Access to Information: State Secrets and Human Rights.

The right to access to information is one of the most difficult to realize rights in the Russian Federation. One should look for the causes of this problem not only on the juridical plane. Unquestionably, the roots of this phenomenon have both historical and social character.

After the dissolution of the Soviet Union Russia inherited the **closed informational space**, which is typical of totalitarian states as well as the traditional for such states disrespect for the right of the citizens to freedom of information. Despite all the positive changes in the Russian law in the sphere of access to information, it still remains imperfect.

In 1996, the Constitutional Court of Russia recognized the right of all attorneys to participate in trials in cases involving state secrets without having to pass a special checking procedure in the security organs. The involvement of the professional attorneys, who were independent of state organs, in such cases encouraged real defense of citizens and their right to access to information. Up until recently, it was impossible to imagine the success of defense in the so-called "spy cases." Full acquittal of Alexander Nikitin, and the success of defense in the Grigorii Pasko case became possible in part due to the revolutionary 1996 Statute of the Constitutional Court.

However, the active participation of independent attorneys in such cases has shown how imperfect the young Russian law on access to information is, and in particular as it relates to state secrets. Legal, historical and social aspects of this problem became the subject of an extensive discussion with the participation of public figures, politicians, experts, scientists and practicing attorneys.

In order to comprehend the depth of legal problems related to access to information and state secrets, it is necessary to look at the process of formation of the Russian law in this sphere in the chronological order.

In July 1993, the Supreme Soviet of Russia passed the Law "On State Secrets," which was intended to regulate the previously closed informational sphere of government activity. It became the first in the history of the Russian jurisprudence law in this area, and as everything "first" in Russia the law was far from perfection.

This law stipulated a three-level system of classifying information. The law provided for a list of subjects, which could be classified as state secrets. Under the same law, the President of Russia was required to immediately develop and publish a detailed list of subjects, which related to state secrets with references to the Ministries in whose authority that information was. Finally, the Ministries and departments within the structure of the Russian Federation government, had to formulate their own extensive lists of concrete information due to be classified as secret on the basis of the list approved by the President of the Russian Federation. At the same time, the 1993 Law introduced a possibility of classifying the content of those Ministry lists secret as well. It was

precisely this stipulation that became the basis of classifying of the absolute majority of them.

Therefore, notwithstanding the obvious progress in the aspiration to transfer the process dealing with secrets into the legal field, the adopted Law carried several serious drawbacks.

The first, and the most serious drawback was that the state secrets were tuned into bureaucratic secrets. In Russia, each department gained an opportunity to compile their own lists of information due to be classified as secret. In addition to that, the content of those lists was classified as secret as well. And as a consequence, a situation became possible where certain information, which is considered open in one bureaucracy, could be considered secret in another one. Therefore, this drawback originated from the fact that the Law did not formulate a single state list of subjects, which would be relevant to all the Ministries and departments. There were cases in my court practice where in response to a court request regarding the classification of a certain document, one Ministry would send a letter stating that the document was not secret, and another would come to the exact opposite conclusion.

The second drawback relates to the fact that an artificial gap emerged in the legal regulation, which made it impossible for a citizen (without access to the secret ministerial list) to evaluate certain information as to whether it related to state secrets. In other words, citizens were denied the right to peruse the ministerial lists and to understand in what area certain information would be considered to be state secret access to which is limited. One needs to be reminded of the case of environmental activist Nikitin, who was accused of passing “state secrets” to an environmental organization. Federal Security Service for a long time had refused to share the content of the Ministry of Defense order approving such a list to his defense attorneys on the grounds of its being classified secret. Thus Nikitin was denied the right even to check if the information published by him was covered by any of the entries of the ministerial list.

The sad events of September-October 1993 in Russia, which happened immediately after the Law was passed, and which brought the country to a parliamentary crisis, postponed the legislative process for several long years. The President of Russia, who was mostly preoccupied with his struggle with the opposition, did not hurry to execute the Law and to approve the list of subjects classified as state secrets. The first Presidential Decree approving such a list appeared only in the end of 1995. In this way, implementation of the Law on State Secrets was delayed by more than two years. And that meant that during that period, a legal protection for state secrets did not exist in Russia. In several documents from the official correspondence between the Apparatus of the State Duma and the President of the Russian Federation, this sensational fact is confirmed by the highest official figures of the government. Subsequently, it was also confirmed in the court decisions in the Nikitin case.

However, even before the publication of that Presidential Decree, after the parliamentary crisis was resolved, a new Constitution—the central normative act of the

state—was adopted and entered in force in Russia in December 1993. All the laws detailing the content of certain relationships regulated by law, including those in the sphere of access to information and the protection of the state secrets, must be formulated on the basis of the Constitution. For the first time in the history of the Russian law, the Constitution established a rule, according to which the list of subjects classified as state secrets should be determined by a federal law. **However, at that moment, such law did not exist in Russia.** As was mentioned above, the version of the Law on State Secrets, which was in force at the time stipulated a different list—the list of the subjects, **which could be potentially classified** as state secrets. At that time, the President of Russia had to decide the issues of classification of certain information by way of including it in his list by his Decree. That obviously contradicted the Constitution.

The new Constitution granted everybody the right to "seek, get, transfer, produce and disseminate" information by any lawful means (Article 29).

In addition, according to the Constitution, any normative legal acts having any bearing on the rights, freedoms and obligations of citizens could not be enforced if they had not been officially published for public information. This provision also came in contradiction with the stipulation of the Law, which allowed the Ministries to issue secret orders, which adopted the lists of subjects to be classified as secret.

The Constitution of the Russian Federation established a rule, according to which the rights and freedoms of a citizen can be limited only by the federal law, but not by a sub legal [administrative] act. All the rest of administrative acts can only explain the process of realization of those laws and obligations, and cannot contradict the federal law.

Therefore, as a result of the adoption of the new Russian Constitution, there emerged a number of inconsistencies between the Law on State Secrets and the provisions of the new Constitution.

First of all, the Law contradicted the Constitution of the Russian Federation because it determined that the list of the subjects classified as state secrets would be established not by the Law itself, but by an administrative act—by the Presidential Decree. In other words, with the adoption of the new Constitution, the legal (based on the provisions of the federal law) limitation of citizens' rights of access to state secrets ceased to exist in Russia.

Secondly, it [the Law] provided for the possibility of issuing secret ministerial normative acts (orders establishing the lists of subjects due to be classified as secret) encroaching on the right of citizens to access to information.

The first inconsistency was removed by the legislature only in October 1997. It introduced changes to the Law on State Secrets, after which it determined **the list of information to be considered state secrets**, as it was stipulated by the Constitution of the Russian Federation. Only from that moment, the legal limitation of citizens' right to access to government secrets emerged in Russia. In 2000, the Supreme Court, in the

course of considering the appeal in the Nikitin trial, came to a conclusion that before the Law on State Secrets was changed to be consistent with the Constitution, there existed no legitimate defense of state secrets in Russia.

The second inconsistency between the Law on State Secrets and the Constitution of the Russian Federation persists to this day. It means that today it is possible to issue secret executive [departmental] normative acts, which encroach on the rights, freedoms and obligations of citizens.

However, one has to note that in 2002, responding to the appeal of journalist Grigorii Pasko, who was also charged with espionage by the Federal Security Service, the Supreme Court of Russia stroke down one of such acts as illegal. It was the 1996 Order of the Defense Minister establishing the list of subjects due to be classified as secret in the armed forces. One of the reasons that this Order was considered illegal was the fact that it was not published. However, without waiting for this decision to enter into force, the Defense Ministry repealed that Order on its own initiative and published a new secret order, access to which still remains closed for the society.

Therefore, Russia still lacks a clear and transparent legal regulation of access to information issues, especially that of the aspects dealing with state secrets. The system of the existing legislation in the sphere looks like the following:

The Law on State Secrets (subsequently the Law) determines the list of the subjects constituting state secrets.

According to the Law, the **President of the Russian Federation** approves the List of subjects classified as state secrets. Under the Law, classifying information as state secret is done **in accordance with the list of subjects** constituting state secrets by the heads of state bodies authorized by the President of the Russian Federation to classify information as state secret.

On the basis of the Law, the heads of state bodies, who are given authority to classify information as state secret, develop **detailed** lists of items due to be classified in accordance with the List of subjects classified as state secret. These lists include items within the jurisdiction of the relevant organs, and establish the level of their classification.

In the process of compilation of the detailed lists, heads of state bodies must be guided by the Law, Presidential Decree No. 1203 from 11/30/1995 (subsequently Presidential Decree No. 1203), and also by the **Rules** of Classifying Information Constituting State Secret by Different Levels of Classification, which were adopted by the Resolution of the Government of the Russian Federation No. 870 from 09/04/1995 (subsequently the Rules). In accordance with paragraph 2 of the Rules, organizational lists must determine the level of classification of **specific** items.

Therefore, as of today, the procedure of classifying information as a state secret looks as follows:

- The Law contains the list of the **categories** of information constituting the state secrets.
- The List approved by Presidential Decree No. 1203 determines an **appropriate government body with authority** over each category as specified by the Law.
- Heads of government bodies identified in the Presidential Decree No. 1203 develop their own **detailed** lists of items due to be classified on the basis of the list contained in the Law, including in them the **concrete information** belonging to the categories, which are within the competence of those bodies.

Each of these normative acts has its own functional meaning in decisions on practical issues about classifying certain **concrete** information as state secret:

Guided by the list contained in the **normative act of a certain state organ** (subsequently the Order), the user of the law has an opportunity to make sure that the information was classified as state secret by a concrete state organ.

The list of the Law allows the law user to check whether the decision of a state organ regarding classification of certain information is consistent with the Law (whether the concrete item covered in the Order actually belongs to one of the categories specified in the list of the Law).

With the help of Presidential Decree No. 1203 the law user can check whether the state organs, which made the decision to classify information as secret had the appropriate authority to do so. In other words, if according to the Decree the category, to which those items belong, is in the exclusive jurisdiction of the Defense Minister, then no other ministries can include them in their lists.

It is necessary to emphasize that in the course of formulating their lists; heads of government organs (Ministries) can only include those items that fall within the categories determined in the List of the Law.

Therefore, the items determined in the ministerial list as due to be classified as secret cannot exceed the limits of the categories of information listed in the Law. Public officials, who are in charge of formulating the ministerial lists, are granted only the right to specify detailed information within the given categories, but not to establish new ones on their own authority.

In practice, ministerial lists often include items, which do not fall within any of the categories of the list of the Law, in violation of this principle.

This problem could be resolved by a radical restructuring of the legislation concerning state secrets. It appears that a transformation of the existing three-tier system

(Law-Decree-Order) into a two-tier system (Law-Decree) would remove many of the drawbacks of the existing legislation. This would help us to get rid of the bureaucratic approach in the issues of classifying certain information as state secrets, and at the same time would make the legislation in this sphere more transparent and easy to understand for law users and citizens.

Notwithstanding the fact that the legislation on access to information and on state secrets had existed in for over ten years now, Russia does not have an extensive court practice of using this legislation. The Russian Supreme Court does not possess a sufficient material to systematize the court practice in the cases related to realization of citizens' constitutional right of freedom of information. The state organs do not have sufficiently qualified personnel to implement a clear and rational information policy in relationship to the citizens. The lack of skill and the lack of willingness of the state organs to carry out the legislation on the access to information create apathy in the society. Very often, the citizens, do not request information they need from the state organs because they do not believe in the effectiveness of their rights. All these circumstances cause tremendous difficulties in the realization of the rights of the citizens to freedom of information. Thus, in the mid-1990s, Russia was swamped by an entire wave of espionage trials, which were initiated by the FSB (formerly KGB) against environmentalists, journalists and scientists, who tried to realize their right to access to information. In each such trial, the secret ministerial normative acts served as the basis of the charges. The decisions to prosecute the activists in the court, and the decisions to classify certain information of social importance as secret were made on the basis of those normative acts. Those court trials negatively affected the civic activity and scared citizens away from attempts to realize their right of access to information.

Therefore, the realization of the citizens' right access to information is made more difficult due to a number of legal and social reasons. A detailed study of those reasons is necessary in order to remove them. In the beginning of 2004, the Institute of Freedom of Information Development was founded in St. Petersburg. This Institute's work is focused on studying and resolving the problems of access to information. Among its highest priority tasks, the Institute sees the formation of legal, including trial, practice of using the legislation on access to information.

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