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Some questions of legal regulation of the information security in Kazakhstan

The right of access to official information is really important. The constitution of RK fixes guarantees of realization of the right of citizens to information, based on the fact that the right to information is a fundamental human right. At the same time, the current law is not fully possible to implement this law.

Key words: right, human rights and citizen, right of access to information, right to information.

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Ресми ақпаратқа қол жетілімділік құқығы аса маңызды. ҚР Конституциясы азаматтардың ақпарат алуға құқылы екеніне кепілдік береді. Сонымен қатар, қолданыстағы заңнамада ол құқықтың іске асырылуы толық қамтамасыз етілмеген.

Түйін сөздер: құқық, адам және азаматтардың құқықтары, ақпаратқа қол жетілімділік құқығы, ақпаратқа құқығы.

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Некоторые вопросы правового регулирования защиты информации в Казахстане

Право доступа к официальной информации крайне важно. Конституция РК закрепляет гарантии реализации права граждан на информацию, исходя из того, что право на информацию является одним из фундаментальных прав человека. Вместе с тем в действующем праве не в полной мере обеспечена возможность реализации данного права.

Ключевые слова: право, права человека и гражданина, право доступа к информации, право на информацию.

It is necessary to understand that information interests are information itself, possibility of receiving information, analysis, creation of new information, information exchange, and also its protection (ensuring confidentiality, safety, integrity and so forth). Therefore, information interests of the personality are reached by means of realization of the certain information rights which circle has to be regulated by rules of law.

Interests of the person, in one way or another, find their direct implementation through refusal of execution of the rights. In this case it's rights in the information sphere or as they to call them now –

information rights. Object of information rights at the same time are information interests which define necessity in using these rights or not using them. The State through regulations and management personnel gives possibility of which actions to choose and guarantees information rights in case such need.

The human personality is the main subject of legal information relations. The role of the human personality and its interests are the main link of all information production cycle, exchange and information distribution or information turn. Information interests of the personality served as the

main reason for all information revolutions, they also caused information oppositions and the information wars which are so widespread nowadays.

In our opinion, consideration of theoretical questions of the information theory rights should begin with the analysis of the «information interests of the personality» concept.

Information rights are quite specific and represent separate system. They are one of the less developed spheres of personality activities, and their studying is one of the greatest interests in the modern theory of the rights and personal rights. In this case, theoretical differentiation of human rights on personal, political, economical and cultural. It means that in the course of consideration and the analysis of information rights and interests should be taken abstractly. And it explained by variety of reasons:

First – information nature. Information is a person's way of achieving his interests and goals. Personal and economic rights reached by receiving and using information. So, for example, the right of citizens for inquiring government bodies allows citizens to acquire necessary official information that can help them to reach desirable interests, for example, to get in line for free housing state program and so forth.

Second – omnipresence of information. Information, its contents has to define those aspects of activity of the personality in which it can be used. Political information it's interest of the personality at achievement of goals in the field of public administration, implementation of political and public convictions whereas information contains economic aspects, allows to use it for the solution of social, financial and other problems.

There are various approaches in classification of information rights of the personality and their reference different known categories of the rights and personal freedoms. A.N.Golovistikov and L.Y.Grudtsyn refer information rights both to personal[1, c.146], and to political, proving that the right and distribution of information can be important political tool, which means that achievement of political goals and at the same time realization of information rights allows person to reach the personal interests, develop, protect itself and so forth. S. S. Sartayev and L.T. Nazarkulova in the monographic work “Formation of the Constitution of the Republic of Kazakhstan” refer a freedom of speech and creativity to the civil (personal)

rights, at the same time, noting that: “freedom to hold own opinion is assumed as ideological and political pluralism”[2, c.161]. At the same time, in our opinion, S. Sheverdyayev's opinion is also rather logical: “Today the right of universal access (the right to universal service) can be considered reasonably as the new social and economic right in system of the rights and freedoms, having a basis of the emergence the concept of a free flow of information”[3, c.89-97]. Such position is reasonable role of the information in modern life of society, the continuous growth of the price of information and information exchange, its role in life of the modern person.

All these positions have the right for existence. Especially because analysis which is carried out in presented work, completely confirms them. We consider that information rights represent complex system of the rights, equally representing personal, political, social and economic and cultural values in the course of formation, development and activity of the personality.

Specifics of information rights is in many respects determined by a role and value of the information sphere – spheres of a turn of information without it life of the civilized person will be impossible. In question of classification of information there is a set of approaches, for example, by the form of a data carrier, on access to information approach, on its usefulness or harm, etc. It is also reflected a question of classification information rights. So, on the subject of possessing information rights it can be shared into 4 main types:

Information rights of the state;

Information rights of society;

Information rights of the human personality (or constitutional and legal approach: information rights of RK citizens, foreigners and stateless persons that often has great importance);

Information rights of legal entities (the gradation of these rights depends on a type of the legal entity).

Proceeding from the essence of the concept “information turn” represents rather difficult mechanism of creation, transfer, receiving and processing information in society. In science are offered various versions and theories of classification information rights. So, I.L.Bachilo emphasizes the following types:

Right to inviolability of private life;

Right to protect honor and reputation;

Right for correspondence secrecy, telephone negotiations, post, cable and other messages;

Freedom of thought and speech;

Freedom of mass information, ban on censorship;

The right to express religious and other beliefs;

The right for reliable information about a state of environment;

The right to reliable information about the facts creating threat to life and human health;

Freedom choice of communication language and creativity;

Freedom of all types of creativity and teaching [4, c.52-53].

Kazakhstan scientist M.A. Shakenov, noting that information rights need a certain streamlining, which is possible when carrying out classification of such rights that “would allow not only to create complete idea of nature of the information processes happening in modern society, but also to give the general directions of legal regulation of the information sphere of society, depicting the general claims and interests of individuals, and also the main ways to permit the possible conflicts proceeding from the principle of ensuring balance of interests of the state, society and the individual”, in turn [5, c.36], offers the following system:

Right for information;

Right for information search;

Right to implement request of necessary information (from government bodies);

Right for information creation;

Right for inviolability of personal information, and also channels of possible transfer of such information;

Right for information transfer;

Right for mass distribution of information;

Right for application of the contents of information;

Right for information reproduction;

Right for information storage;

Right for information concealment.

Z. Baishev on the basis of the constitutional norms allocates such category as freedom of information and information field, which leads him to:

– freedom of speech;

– access for information and its free distribution, i.e. everyone has the right to receive and extend freely information; any should not forbidden by law;

– the right to denial of unreliable information and to the answer in mass media;

– the right to protection of a source of information received by mass media;

– ban of information censorship and information isolation [6, c.37].

There are other versions and views. Many authors lean on the legislation directions in the field of information law and try to split up the right to information, than only burden their system. Any system including the system of information rights has to be harmonious and accurate. And it is necessary to precede only from information turn structure, that is access, production and distribution, protection and information storage. Respectively, it is possible to allocate four main types of the information that's right:

– right for access to information;

– right for production and information distribution;

– right for protection (confidentiality) of information;

– right to storage information.

These rights are universal in the senses that treat as to physical, and to legal entities. That is all four subjects of information legal relations.

These rights – the interdependent definitions which are inseparably linked among themselves, lack of one of them has to lead to a rupture of information chain and, respectively, to lack of information turn. The essence of information rights consists in their unity, interdependence.

Basis of information rights as well as a basis of information security of the personality, societies and the states, are made by the right to access to information.

The history of creation of this right begins with the slogan “freedom of information” which was proclaimed by the USA delegation, which has taken part in inter-American conference in Mexico City in 1945. Therefore in 1946 the General Assembly of the UN adopted the resolution No. 59 (1) “Convocation of the international conference for freedom of information”. According to this resolution, freedom of information began to be considered as a fundamental human right consisting in opportunity to freely collect, transfer and publish information [7, c.72].

The universal declaration of human rights from 1948 fixed the provision on the right to freedom of belief and their expression: “Each person has the

right to freedom of belief and their free expression: this right includes freedom to freely adhere to the belief and freedom to look for it, receive and extend information and ideas by all means and irrespective of frontiers” [8]. Introduction of the concept “irrespective of frontiers” from the original principle of the international information exchange, the principle of a free flow of information was an achievement in this situation.

These principles initially had many opponents because of providing an international legal basis for ideological opposition of two blocks: USA and USSR. The countries of the Soviet block opposed to this theory the concept of the people and the nation’s right for information. This concept considered the international information exchange as respect of the state sovereignty, the right of the people to support national cultures and responsibility of the state for information distribution through borders. Danger of a free information exchange posed at that time as a serious threat. While the principles offered by the Soviet block, didn’t suit a warring party as the organization of system of the state control and regulation behind activity of national mass media demanded [8, c.89-97].

On November 4th, 1950 accepted European convention on protection of human rights and fundamental freedoms established: “Everyone has the right to express their opinion freely. This convention stated a freedom to reckon opinion and freedom to receive information and ideas without intervention from public authorities irrespective of frontiers” [9].

Actually, the right for information can be implemented in the various ways. It is necessary to carry it to most widespread: interpersonal communication of people among themselves, obtaining information by means of mass media and the Internet, and other material carriers. A.N.Golovistikov and L.Y.Grudtsyn classify these ways as an interpersonal and mediated [1, page 45]. And the picture of information exchange in the world community for the last century significantly changed. Today, in a century of rapid development and progress, communication of people significantly decreased. Received information for 85% and more comes from multimedia; in this regard the right for information generated a new type of the right – the right for communication. The information environment in the world develops rather dynamically. Today more questions are connected

with the concept “information”, than ever, that there were a number of the reasons which simply didn’t exist less than ten years ago. One of the reasons – technological innovations: rapid growth of the new extensive information infrastructure, which is including not only the Internet, but also cable networks, satellites for a direct broadcasting, cell phones, etc. in which the balance is far displaced from broadcasting receptions on the type “one-to-many” (for example, traditional radio and television) to broadcasting type “many – to – many” which is peculiar to dialogue media. In many states positive changes in economy and growth of national welfare are caused by elimination of the problems connected with providing a free access to information resources, for the solution of problems of commercial, social, diplomatic, military and other character.

In connection with this, the next stage in the development of information rights is the development of the concept of the right to communicate. It is considered that the founder of this theory is the major French official-lawyer J. D’Arcy who in the early seventies of the XX century suggested to make changes to systems of distribution of information from “vertical” to “horizontal”. That is, it was offered to enter on an equal basis with system of distribution of information through a mass media to a large audience of consumers of information, the possibility of direct exchange of information between people, as being in the territory of one state, and in other countries. It was J. D’Arcy who proposed the concept “human right on universal communication» because at that time there wasn’t any principle which governed and regulated the processes of international communication. This theory was announced in 1976 in Costa Rica at the international conference where two main concepts on which the right to communication is based were defined, namely: right of access to means of communication and right of direct participation in communication process. Thus access was understood as ability of the potential consumer really and effectively to use available means of communication as the recipient of the information. And the same was considered as real and effective possibility of the consumer in turn to become directly or indirectly the founder and the distributor of information [10, c.39-40]. This theory was absolute, considering the beginning of mass distribution of the Internet which already for that

period turned into world cross-border information system.

However since then, it should be noted, the world community including by means of use of the legal tool, doesn't put so deeply a problem of guaranteeing the right of citizens on communication which so succeeded by means of functioning of global communication systems. Priority emphasis on the other side of the issue, namely providing with the state of certain standards of access is at the center put as it is possible bigger number of people to telecommunication technologies, to world's information heritage. In this area, the first to introduce these concepts in the legal field, were Germans. The law "on telecommunications" of 1996 in Art. 17 defined: "universal services are the minimum offer of telecommunication services for the public for whom the quality is set and which should be available to all users, regardless of the place of residence or work at an affordable price" [11].

It should be noted that the concept "universal services", despite the prevalence, is in some way discredited. First, "universal services" are seldom considered in regulations in a context of ensuring information rights of citizens and second, the list of universal services have a very narrow and regulated by the Law "On Communications" on July 5, 2004 № 567-II (telephones, radio, television broadcasting signal distribution). Today in all developed world community these services and many others, are considered for a long time self-evident.

Nowadays, the right to information is even more often substituted for right of access to information. National legislations of many countries don't solve problems of ensuring the right to information in full, just considering regulation of providing citizens to official information.

Of course, this right – the right of access to official information, it is extremely important. Its legal regulation is urged to provide the following purposes:

It allows consolidating and providing the right of the citizens to search and obtaining necessary official (governmental) information. That, according to I. L. Bachilo, "the most important characteristic of information function of the democratic state" [12, c.58];

These norms provide a certain openness of activity of government bodies and structures that is one of ways of realization of the principle of transparency of public administration.

Constitution and the laws of different countries, to varying degrees advanced on this issue. In a number of the countries the right to information is consolidated constitutionally (Sweden, Spain, the Netherlands, Portugal, Austria, Hungary, Estonia, Belgium, Romania, the Russian Federation). In other countries this right definitely special legislation, or is considered by administrative procedures. So, now 16 countries of the world adopted the special laws providing access to information and official information in particular. Sweden the first adopted the Law "on freedom of media" in 1776; Finland – the Law "on openness of public documents" of 1956; The USA – the Law "on freedom of information" of 1966; Denmark – the Law "on access to administrative documents" of 1970; Norway – the Law "on public access to documents" of 1970; France – the Law "on access to administrative documents" of 1978; The Netherlands – the Law "on Access to official information" of 1991; Austria – the Law "on freedom of information" of 1983; Germany – the Law "on acquaintance with official documents and on access to information"; Italy – the Act of information of 1990; Hungary – the Law "on public interest" of 1994; Switzerland – the Law "on public awareness" of 1995; The Republic of Korea – the Law "on disclosure of information of government bodies" of 1996; Japan – the Law "on publication of information belonging to administrative bodies" of 2001. In Russia the special Law "on information, informatization and information security" in 1995 was adopted. In the research D. Banissar carried out the analysis of 58 such laws [13].

The Constitution of the Republic of Kazakhstan as the Basic Law plays an important role in society and state life that is expressed through its functions. Classification of functions of the constitution into three main types: political, legal and ideological [14, c.97], is especially obviously traced through consolidation and ensuring realization of information rights of citizens.

The constitution of RK fixes guarantees of realization of the right of citizens on information, based on the fact that the right to information is a fundamental human right.

The constitution of the Republic of Kazakhstan also consolidated the right to information. Point 2 of article 20 of the Constitution of RK guarantees: "Everyone has the right to freely receive and impart information by any means not prohibited by law"

which corresponds to the largest international documents in the field of information security. But the process of ensuring this rule Kazakhstan legislation drifted to administrative legislation. It is provided by standards of Laws RK “on administrative procedures” of November 27, 2000 No. 107-II and “on order of consideration of physical and legal entities” of January 12, 2007 No. 221-III, and the relevant normative legal acts.

One of the constitutional rights of citizens is a “right to know” which is undergoing a recent major adjustments, namely, broader treatment. If earlier it was more understood as the right of the citizen to obtaining information affecting its rights and interests, now the citizen has the right and opportunity to receiving of any interesting information which promotes both technical progress, as well as government policies on open dialogue with society. According to this policy, citizens have the right of obtaining any information about the state, its activity, activity of separate government bodies and officials that does public administration transparent. In this perspective, the “right to know” is converted into the right to access to information.

In modern society, the most relevant is the concept of open government. “The concept of open government based on democratic mechanisms of interaction between the state and society, based on the fact that contractor of the state is active pluralistic civil society, and the state is able to perceive the activity of society, while society – to understanding the role of the state as a special tool for its operation and development “.

Based on the role of media in modern society, as well as specific information as a basis for decision-making in all spheres of life, it is concluded that the right to information rights can't be allocated as separate category as the political or economic rights. Information rights should be considered as complex system of the rights equally covering

political, social and economic, personal, cultural and other values.

The development of information technology, multiple increase in turnover of information, the modern role of information in a person's life in many ways determine the ability and the right to have access to information, which is one of the key constitutional rights of the individual. Providing conditions for realization of this right is the main indicator of openness of the government, an indispensable condition of functioning of civil society and transparent public administration[15, c.60].

In this regard, it is necessary to settle legislatively process of realization of this right, having fixed legal status of participants of legal relationship on providing and obtaining information that is possible by the adoption of the law on “access to information”, as is done in number of the countries. It will also allow to fix legal status of information, to establish information list with limited access and open information, to define the mechanism of access to open information, to set limitations and restrictions to the rights of citizens in the information area, to define the legislative bases for permission of collisions in the implementation of the right to information and the right to privacy.

Legislative fixing of legal status of information and its classification has to be directed on elimination of available collisions between legislative and bylaws, and also completion of gaps in the operating Kazakhstan right, which applies to the right to information security.

The right to information security, to ensuring its confidentiality is treated in most cases as the right to secret. The desire to protect a certain range of information from outside interference is justified desire to protect own interests, honor, dignity and the honor and dignity of the family. However, the current law is not fully possible to implement this law, which should be attributed to personal information [16].

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