DOI: 10.22394/2070-8378-2020-22-4-37-41

Цифровые права человека и гражданина: конституционное измерение

МАРИЯ АЛЕКСАНДРОВНА ЛИПЧАНСКАЯ, **доктор юридических наук, профессор, заведующая кафедрой конституционного права**
Саратовская государственная юридическая академия (410056, Российская Федерация, Саратов, ул. Вольская, 1). E-mail: lipchan_maria@mail.ru

Аннотация: В статье исследуется сущность цифровых прав в конституционно-правовом аспекте. Автор подвергает критике концепцию цифровых прав как новых объектов гражданских прав, нашедшую отражение в отечественном гражданском законодательстве, поскольку она не только противоречит сложившейся мировой практике понимания термина «цифровые права», но и некорректно закрепляет в качестве самостоятельных прав отдельные правомочия иных субъективных прав, реализуемые с помощью цифровых технологий. Также доказывается ошибочность отнесения к цифровым правам ряда конституционных прав, закрепленных в российской конституции (права на информацию, на защиту частной жизни, на свободу массовой информации).

По мнению автора, цифровыми правами в конституционно-правовом смысле следует считать лишь те, которые либо появились вместе с возникновением современных цифровых технологий, либо приобрели действительно новое наполнение. Автор приводит некоторые примеры таких прав (право на доступ к сети Интернет; право на коммуникацию; право на защиту от машинной обработки информации) и делает вывод о формировании в настоящее время конституционно-правового института цифровых прав.

Благодарность: Работа выполнена при поддержке гранта РФФИ 20-011-00765.

Ключевые слова: конституционные права, цифровые права, объекты гражданских прав, блокчейн-технологии, право на информацию, право на доступ в сеть Интернет, право на коммуникацию, защита прав граждан

Статья поступила в редакцию 16 июня 2020 года.

Липчанская М.А. Цифровые права человека и гражданина: конституционное измерение. *Государственная служба*. № 4. С. 37–41.

DIGITAL RIGHTS OF MAN AND CITIZEN: CONSTITUTIONAL DIMENSION

MARIA ALEXANDROVNA LIPCHANSKAYA, **Dr. of Sci. (Law), Professor, Head of the Department of Constitutional Law**
Saratov State Law Academy (1, Volskaya st., Saratov, Russian Federation, 410056). E-mail: lipchan_maria@mail.ru

Abstract: The article examines the meaning of digital rights in the constitutional and legal aspects. The author criticizes the concept of digital rights as new objects of civil rights in domestic civil legislation since it contradicts the established world practice in understanding such a term as “digital rights”, as well erroneously ascribes certain powers of other subjective rights as independent ones, which can be realized through digital technologies. The article considers the incorrect assignment to digital rights of some constitutional rights, enshrined in the Russian constitution (rights to information, the right to privacy, freedom of the media).

According to the author, digital rights in the constitutional and legal framework should be considered only those that either appeared along with the emergence of modern digital technologies, or acquired a significantly new meaning. The article gives some examples of such rights (the right to Internet access; the right to communication; the right to protection from machine processing of information) and states the conclusion on the formation of a constitutional and legal institution of digital rights at the present time.

Acknowledgment: This work was supported by RFBR grant 20-011-00765.

Keywords: constitutional rights, digital rights, objects of civil rights, blockchain technology, the right to information, the right to access the Internet, the right to communication, protection of the rights of citizens

The article was received on June 16, 2020.

Lipchanskaya M.A. Digital rights of man and citizen: constitutional dimension. *Gosudarstvennaya sluzhba*. 2020. No. 4. P. 37–41.

Introduction

According to article 18 of the Constitution of the Russian Federation, human and civil rights and freedoms shall have direct force. They shall determine the meaning, content, and implementation of laws, the functioning of legislative and executive authority and local self-government, and shall be guaranteed by law.

The second chapter of the Constitution of the Russian Federation contains a large number of fundamental rights and freedoms that meet the highest international standards. However, there cannot be listed all possible rights and freedoms of citizens. According to Part 1 of Article 55 of the Constitution of the Russian Federation, the fundamental rights and freedoms listed in the Constitution of the Russian Federation should not be interpreted as a denial or diminution of other universally recognized human and civil rights and freedoms. It should be noted that attention is paid here to the inadmissibility of denying or diminishing the commonly recognized rights and freedoms of man and citizen. The commentary to the Constitution of the Russian Federation states that the universality of rights and freedoms underlines their natural-legal nature; to protect such rights, no official "procedure for their implementation by the federal parliament or other legislative recognition in the form of enshrining in a regulatory legal act is required. That is, such rights and freedoms, as long as they are generally recognized, are directly applicable, and therefore, they oblige the state, all its bodies and officials" [Commentary to the Constitution..., 2011].

As a result, a problem arises. As we know, in the 18th century the Concept of Natural Rights was formed, and the list included only those rights that were known to the actors of that time. Bartsits I. N. rightfully noted: "The definition of modern society assumes the use of such characteristic as "informational". In the "information society" completely new social relations appear, in which previously unknown rights and obligations are realized, as the result, the question arises – which of them need protection not only at the constitutional level, but also at other levels. The modern civil information society puts forward new challenges to the state and authorities, to which the state must answer with its best instrument – law [Bartsits, 2017. P. 120].

Declaration of Digital Rights

Experts note that the Constitution of the Russian Federation is of the pre-digital era [Maslovskaya, 2019. P. 18]. It did not and could not have human and civil rights that are associated with digital technologies. Meanwhile, many experts note the formation of a system of such rights. Zorkin V. D. says that "the digitalization of social life has led to the emergence of previously unknown the so-called digital rights".[1] Anichkin E. S. once noted that "adaptation of constitutional law to digital reality will contribute to the formation of new amendments in current constitutional law, such as "digital rights and freedoms" [Anichkin, 2019. P. 20]. Maslovskaya T. S. emphasizes the need to protect digital rights, and proposes "to develop a universal document – the Universal Declaration of Digital Human Rights (in case, when self-sufficiency of such rights is recognized)" [Maslovskaya, 2019. P. 21].

Taking into account the above, it is necessary to apply to the study of the very concept and essence of digital rights, as well as their role and place in the system of constitutional and legal regulation.

Concept and essence of digital rights

First of all, let us note that the concept of digital rights is currently legal, that is, enshrined in legislation. However, this term is used not in the constitutional and legal field, but only within the framework of civil legislation. In article 141.1 of the Civil Code of the Russian Federation, it is written that "obligation and other rights, the content and conditions of which are determined in accordance with the rules of the information system that meets the criteria established by law. Exercise, disposal, including transfer, pledge, encumbrance of a digital right by other means or restriction of disposal of a digital right are possible only in the information system, without recourse to a third party". Summarizing the above, under the digital rights in civil law it is proposed to understand some statements that are executed through the functioning of some information system. Due to the unspecified requirements for such a system, fair criticism has been raised in the scientific literature [Dobrobaba, Channov, 2019; Konobeevskaya, 2019]. This flaw was partly emended by the Federal Law of August 02, 2019 No. 259-FZ "On attracting investments using investment platforms and on amending certain legislative acts of the Russian Federation". As noted by Dobrobaba M. B. and Channov S. E., "it is easy to observe that the list of utilitarian digital rights enshrined in the law corresponds to the rights that are usually granted to token holders (more specifically utility tokens) within the framework of various ICOs (or IEOs) implemented on blockchain platforms" [Dobrobaba, Channov, 2020]. In the Civil Code of the Russian Federation and in the Federal Law "On attracting investments using investment platforms and on amending certain legislative acts of the Russian Federation" the lawmaker called digital rights, but in fact, they are not independent subjective civil rights, but their individual powers, rights-requirements for certain benefits that can be realized both within the information system and in the real world.

Here a controversial point arises, namely, why do the lawmaker needed to add the concepts of digital rights to civil legislation, since they look extremely doubtful there. Konobeevskaya I. M. adheres to the same opinion, she notes that "the introduction of the concept of "digital rights" into legislation is, in principle, terminologically not quite accurate, and their attribution to objects of civil rights is completely erroneous" [Konobeevskaya, 2019. P.

1 https://rg.ru/2018/05/29/zorkin-zadacha-gosudarstva-priznavat-i-zashchishchat-cifrovye-prava-grazhdan.html

333]. Zaitsev O. V. also agrees that the adoption of such laws does not improve the efficiency of blockchain programs [Zaitsev, 2019. P. 9]. Some scientists, who also understand the groundlessness in classifying digital rights as objects of civil rights, propose to clarify in Article 128 of the Civil Code of the Russian Federation the list of objects which will be specified in it. Andreev V. K. believes that a certain special object must correspond to digital rights, access to which is got through the use of electronic devices. He proposes to reformulate Article 128 of the Civil Code of the Russian Federation as follows: "The objects of civil rights include such things as energy, radio signal, electrons, cash and documentary securities, other property, including non-cash funds, uncertified securities, property rights, results from works and rendering of services, protected results of intellectual activity and means of individualization equated to them (intellectual property); digital rights; intangible benefits" [Andreev, 2018. P. 40].

It is rather difficult to comment on such a proposal. First, among the new objects of civil rights, professor listed a concept that absorbs another. Secondly, the attribution of such an object as an electron to the objects of civil rights causes extreme bewilderment. As we know, an electron is a negatively charged elementary particle and is a part of atom structure. It remains a mystery why this element of the atom attracted the attention of Andreev V. K. so much that he considered it necessary to highlight it among the objects of civil rights. We can only assume that Andreev V.K. in this case simply equated the concepts of "digital" and "electronic", which are actively used in modern information technologies (digital economy, digital technologies, electronic commerce, and electronic signature).

But, we agree with the researchers who believe that the concept of digital rights in the current civil legislation is obviously redundant, and the term "digital rights", in this case, is used incorrectly. As Sannikova L. V. and Kharitonova Y. S. rightly noted, digital rights, by their nature, are linked to constitutional rights and freedoms of individuals, and the term "digital rights" is used in foreign sources to denote human rights in the digital space [Sannikova, Kharitonova, 2018. P. 89]. However, in this case, in the domestic legislation, the lawmaker went against all world practice.

What is meant by digital rights in the public (constitutional and legal) legislation? Maslovskaya T. S. says that the main thing in this group is the right to information, to gain access to it using (including) information technologies, and the emerging digital rights presuppose the presence of a new subject – a digital person [Maslovskaya, 2019. P. 20]. Nevinsky V. V. believes that the essence of digital human rights is the quintessence of nature, content, assignment of the role and methods of constitutional and legal regulation of human rights, which are expressed in information and telecommunication form. He clarifies that the legal basis of digital human rights is one of the fundamental human rights – the constitutional right to freedom of information, which is developed by other traditional constitutional rights to certain types and methods of information usage (everyone shall have the right to privacy of correspondence, of telephone conversations and of postal, telegraph and other communications (Part 2, Article 23); collecting, storing, using and disseminating information about the private life of a person shall not be permitted without person's consent (Part 1, Article 24); state government bodies and local self-government bodies and their officials shall be obliged to provide everyone with access to documents and materials directly affecting their rights and freedoms, unless otherwise envisaged by law. (Part 2, Article 24); the right to freedom of mass media (Part 5, Article 29); the right to reliable information about the state of the environment (Article 42) [Nevinsky, 2019. P. 26-32].

It can be seen that the above authors mention "digital rights" which are not digital rights in fact. The right to information and the right to privacy of correspondence, telephone conversations and postal, telegraph and other communications are well known to constitutional and legal science and are enshrined in the Russian Constitution. The fact that they can be realized through modern digital technologies, to a certain extent, changes their content, but not the original essence.

In this regard, some scientists think that the emergence of a new type of rights (digital) is nothing more than an illusion [Khabrieva, 2018. P. 12].

Do digital rights exist not in the civil but in the public legislation? Do they differ from traditional constitutional rights in the information sphere? In our opinion, the answer to these questions should still be positive. Digital rights of a person and a citizen should be understood as those rights, the emergence and implementation of which are due to the presence of modern digital technologies, such as the Internet, other telecommunication systems, blockchain, Big Data, artificial intelligence and others.

The right of everyone to access the Internet should prevail among others. The official recognition of this right at the international level is associated with the UN report from 2011, which states that the right to access the Internet is recognized as an inalienable human right.[2] But, the UN report is not an international covenant on human rights. In this case, the low level of formal recognition of the right to Internet access only testifies to its novelty. There is no doubt that over time it will find consolidation in international legal documents of an official nature. Currently, many states have already reflected it either in national legislation or in various decisions at the law enforcement level. By Decision No. 2009-580 DC of June 10, 2009, the French Constitutional Council recognized the freedom of access to the Internet and prohibited its interruption (likewise access to water or electricity).[3]

2 https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

3 https://www.conseil-constitutionnel.fr/decision/2009/2009580DC.htm

Among other states that have guaranteed such a right, we can note Estonia, Costa Rica, Greece, Mexico, and Spain.

This right is also recognized in Russian jurisprudence, but only at the level of constitutional and legal doctrine. Namely, Zorkin V. D., Chairman of the Constitutional Court of the Russian Federation, among digital rights distinguishes the right to access and use communication networks, in particular, the Internet.[4]

The right to communication

Another right closely related to digital technologies is the *right to communication*. The right to communication should be distinguished from the right to information, although they are very similar in meaning. "Realization of the right to information is a necessary but insufficient part of the communicative and legal tasks of modern society. As a broader category, the right to communication largely reflects the specifics in the course of modernization of the country's socio-economic development, the intensification of social interactions both vertically and horizontally, creates conditions for a person's self-realization and expanding his or her rights and freedoms" [Gainulina, Leontyeva, 2013. P. 218]. It should be mentioned that back in the 1970s, the French researcher J. d'Arcy conceptually formulated the right to communication, he emphasized that, unlike the right to information, when exercising the right to communication, information flows in society has a horizontal character, not vertical one. At that time, it was more of a theoretical nature. The right to communication received its real reflection with the advent of the Internet, and it became truly significant with the development of social networks and other technologies that provide precisely horizontal information exchange. Modern researchers note that nowadays, for many people it is the information obtained from social networks that becomes more significant than any other transmitted through official TV channels or through the media [Tikhonova, 2015]. It became necessary not only to recognize the right to communication within the framework of domestic constitutional and legal science, but also to consolidate it, if not at the constitutional level, then at least within the framework of national legislation.

Threats and challenges of digitalization

Now we can already talk about the formation of other constitutional citizens' rights directly related to digital technologies. For example, in addition to the well-known positive aspects associated with digitalization, today, more and more specialists are paying attention to the fact that digitalization of society brings certain threats. Kutovoy D. A. shares his opinion on the situation with digitalization, "after the invention of nuclear weapons, which for a long time was considered as the greatest threat to civilization, now, we have a new threat to humanity that can have a devastating impact on civilization without its physical destruction – this is the power of information combined in a network" [Kutovoy, 2017. P. 35].

Currently, citizens often have problems related to the fact that the absolutely legitimate use of modern digital technologies in public administration entails a violation of their constitutional rights. Amelin R.V. in his monograph gives many examples when citizens could not register any rights or obtain permits, since they did not give information or documents into the state or municipal information system that are not even required by law [Amelin, 2016. P. 124-126]. In such situations, the implementation of the legitimate rights and interests of citizens (including constitutional ones) is made dependent on the functionality of specific information systems and technologies. Channov S. E. raised the issue on violations of the constitutional right of citizens of the Russian Federation to education due to the widespread use of the Federal Information System for the State Final Certification of Students, and proposed to enshrine in domestic legislation a general rule that allows monitoring the execution of rights granted to a citizen without the mandatory use or municipal information systems [Channov, 2018. P. 13].

Another threat is represented by some of the latest digital technologies, such as Big Data, neural networks, and some others. The use of such digital technologies makes it possible to make management decisions that affect the interests of many people without human participation or with his/her formal involvement [Mayer-Schönbergen, Kukier, 2014. P. 123]. Some nations are already aware of this threat. For example, in 2019, some US states have already passed laws protecting the rights of citizens when processing personal information through Big Data technologies.[5] In our opinion, all of the above allows us to raise the question of the formation (if not at present, then in the future) of the *constitutional right of citizens to protection from machine information processing*. The point is that a citizen should always be able to demand the realization of his/her rights without using modern digital technologies in cases where their use in some way could harm his/her position.

Conclusion

At present, we can talk about the formation of a new institution of digital rights in the domestic science of constitutional law. It is formed by those constitutional rights that either appeared along with the introduction of modern digital technologies or acquired a significantly new content. A distinctive feature of these rights is the fact that at present they are still poorly formalized, and do not have consolidation at the constitutional level. However, this must happen in the near future.

4 https://rg.ru/2018/05/29/zorkin-zadacha-gosudarstva-priznavat-i-zashchishchat-cifrovye-prava-grazhdan.html

5 https://www.kommersant.ru/doc/3673035

References

Amelin R. V. Legal regime of state information systems: monograph. M., 2016. GrossMedia. 338 p. In Russian

Amelin R. V., Channov S. E. Transformation of law under the influence of digital technologies: new requirements to training of lawyers. In: *Izvestiya Saratovskogo universiteta. Novaya seriya. Seriya: Ekonomika. Upravleniye. Pravo.* 2019. No. 2. P. 200-204. In Russian

Andreev V. K. On the concept of digital rights and their negotiability. In: *Zhurnal predprinimatelskogo i korporativnogo prava*. 2018. No. 2. P. 38-41. In Russian

Anichkin E. S. Modernization of the constitutional and legal status of an individual in the conditions of digital space formation. In: *Konstitutsionnoye i munitsipalnoye pravo*. 2019. No. 12. P. 19-22. In Russian

Bartsits I. N. Information law in the information society (Concerning the book under edition of Bachilo I. L. and Lapina M. A.). In: *Gosudarstvo i pravo*. 2017. No. 1. P. 119-122. In Russian

Channov S. E. Legal issues of personal data processing in state information systems. In: *Informatsionnoye pravo*. 2018. No. 2. P. 10-13. In Russian

Commentary to the Constitution of the Russian Federation (Article by Article). Ed. by Zorkin V. D. Second edition, Revised. M.: Norma, Infra-M, 2011. P. 1008. In Russian

Dobrobaba M. B., Channov S. E. Digital law: problems of understanding in subjective and objective sense. In: *Informatsionnoye pravo.* 2020. No. 2. P. 4-8. In Russian

Dobrobaba M. B., Channov S. E. The use of state information systems in financial management. In: *Pravovaya kultura*. 2019. No. 3. In Russian

Gaynulina L. F., Leontyeva L. S. The right to communication: the due and the existing. In: *Aktualnyye problemy ekonomiki i prava*. 2013. No. 4. P. 217-225. In Russian

Golovkin R. B., Amosova O. S. "Digital rights" and "digital law". In: *Vestnik Vladimirskogo yuridicheskogo instituta*. 2019. No. 2. P. 163-166. In Russian

Khabrieva T. Ya. Law facing the challenges of digital reality. In: *Zhurnal rossiyskogo prava.* 2018. No. 9. P. 5-16. In Rusian

Konobeevskaya I. M. Digital rights as a new object of civil rights. In: *Izvestiya Saratovskogo universiteta. Novaya seriya. Seriya: Ekonomika. Upravleniye. Pravo.* 2019. Vol. 19. No. 3. P. 330-334. In Russian

Kutovoy D. A. Digital analogy of social relations in a post-industrial society: development potential or a new threat? In: *Informatsionnoye pravo*. 2017. No. 4. P. 34-38. In Russian

Maslovskaya T. S. Digital environment and constitutional law: Interaction areas. In: *Konstitutsionnoye i munitsipalnoye pravo*. 2019. No. 9. P. 18-22. In Russian

Mayer-Schönberger V., Cukier K. Big data. A revolution that will transform how we live, work and think. Translated from English by Inna Gaydyuk. M.: Mann, Ivanov and Ferber, 2014. P. 240. In Russian

Nevinsky V. V. Human "digital rights": essence, system, meaning. In: *Konstitutsionnoye i munitsipal'noye pravo*. 2019. No. 10. P. 26-32. In Russian

Sannikova L. V., Kharitonova Yu. S. Legal essence of new digital assets. In: *Zakon*. 2018. No. 9. P. 86-95. In Russian

Tikhonova S. V. Legal policy in the digital world: the ideas, methodology, doctrine: monograph. Saratov: Saratov National Research State University named after N.G. Chernyshevsky, 2015. 276 p. In Russian

Zaitsev O. V. The role of notaries in the digital economy through the principles of functioning of distributed registers. In: *Notarialnyy vestnik*. 2019. No. 10.P. 5-9. In Russian

ПОДПИСАН ФЕДЕРАЛЬНЫЙ ЗАКОН О «ЦИФРОВЫХ ПЕСОЧНИЦАХ»

31 июля 2020 года Президент Российской Федерации В.В. Путин подписал Федеральный закон N 258-ФЗ «Об экспериментальных правовых режимах в сфере цифровых инноваций в Российской Федерации».

Документ устанавливает специальные правовые режимы для производителей-инноваторов, «определяет цели и принципы экспериментальных правовых режимов в сфере цифровых инноваций, круг участников экспериментальных правовых режимов в сфере цифровых инноваций, а также регулирует отношения, связанные с их установлением и реализацией, в том числе изменением, приостановлением, прекращением, мониторингом, оценкой их эффективности и результативности».

Благодаря возможностям, открывающимся с появлением нового закона, бизнес, занимающийся разработкой и внедрением инноваций, получает право испытать свой продукт на практике. «Цифровые песочницы» могут быть созданы, даже если действующие правила содержат некоторые ограничения – требования и запреты в цифровой сфере могут быть отменены для проведения эксперимента. Экспериментальный правовой режим в сфере цифровых инноваций понимается в законе как «применение в отношении участников экспериментального правового режима в течение определенного периода времени специального регулирования по направлениям разработки, апробации и внедрения цифровых инноваций».

Экспериментальные правовые режимы в сфере цифровых инноваций могут устанавливаться в следующих отраслях: медицинская деятельность, применение телемедицинских технологий, фармацевтическая деятельность; транспорт и логистика, особенно высокоавтоматизированные технологии, такие как беспилотный транспорт; финансовый рынок; дистанционные продажи; строительная сфера; промышленность; сельское хозяйство; предоставление государственных и муниципальных услуг и государственный контроль.

Целями экспериментального правового режима заявлены: «1) формирование… новых видов и форм экономической деятельности, … 2) развитие конкуренции; 3)… повышение качества или доступности товаров, работ и услуг; 4) повышение эффективности государственного или муниципального управления; 5) обеспечение развития науки и социальной сферы; 6) совершенствование общего регулирования по результатам реализации экспериментального правового режима; 7) привлечение инвестиций в развитие предпринимательской деятельности в сфере цифровых инноваций в Российской Федерации; 8) создание благоприятных условий для разработки и внедрения цифровых инноваций.

Финальное решение о проведении эксперимента и его продолжительности в каждом отдельном случае будет принимать правительство Российской Федерации.

Закон вступает в силу 28 января 2021 года.