Germany these relations are regulated by the General Data Protection Regulation (GDPR) and the Federal Data Protection Act (BDSG).

Thus, modern European law in the field of personal data protection, which has accumulated extensive experience of formation and is still being improved today, can be described as the most pragmatic. In accordance with it, all objects and subjects requiring protection, and its economic effectiveness has been proven in practice.

Kazakhstan, like other countries of the world, is actively developing an innovative economy, in which various industries are undergoing digital transformation. Digitalization is currently a key factor contributing to economic growth and is a national-level priority for Kazakhstan.

Along with the active process of digitalization, intensive information processing is also observed in the country. In the National Development Plan of the Republic of Kazakhstan until 2029, one of the priority tasks is the optimization of regulation in the field of personal data protection (priority 2) [14].

By Resolution of the Government of the Republic of Kazakhstan, the Concept for the Development of Digital Transformation, Information and Communication Technologies, and Cybersecurity for 2023–2029 was approved, which addresses issues related to the protection of personal data. One of the principles of the development of the field of information and communication technologies and cybersecurity is the principle of trust, which includes the protection of privacy and personal data, as well as monitoring digital security [15].

In the Concept of Legal Policy until 2030, approved by the President of the Republic of Kazakhstan, the obligation to revise the legislation on personal data protection in accordance with its basic principles is established. In addition, taking into account international experience, a draft of the Digital Code is currently being developed [16].

In Kazakhstan, a regulatory and legal framework is gradually being formed to govern legal relations connected with the collection, processing, and control of personal data. The legislation regulating the protection of citizens' personal data is based on the Law of the Republic of Kazakhstan "On Personal Data and Their Protection" adopted on 21 May 2013, as well as on the Law of the Republic of Kazakhstan "On Dactyloscopic and Genomic Registration", the Law of the Republic of Kazakhstan "On Electronic Document and Electronic Digital Signature", the Law of the Republic of Kazakhstan "On National Security of the Republic of Kazakhstan", and other laws, supplemented by government resolutions and orders from authorized ministries.

Article 18 of the Constitution of the Republic of Kazakhstan states: "1. Everyone shall have the right to inviolability of private life, personal or family secrets, protection of honor and dignity. 2. Everyone shall have the right to confidentiality of individual deposits and savings, correspondence, telephone conversations, postal, telegraph, and other messages. The limitation of this right shall be permitted only in cases and according to the procedure directly established by law" [17].

In order to implement the above-mentioned constitutional guarantees, on 21 May 2013, the Law of the Republic of Kazakhstan "On Personal Data and Their Protection" was adopted. In accordance with paragraph 2 of Article 1 of the said Law: "personal data are information relating to a specific or determinable subject of personal data, recorded on electronic, paper and (or) other material carriers" [18]. Expanding this definition, personal data includes information in electronic or paper form, or such information must be recorded on other carriers (disks, flash drives, etc.). In our view, the issue of the legal status of individual information transmitted orally has not been fully resolved.

By Order of the Minister of Digital Development, Innovation and Aerospace Industry of the Republic of Kazakhstan dated 29 August 2024, No. 526/NK, a list of personal data of individuals included in the state electronic information resources was approved [19]. According to the order, the following information is classified as personal data: individual's last name, first name, patronymic, transcription of last name and first name, , date of birth, place of birth, nationality, gender, marital status, citizenship, individual identification number, digital photograph, signature, legal address, and details of the identity document.

A comparison of the Law of the Republic of Kazakhstan "On Personal Data and Their Protection" with foreign legislation showed that the Kazakhstani law is distinguished by a rather high degree of specificity and comprehensiveness. At the same time, practice demonstrates that many aspects of ensuring the security of personal data remain insufficiently regulated. Thus, Article 2 of the Law of the Republic of Kazakhstan "On Personal Data and Their Protection" states that the purpose of the Law is to ensure the protection of rights and freedoms of individuals and citizens in the collection and processing of their personal data [18]. Paragraph 1 of Article 1 defines the concept of "collection of personal data", defining it as "actions aimed at obtaining personal data". Unfortunately, the law does not define the concept of "processing of personal data". In addition, in our opinion, the norm provided in Article 2 of the Law does not cover actions related to

the storage of personal data. In other words, measures related to ensuring the integrity, confidentiality and accessibility of citizens' personal data are not clearly defined.

Discussion

Contradictions in the development of legal protection of personal data are noted in the works of many scientists [20; 33–35]. The concept of "protection of personal data" is conditional, since it is not the data itself that are protected from unlawful or arbitrary use, but its bearer—the individual. At the same time, personal data should not be completely removed from circulation; however, the procedures for their collection, storage, and processing must be clearly regulated so that the rights of the personal data subject are adequately safeguarded.

As mentioned above, the protection of personal data is closely connected with the right to privacy. As a legal category, this right took shape in 1928, when the United States Supreme Court Justice L. Brandeis stated that the United States Constitution provides for the "right to be let alone" and the "right to privacy". This statement has serious scientific foundations. As early as 1890, the young Boston lawyer L. Brandeis, together with Justice S. Warren, prepared and published an article "The Right to Privacy", which for the first time raised legal and ethical issues arising from the practice of active interference in private life.

The earliest precedent for the protection of personal data arose in 1965, when the United States Supreme Court considered the Griswold case. In its decision, it was indicated that the right of a person to privacy had existed long before the Bill of Rights. As a result, the American legal doctrine recognized the right to "privacy", i.e., the right of every person to control their "personal living space" and to be protected against the unjustified seizure of personal documents. This implies that the individual independently decides what information about them, to what volume, and in what form to transfer to third parties.

L. Brandeis's formulation of the "right to privacy" underwent significant changes in the 21st century. Whereas previously state interference in private life was strictly prohibited, over time there appeared an increasing number of legitimate grounds for collection and processing of information related to private life. The acceleration of this process in the United States was largely due to the events of 11 September 2001 in New York and the subsequent counter-terrorism campaign. In 2002, the Sarbanes-Oxley Act was adopted, with its primary focus not on the protection of personal data, but on maximizing the transparency of databases to prevent threats to public security.

The Russian scientist Yu. Travkin notes: "The spread of the European approach to personal data issues and its recognition in almost all countries of the world, from Central and Eastern Europe to Canada, the Asia-Pacific region and Latin America, is not an accidental. In all of these states, a legal framework concerning personal data has developed, but the content of the relevant laws is a clear reference to the legal system developed in Europe can be traced" [21]. This opinion is difficult to dispute. As mentioned above, the development of Kazakhstan's current legislation on personal data is also oriented towards the European model.

The absence of personal data in the law of norms regulating the storage leads to risks and threats confirmed by practice. Such risks arise form the loss of control over personal data, as cases of loss of electronic and paper carriers of personal data are not uncommon in domestic practice. For example, in 2017 the personal data of clients of the former Qazkom bank (now Halyk Bank) were discovered at a landfill. At first glance this may seem like an ordinary situation, but such information should have been kept in the bank's archive and destroyed using shredder in accordance with the established rules of archival storage and destruction of documents. The Qazkom Bank press service apologized, promised to identify and punish those responsible, but the result was only the dismissal of the head of the bank's branch in Astana, while the further fate of the clients' personal data remained unknown [22].

An example of the loss of personal data in electronic form can be seen in the following case. In 2019, the complete data of about 11 million citizens were leaked from the database of the Central Election Commission's to the Internet. That same year, the Association of Legal Entities "Center for Analysis and Investigation of Cyberattacks" (TSARKA) identified the fact of the leakage of Kazakhstani citizens' personal data. The complete database of 11 million citizens became available online. In August 2019, the Ministry of Internal Affairs of the Republic of Kazakhstan initiated pre-trial proceedings under case No. 197115031001878, opened on 22 July 2019, for the unlawful distribution of restricted-access electronic information resources under Part 1 of Article 211 of the Criminal Code of the Republic of Kazakhstan. However, the proceedings were terminated due to the absence of elements of criminal offense [23].

Conclusion

In conclusion, it should be noted that in the Republic of Kazakhstan, which is integrated into the global political and economic information space, there has been a significant impetus for the digitalization of the activities of state bodies and private structures. In our view, insufficient attention to the new opportunities of digitalization of society, as well as to its risks and threats, leads to the loss of the right to exercise state power in Kazakhstan, which belongs to the local population.

The formation of electronic government has not only led to a change in the relationship between the state and society, but has also reduced the cost of administering many tasks. At the same time, along with such positive changes in the Kazakhstani information system, there is a clear trend towards an increase in real threats to the information security of the Republic.

We consider it important to examine the issue of Kazakhstan's accession to the the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which would provide the right to investigate violations of the rights of our citizens in the field of personal data protection committed by operators of states that are parties to the Convention. This is of fundamental importance, since the purpose of the Convention is to ensure respect for the rights and fundamental freedoms of individual, regardless of citizenship or place of residence, and in particular, the right to privacy in relation to the automatic processing of personal data.

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14 Қазақстан Республикасының 2029 жылға дейінгі Ұлттық даму жоспарын бекіту және Қазақстан Республикасы Президентінің кейбір жарлықтарының күші жойылды деп тану туралы Қазақстан Республикасы Президентінің 2024 жылғы 30 шілдедегі № 611 Жарлығы. — [Электрондық ресурс]. — Қолжетімділік тәртібі: https://adilet.zan.kz/kaz/docs/U2400000611.

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Дербес деректердің қорғалуын құқықтық реттейтін халықаралық және ұлттық құқықтық нормаларға салыстырмалы-құқықтық талдау

Жүргізілген зерттеу азаматтың құқықтары мен бостандықтарын қамтамасыз ету мәселелерінің бірі — дербес деректерді қорғауды құқықтық реттейтін халықаралық нормаларға талдау жүргізу арқылы ұлттық нормаларды жетілдіру бойынша қорытындылар шығаруға бағытталған. Дербес деректерді қорғауға бағытталған халықаралық актілерге қосылудың маңыздылығы атап өтілген. Зерттеу тақырыбының өзектілігі қазіргі кезеңде басты назар аударатын дербес деректердің қауіпсіздігін қамтамасыз ету мәселесімен байланысты. Жұмыста азаматтардың дербес деректерін сақтау жөнінде құқықтық норманың болмауы себепті тәуекелдер мен қауіпке әкеліп соққан жағдайлар қарастырылған. Авторлар Қазақстанда цифрландырудың дамуымен бірге дербес деректердің таралып кету жағдайларының жиілеп кетуіне, ұлттық құқықтық-нормаларды жетілдіру қажеттігіне басты назар аударады. Сонымен қатар, дербес деректерді пайдалануды бақылау жүргізу, заңсыз таралған жағдайда жауапкершілікті жетілдіру мәселелері талқылауға шығарылған. Дербес деректерді қорғаудың құқықтық тетігінің әлсіздігі салдарынан кибералаяқтық қоғамда белең алуда, соның салдарынан азаматтар зардап шегуде. Бұл мәселені шешудің бір жолы — дербес деректерді қорғауды құқықтық реттейтін ұлттық заңнаманы жетілдіру. Авторлар қолданыстағы заңнамада дербес деректерді өңдеу, сақтау, жою тәртібін реттейтін құқықтық тетіктерді анықтау, дербес деректерді сақтауға қатысты әрекеттерді реттеу жөнінде ұсыныстарын тұжырымдайды.

Кілт сөздер: дербес деректер, дербес деректерді жинау, өңдеу, сақтау, дербес деректерді қорғау, салыстырмалы-құқықтық талдау, директива, конвенция, Еуропалық одақ, АҚШ, халықаралық-құқықтық нормалар, GDPR.

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Сравнительно-правовой анализ международных и национальных правовых норм, регламентирующих защиту персональных данных

Проведение исследования направлено на подведение итогов по совершенствованию национальных норм путем проведения анализа международных норм, правомерно регулирующих защиту персональных данных — одного из вопросов обеспечения прав и свобод гражданина. Подчеркивается важность присоединения к международным актам, направленным на защиту персональных данных. Актуальность темы исследования обусловлена проблемой обеспечения безопасности персональных данных, которая на современном этапе является главной в стране. В работе рассмотрены риски и случаи, возникшие вследствие отсутствия правовых норм, регламентирующих хранение персональных данных граждан. В условиях активного развития цифровизации в Казахстане участились случаи незаконного распространения персональных данных. Автор акцентирует внимание на необходимости совершенствования национальных правовых норм. Кроме того, вынесены на обсуждение вопросы проведения контроля за использованием персональных данных и совершенствования ответственности в случае их незаконного распространения. Из-за слабого правового механизма защиты персональных данных кибермошенничество набирает обороты в обществе, в результате чего страдают граждане. Одним из путей решения данной проблемы является совершенствование национального законодательства, регламентирующего защиту персональных данных. Авторами сформулированы предложения по установлению в действующем законодательстве правовых механизмов, регулирующих процедуру обработки, хранения, уничтожения персональных данных, регулирование действий, связанных с хранением персональных данных.

Ключевые слова: персональные данные, сбор, обработка, хранение персональных данных, защита персональных данных, сравнительно-правовой анализ, директива, конвенция, Европейский союз, США, международно-правовые нормы, GDPR.

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