



ACCESS TO PUBLIC INFORMATION AS A KEY RIGHT OF THE DEMOCRATIC INSTITUTIONALITY

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ABSTRACT

The Constitution of the Republic of Ecuador determines that Ecuador is a constitutional state of rights and justice, whose primary duty is to guarantee, without any discrimination, the effective enjoyment of the rights established in its articles and in international instruments; Thus, one of the rights of citizens is

access to public information, which emanates or is in the power of institutions, agencies, entities and legal persons of public law and private law that have State

participation. Undoubtedly, one of the most accurate paths in the fight against corruption is transparency in public action that allows the right of citizen aspects regarding the right of citizens to access public information and the method used was historical, through which it was possible to identify the relevant

obligation to make the information generated by the State transparent. The right of access to public information that obliges public officials to comply with the effective. The objective of this work focused on analyzing the importance of the participation and social control, essential within a democratic State, to become obligation of public servants to grant it; since access to public information is a key right of democratic institutions.

KEYWORDS: *Public information; Transparency; Citizen participation; Social control.*

INTRODUCTION

The right of Access to Public Information allows citizens to have at their disposal the information that rests in state agencies, which makes it possible to make public management transparent, while guaranteeing citizen participation and social control.

As stated by the United Nations General Assembly in its resolution No. 59 of 1946, "freedom of information is a fundamental human right and a touchstone of all the freedoms to which the United Nations is enshrined." (United Nations Assembly, 1946)

The Universal Declaration of Human Rights of 1948, in its article 19 states that. "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference, to seek, receive and impart information and ideas through any media and regardless of frontiers." From the writing of this article we can identify three main elements: research, receive and disseminate information and opinions. (Universal Declaration of Human Rights, 1948)

Article 19 of the International Covenant on Civil and Political Rights, in force since March 1976, provides: 1. No one shall be disturbed because of his opinions. 2. Everyone has the right to freedom of expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other media of one's choice. (International Covenant on Civil and Political Rights, 1976)

The exercise of this right entails special duties and responsibilities; Therefore, it may be subject to



certain restrictions, but which must be expressly provided for by law when to ensure respect for the rights, reputation or health of other persons, as well as the protection of national security and public order.

The right to investigate has to do with the power to directly access sources of information and opinions, its limit being those rights of greater general interest that will take precedence over individual interests. The right to investigate implies the obligation of the Public Power to provide updated information, which must be included in properly classified and well-guarded files, since these files must be a reliable source of information.

Among other international instruments that strengthen this right are the American Convention on Human Rights, also known as the Pact of San José, signed on November 22, 1969 (Article 13). An important milestone that set a precedent was in 1789 in the midst of a period of change and revolutions was drafted and signed the Declaration of the Rights of Man and the Citizen in whose article 15 establishes that society has the right to request accounts from any public agent on its administration.

As mentioned at the United Nations Conference on Trade and Development (UNCTAD) In a world where information is becoming increasingly important and an economic resource in itself, barriers to access to information, also linked to the digital divide, are creating a new dimension of inequality, which adds to income and educational inequality. (United Nations Conference, 2019)

The concept of freedom of information went beyond the expression and dissemination of ideas and opinions to also include the right to request and receive information. Over time, the concept of freedom of information was developed by the European Court of Human Rights and the Inter-American Court of Human Rights, and it was through this deepening that The legally binding interpretation emerged that the right to access public information is part of the right to freedom of expression, but it is also a human right in itself. (La Rue, 2011)

In this sense, public information becomes an important resource, not only to know all the rights we hold and the resources that the State allocates to guarantee them, but also to be able to comprehensively understand our reality. In other words, "the value of information consists, essentially, in the fact that it allows to link together elements that otherwise would not be connected. Information about resources is in turn a resource that is often filtered in the system input." (Lavigne, 1998)

For Miguel Carbonell (2004) in his work called *Los Derechos Fundamentales en México*; The right to information is a right of a complex nature, which involves several subjects and generates, for these subjects, a varied network of subjective positions and obligations of action and abstraction. The subjects that are mainly involved in the right to information are: the State, the media, journalists and, as is obvious if one accepts the universal nature of fundamental rights, all other people; However, it is important to bear in mind the distinction between people who work or own the media, journalists and the rest of all citizens by virtue of the fact that the former and the latter have a series of rights in addition to those enjoyed by citizens in general. (Carbonell, 2004)

Just as information can be requested from the multiplicity of institutions that make up the State, information can also be requested, under this right, from private organizations or companies when they execute public resources. For example, when a public works service or project is concessioned, or when the government grants financing to a private foundation. This information, referring to the use of public funds, is also covered by the right to information. (IACHR, 2012) This active participation also reconceptualizes the role of the State, based on the dissemination of public information. The increase in citizen participation, through access to public information and greater democratization in public policy decision-making, contributes to the modernization of the state apparatus, by strengthening the duty of public probity, the proper use of public resources and transparency in general. (Schönsteiner, J., Feddersen, M., Valenzuela, P., 2012)

Everyone has the right to request and receive information from the institutions and bodies that make up the State, especially when it comes to information of public interest. You have this right regardless of your nationality, immigration status, background, or any other consideration that may establish a discriminatory barrier. In turn, it implies that the State has the obligation to provide this information



to any person who requires it. (Blanke, H.-J., Perlingeiro, R. , 2018)

For the State to fulfill its duty to guarantee this right, it is not enough that the information is published or that the requests in which it is requested are met; on the contrary, its responsibility goes beyond access to information as a formal procedure, since it also implies ensuring a series of related guarantees to effectively satisfy the enjoyment of this right, which enables all citizens to make informed decisions when electing their leaders and representatives; since the right of access to information is key to citizen participation. Without access to information it is not possible to analyze and discuss the different issues of public interest.

Being a universal human right, anyone has the right to access public information, regardless of nationality, gender or immigration status; Despite this, in several countries there are legal and practical barriers to exercising it, such as the requirement to express an express reason why a citizen makes his request; this type of barrier violates the provisions of the jurisprudence of the Inter-American Court on the matter, which, in the judgment of *Claude Reyes et al. v. Chile* (2006), stated that the publicly accessible information "must be delivered without the need to prove a direct interest in obtaining it or a personal affectation"; and along the same lines, the OAS has issued recommendations against this type of obstacle, because they are opposed to the full enjoyment of the right to information; however, some countries maintain them. It is very common for such barriers to occur in practice and not in law, since in most countries a "culture of secrecy" persists based on the assumption that any circulation of information entails risks for the institution or government, or on the misperception that the information belongs to the State. (Jordão, 2011) As Luis Esquivel of the World Bank Institute's Access to Information Program explains, the right to information has the potential to transform the social conception of government: "Access to information at its most basic level is important because it changes the fundamental relationship between the citizen and the state." (Esquivel, 2013)

Through an allocation of open budgets that respond to the needs of citizens, and that complies with the obligation of progressivity of human rights, the effectiveness of social programs and State support can be improved and, in addition, corruption can be reduced. As the IMF has pointed out, corruption negatively affects the State's tax collection capacity and has an impact on social indicators such as the quality of education. (IMF, 2019)

An important aspect of the concept of open government is that it requires understanding access to information from the perspective of service to citizens. This implies that citizens are not simply agents receiving information, but also assume an active role in order to transform public information into useful information to improve the living conditions of society. (ECLAC, 2017)

The right of access to information aims to ensure the maximum possible transparency and disclosure of the work done and the data produced by the State and its institutions, and this implies positive and negative obligations on the part of the State. In the area of human rights, States have an obligation to respect, protect and fulfil every right. This it entails positive obligations, which are all those that imply a proactive role of the State to protect and promote a human right, and negative obligations, which consist in that the State must refrain from interfering to respect and facilitate the enjoyment of the right. The set of positive and negative obligations make up what is known as the triad of obligations, contained in the duty of the State to protect, respect and fulfill human rights. (Fuchis, 2020)

In Ecuador, the right of access to public information is enshrined in Art. Article 91 which states: The action of access to public information will aim to guarantee access to it when it has been expressly or tacitly denied, or when the one that has been provided is not complete or reliable. It may be filed even if the refusal is based on the secret, reserved, confidential or any other classification of the information. The confidential nature of the information must be declared prior to the request, by competent authority and in accordance with the law. (Constitution, 2008)

The Organic Law on Transparency and Access to Public Information in Ecuador contemplates the power of citizens to access public information, as a key right of democratic institutions. It entered into force in 2004, which enshrines the Judicial Remedy of Access to Public Information, in which Art. Article 2 establishes that this Act guarantees and regulates the exercise of the fundamental right of individuals



to information, in accordance with the guarantees enshrined in the Constitution of the Republic, the International Covenant on Civil and Political Rights, the Inter-American Convention on Human Rights and other international instruments in force, to which our country is a signatory. It provides for two mechanisms to exercise the right of access to public information: through an administrative procedure; and, through a judicial process. (LOTAIP, 2004)

The current Constitution guarantees the right of access of citizens to information, conceived as the power that every person has to know and access the information that emanates or that is focused on the power of institutions, agencies, entities and legal persons of public law and of private law that have participation of the State or are concessionaires of it; however, despite the fact that the Organic Law on Transparency and Access to Public Information has been in force since 2004, it has not fully achieved its objectives, nor has it fully guaranteed the protected legal good, since there is still a culture of secrecy in the State.

METHODS

For the development of this research, the following methods were used:

Historical method, through which it was possible to identify the relevant aspects around the right of citizens to access public information and the obligation of public servants to grant it.

Logical analysis, applied to the definition of fundamental concepts related to the subject, to determine its particularities.

Comparative legal analysis, applied to Ecuadorian and international legislation to determine the elements related to the fundamental rights of citizens.

As a scientific research technique, the analysis of documents that allow to determine the arguments of the studies carried out on the subject, as well as the current regulations, was used.

Qualitative technique.

Bibliographic analysis.- the concepts, information, texts, and theories related to the proposed work that contributed to an approximation and understanding of the subject, supported by written documents that facilitated the development of the discussion and the obtaining of results that evidence the existing problem regarding access to public information.

RESULTS

The results of the research are conceived in a central aspect; The law Access to information as a fundamental right for the exercise of democracy, as it allows informed decision-making and, potentially, leads to the construction of a permanent dialogue between citizens and the government, since it promotes transparency and accountability and improves governance, since, It empowers civil society to combat corruption and seek joint solutions to the multiple problems afflicting the population.

The right to public information has progressively become an important instrument that is now part of legislation in many countries around the world; Over the last three decades, a significant number of international standards and treaties on this subject have been promoted and implemented, which have strengthened the exercise of this right and have contributed to the development of its scope and also its limits.

There is no doubt that new information technologies have opened up new possibilities for the exercise of political and civic rights, promoting in citizens a proactive attitude in the participation and construction of public policies; This has forced governments to recognize and value the role of citizens, who go from being seen as recipients of decisions and public policies to being proactive entities, generators of development proposals.

All this implies leaving behind the culture of state secrecy and distrust of citizen participation, a process that has undoubtedly not been easy; Although more than 170 countries around the world have an access to information law, in Latin America there are still countries such as: Venezuela, Cuba, Bolivia and Costa Rica that do not have this type of legislation; This leads to persistent barriers to access to information that hinder the democratizing effect of this right in these countries of the region.



Access to information held by the state empowers citizens to better understand the role of the state and the decisions made on its behalf, because an informed citizenry will be able to hold their governments accountable for their policies and choose their leaders more effectively.

DISCUSSION

The human right of access to information is a key component of the right to freedom of thought, expression and political participation; the search and receive information that rests in the possession of organs, institutions and companies of the State, except in cases in which the information is qualified as secret or of restricted access by the Constitution or by any law, allows citizens to be proactive entities in the control of the management of public affairs, as well as, To be protagonists of the great changes that can be generated for the collective benefit.

The State is an administrative entity, therefore, the information it generates daily is of interest to society, being the final recipient of the policies that are implemented or the work that is done for the collective good and that is what the institutions of the State are for; the use of public resources, their destination and the public policies that are implemented and that require public resources, which must be known how it is being invested and if the results of that expenditure meet the objective of improving the quality of life of citizens.

It is essential for the most vulnerable people in society to know the information related to social programs and financing opportunities offered by the government to guarantee respect for their human rights and the obligations that the State has to fulfill as guarantor of them; Information that may be difficult to access due to barriers in practice, rather than legally.

Transparency in information contributes to greater and better citizen participation, because it provides confidence for people to assume an active role in the oversight of the actions and decisions of the authorities; since the apathy to participate in matters of public interest, is often generated by distrust in the institutions of the State and its authorities, which does not allow a joint work to improve the quality of life and solve the enormous problems that afflict historically excluded sectors. Limits to the right to information should be clearly set out in national law and should be in exceptional cases; but which obeys reasonable grounds and which are based on an overriding collective interest.

CONCLUSIONS

If communication is valued in the sense of the public right to information, the citizen appears as responsible for its destination; since the acts of the State and transparency in public administration contribute to fostering a participatory democracy, in which citizens are not limited to delegating their representation and access to information related to common problems to the authorities, but also use the tools to express themselves with knowledge, propose solutions and call their representatives to account.

The active participation of citizens supported in public information, as well as greater democratization in public policy decision-making by the authorities, contributes to the modernization of the state apparatus, because it strengthens the duty of public probity, as well as the proper use of public resources and transparency in general.

The right of access to information creates obligations for all public authorities of all branches of power and autonomous bodies, at all levels of government; who must provide information exclusively regarding the management of public resources, the satisfaction of the services under their charge and the fulfillment of public functions; and, if there is a refusal, the State must justify and demonstrate the reason for the refusal, which must also be appealable.

The centrality of the right of access to information as a human right implies that it cuts across civil and political, as well as economic, social, cultural and environmental rights, which means that the right to information is necessary for the full enjoyment of all human rights.

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