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THE ENFORCEMENT OF EMPLOYEE RIGHT TO PRIVACY IN THE RUSSIAN FEDERATION
DARBINIEKU TIESĪBU UZ PRIVĀTUMU IZPILDES NODROŠINĀŠANA KRIEVIJAS FEDERĀCIJĀ

Anna V. Andreyanova
National Research University - Higher School of Economics (Saint Petersburg Campus), annaandreyanova5@gmail.com, Saint Petersburg, Russian Federation
Supervisor: ***Tatyana I. Belokolodova****, PhD in Law, Associate Professor*

Abstract. *The right to privacy is a constitutionally safeguarded human right. The employee right to privacy exists due to consolidation of the mentioned liberty in the Constitution of the Russian Federation. The Labour Code of the Russian Federation does not secure employee right to privacy directly, it regulates the issue of the employee personal data. But the employee right to privacy is characterized by particular qualities that are extrinsic to general human privacy. The aim of the present research is to analyze different spheres in which the employee right to privacy realizes. In response to this aim, firstly, the concepts of the privacy will be evaluated, the national and international labor law will be examined, and the judicial practice will be reviewed. Eventually, some unresolved points of the process of employee right to privacy enjoyment will be identified.*
Keywords: *employee, personal data, right to privacy*

Introduction

The right to privacy is an inalienable human right. The rights to privacy, to personal and family secret are constitutionally mandated. The employee right to privacy is based on the above indicated liberty. At the same time the employee right to privacy has its special aspects of enjoyment and legal regulation that arise from the kind of jural relationship in terms of which this right appears. Besides, it is considered as interrelated with the employer supervisory powers and right to data accessing, which also have an influence on the process of the employee right to privacy enjoyment.

Employee and employer are parties to employment relationship that are vested corresponding rights and obligation. The legal establishment of the perspicuous line between employer supervisory right exercise and employee's private sphere wherein invasion is inadmissible is considered as the topical issues of employment law. The advent and further extension of information technology as well as a widespread use of data engineering in various life spheres interferes with the issue of privacy. This challenge necessitates legislative improvement for achieving a goal of its reconciliation with newly emerged existence conditions of the data infrastructure. The urgency of this point is indicated in the scientific literature. For one, Dzhavakhyan and Yastrebova consider employee right to privacy as the issue of great current interest of the juridical science and law enforcement practice. The scientists mark that such employer action as the revision of the work electronic mail, the installation of the video control system at workplace and monitoring of the office telephone conversations are debating points of the labor law *(Джавахян, Ястребова, 2015, с. 106)*. Also Smirnova (2015), Osipova (2014) and Stanskova and Shafikova (2006) analyze the employee privacy as a currently important topic of the modern science. At the same time the mentioned subject matter is not investigated completely: inconclusive focus has been made on the special aspects of enjoyment of the employee right to privacy. Also its correlation with the employer supervisory powers seems to be not reported in scholarly works. In view of this, the present paper focuses in large part on the particular qualities in the process of employee right to privacy enjoyment.

On the one hand, a broad scope of rights, guaranties of its enforcement and remedies are attached for an employee as for a weaker party of a labor contract. On the other hand, an employer is interested in concerted efforts and rewarding work that is why he is vested with a right of supervisory and organizational powers with regard to employees. Nowadays the achievability of these powers is completely established on the technology utilization used by an employer at the different stages of employer-employee relationship.

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The aim of the paper is to analyze the different issues that appear in the process of enforcement of the employee right to privacy and to correspond and to balance investigated items with employer supervisory powers and right to data accessing. The tasks of this paper which serve as achieving the aim are:

1) the definition of terms "privacy" and "right to privacy";
2) the revealing of a legal platform of the employee right to privacy on the basis of international and national law;
3) the ascertainment of particular qualities in the process of the employee right to privacy enjoyment.

The main method used in the present paper is a formal legal method. It implies the analytical investigation of both national and international legislations. The Constitution of the Russian Federation, The Labor Code of the Russian Federation and The European Convention for the Protection of Human Rights and Fundamental Freedoms have become the object of study. Also selected judicial decisions that deal with invasion upon the employee right to privacy are a substantial part of the adduced formal legal analytical treatment.

The research period: June 2017.

Descriptive part

The necessity to define the terms of "privacy", "right to privacy" is conditional on the fact that these terms are used in the present paper. The absence of such specification in the Russian legislation prompts to investigate the case law and academic literature.

Two main definitions were identified in the case law. Thus, the European Court of Human Rights has noticed the impossibility of the designation of "privacy" completely: it will be so strict to exclude to external world and to limit it by intimate sphere, where each individual may live his own life as he wishes. The respectfulness of private life must also include in some degree the right to open up and to develop relations with other people *(Решение Европейского Суда по правам человека, 1992, № 13710/88)*. The Constitutional Court of the Russian Federation has mentioned that "the concept of privacy includes the circle of human life-sustaining activity which relates to the individual, bears only on him and is not controlled by the government and society if it is legally acceptable" *(Определение Конституционного Суда РФ, 2005, № 248-О)*.

There is a variety of views about "privacy" and "right to privacy" in academic literature. In describing the basic elements that create these terms there are the similarities and differences in the determinations adduced by the follow authors. According to Grishaev, privacy comprises all spheres of human life: family, household, interpersonal communication, religious beliefs, nonservice activities, hobby, rest and others that the individual does not make public *(Гришаев, 2012, с. 25)*. As for Petrukhin the right to privacy is defined as a spacious juridical category consisting of different powers among which primarily it is indispensable to underscore the possibility to stay out of the workplace and to be independent from the state, society and staff members during this time *(Петрухин,1998, с. 9)*. The private life seems to be the most assailable that is why it should be protected by numerous warranties. The sphere of family life, cognate and social connections, personal relationship, sympathies and dislikes is covered by the term of privacy. The privacy is considered as a continuous state in which legal status of the individual is realized. Petrukhin emphasized that the countercheck to the unlimited authority is the essential assignment of the right to privacy *(Петрухин,1998, с. 14)*. Frolova mentioned, the privacy is the comprehensive right that incorporates the complex of political, social and other personal rights with specific, unique peculiarities which determine particular warranties to each individual *(Фролова, 2008, с. 123)*. All these views emphasize the plural core of privacy.

Some authors named such features of this item as freedom and sovereignty closely related to each other. Aaken, Ostermaier and Picot review privacy as connected with the freedom and state that they are mutually conditioned terms. "Because privacy is a specific form

of freedom, the value of privacy logically depends on that of freedom. Thus, if freedom has intrinsic value, it follows that privacy has intrinsic value as well" *(Aaken, Ostermaier, Picot, 2014, p. 142).* The privacy is understood by Kadnikov as a sovereignty of each individual, citizen from the state, society and other people. It is a self-sufficiency from all other subjects, but under the understanding that all other individuals also have their own sovereignty *(Кадников, 2007, с. 68).* It is obvious from the author's analysis that he has a consent with other scholars who support the idea that such elements as person's inviolability, person's domicile and place of temporary residence; inviolability of the mail, telephone conversations, telegraph and postal messages, untouchability of intel that constitute the family and personal secret *(Кадников, 2007).* Kadnikov's handling is likely to point out the importance of the privacy for each individual by using such a definition as a sovereignty. This term redounds to recognition of human's rights, powers and capacity warranted by law to draw a line between social life and private life as well as to conceal their emotions, sentiments and thoughts from the illicit access.

Mendel, Puddephatt, Wagner, Hawtin and Torres underlined the significance and many-sidedness of privacy. Also their opinion correlates with the approach of the European Court of Human Rights: impossibility of the designation of "privacy" is pointed out. The scientists primarily associate the privacy with the information which has a special legal regime. "Privacy is a fundamental right, even though it is difficult to define exactly what that right entails. Privacy can be regarded as having a dual aspect – it is concerned with what information or side of our lives we can keep private" *(Mendel, Puddephatt, Wagner, Hawtin, Torres, 2012, p.7).* But also the right to privacy underpins other rights and freedoms, including freedom of expression, association and belief.

To sum up various views of the scientists, it seems to be the most veracious to resort to the concept of Warren and Brandeis. According to this concept, the right to privacy is considered as the right to be alone *(Warren, Brandeis, 1890).* Moreover, Warren and Brandeis held forth on the value of the right to privacy and compared it with different kinds of corporal hurts that can be a result of the invasion upon the right to health and safety. Eventually, as the authors noted, the significance of the privacy is conditional on the fact that invasions upon someone's privacy subject him to mental pain and distress, far greater than it could be inflicted by mere bodily injury. So, this investigated concept completely reflects the nature of the privacy, proves the significance of its protection and can be the base of a particular legal regulation within the framework of each public order.

The Constitution of the Russian Federation secures to each individual the right to privacy. The existence of this right does not depend upon the individual location: he has such liberty at the workplace and out of the workplace (*Конституция Российской Федерации, 1993).* The mentioned provision implied by the principles of the Constitution's supremacy and by the recognition of human rights as a supreme value that must be esteemed and safeguarded. Also this rule is the constitutional framework of a personal legal status *(Лихолетова, 2007).* The European Convention for the Protection of Human Rights and Fundamental Freedoms states that everyone has the right to respect of his private and family life, his home and his correspondence. There will be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others *(Конвенция о защите прав человека и основных свобод, 1950).* Noted provisions of the Convention extend to the Russian employees. Identical basic values have been embedded into the foundation of The European Convention and The Constitution of the Russian Federation *(Николаев, 2011, с. 86).* Nikolayev's statement especially found endorsement in the norms regulating the right to privacy.

The Labor Code of the Russian Federation protects the employee right to privacy in the aspect of personal data security. This act establishes processing requirements, rights and duties of an employer and employee, storage and using regulations of personal data and liability of

infringement of these rules *(Трудовой кодекс Российской Федерации, 2001).* Also the issue of personal records is regulated by the Federal Law Concerning Personal Data *(О персональных данных, 2006).* It is the general act prescribing the rules that apply to all personal data subjects and data controllers while The Labor Code sets norms in the labor sphere. The institute of employee data privacy is considered as a novelty of The Labor Code of the Russian Federation *(Lushnikov, 2009).* The existence of such regulation redounds to remove potential challenges in the law enforcement practice and seems to be the primary benefit of the legislator's efforts aimed at the security of employee right to privacy.

However, the legislative regulation in this sphere also has some gaps and downsides. Such disadvantages arise from the process of technology development. Historically, employee expectations of privacy were limited in physical sense, employees maintained their individual privacy rights relative to their lives outside of the workplace. Nowadays technological developments such as laptops, tablets, and mobile telephones switch round the boundaries between workplaces and private lives *(Shannon, O'Sullivan-Gavin, 2016, p. 182).* The employers monitor the Internet and different social platforms in order to receive information about both employees that work now and applicants at the stage of hiring. Russian labor legislation standardizes neither named employer opportunity nor certain confines of monitoring of various modern social media tools. Furthermore, such methods of control as a video observation of the work place, wiretapping, examination of mail system stay out of the labor law regulation. Still there are difficulties in the law enforcement practice. The application of these methods by employer leads to court proceedings in the frame of which employees attempt to litigate the legitimacy of such employer actions. For instance, the employee filed a lawsuit in court in order to contest the installation of video control system at the workplace *(Апелляционное определение СК по гражданским делам Алтайского краевого суда, 2013, № 33-8403/2013).* In the employee's opinion the installation of video control system is the essential modifications of terms and conditions of the employment. In the light of this fact the employee must be informed about such changes. The court dismissed the suit for the reason that The Labor Code does not define the installation of video control system as the essence of a labor contract. The similar decision was adopted by the Krasnoyarskiy regional court in 2012 (*Апелляционное определение СК по гражданским делам Красноярского краевого суда, 2012, № 33-9899).* Employees litigated the installation of the video control system at their workplace on the base that such measures violate their right to privacy. During business hours they make necessary personal calls, take a medicine and so forth. All these employee actions become a monitored item. The court rejected the claim on the grounds that the aim of the installation of the video control system is to ensure security for the employees and their clients.

In summary, the analysis of the legal and judicial acts allows for the conclusion that the legal regulation of the employee privacy has both advantages and disadvantages. Some gaps and downsides spring from the rapidly growing technological advances and should be settled in order to protect employee privacy in any and all possible nowadays aspects.

Conclusions and suggestions

The present research gives the opportunity to figure out several scientific focal points. Three key results can be outlined in the light of investigation of the employee right to privacy.

Firstly, the variety of approaches to define terms "privacy", "right to privacy" in scientific literature and judicial practice were examined. The result of this process is the selection of the most appropriate variant of the mentioned definitions. The designation of the Constitutional Court of the Russian Federation became the base of the present paper.

Secondly, the legal base of the employee right to privacy in national and international aspects was established. The Constitution of the Russian Federation (1993) was considered the keystone that secures the right to privacy to each individual. The existence of this right does not depend upon the individual location: he has such liberty both at the workplace and out of

the workplace. Also the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) states that everyone has the right to respect of his private and family life, his home and his correspondence. The Labor Code of the Russian Federation (2001) protects the employee right to privacy in the aspect of personal data security. Moreover, the issue of personal records is regulated by the general act - the Federal Law Concerning Personal Data (2006).

Thirdly, it was established that the employee right to privacy is affected in different aspects during a work process. Such issue as the installation of video control system, the examination of electronic work mail and wiretapping are the most spreading employer actions that come in touch with the employee privacy. Moreover, such common elements of the workflow are considered in distinct ways in doctrine and judicial practice by the reason of the absence of direct legal regulation of the entitled question.

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Kopsavilkums

XXI gadsimtā tiesību uz privātumu īstenošana, izmantojot mūsdienu tehnoloģijas, ir sarežģīta un izaicinoša. Tiesību uz privāto dzīvi nozīmīgumu nosaka fakts, ka uzbrukums kādas personas privātumam pakļauj viņu garīgām sāpēm un ciešanām, kas ir daudz lielākas, nekā to varētu radīt miesas bojājumi. Darbinieku privātums ir svarīga darba likuma sastāvdaļa. Pirmkārt, cilvēku lielākai daļai darba alga ir galvenais ieņēmumu avots. Otrkārt, darbs ir būtiska darbinieku dzīves cikla daļa. Turklāt, darbiniekiem uzsākot darbu, ir pienākums sniegt darba devējam lielu personīgās informācijas daudzumu. Šādas informācijas apjoms pieaug darba attiecību attīstības procesā.

Darba ņēmēja tiesības uz privāto dzīvi izriet no cilvēktiesībām uz privātumu, bet tām ir dažas īpatnības, kuru dēļ darba ņēmēja tiesības uz privāto dzīvi tiek uzskatītas par neatkarīgu izmeklēšanas subjektu. Privātuma jēdzienu var definēt kā cilvēka dzīves aktivitāšu uzturēšanu, kas attiecas uz personu, pieder tikai viņai un to nekontrolē valdība un sabiedrība, ja tas ir likumīgi pieļaujams. Krievijas Federācijas Darba kodekss darbinieku privātumu reglamentē tikai saistībā ar personas datu aizsardzību. Tomēr, tiesību aktos nav sniegti skaidrojumi par tādām darba devēju plaši izplatītām darbībām kā, piemēram, darbinieku darba vietu videonovērošanu, darbinieku darba elektronisko pastu monitoringu, telefona sarunu noklausīšanos, kopējamo aparātu pārbaudi un dažādiem testēšanas veidiem. Daži no minētajiem punktiem kļuva par tiesu lietu un pētījuma priekšmetu. Tiesu pieejas un doktrīnas nostājas ir atšķirīgas. Arī šajā jautājumā trūkst augstāko tiesu iestāžu viedokļa. Tomēr pieaug pieminēto metožu izmantošana, ko darba devēji pielieto darba procesu pilnīgai kontrolei. Pašreizējā situācija likumdevējam jāpievērš uzmanība mūsdienu strīdīgajiem jautājumiem par darbinieku privātumu un jāpapildina darba likums. Starp minētajām darba devēju veiktajām pārbaudēm dominējošs uzraudzības pasākums ir videonovērošanas sistēmas uzstādīšana darbavietā. Tādēļ šis konkrētais darbinieku tiesību uz privāto dzīvi aizsardzības aspekts ir jāiekļauj likumā prioritārā kārtā.