

RIGHT TO FREEDOM OF EXPRESSION IN CONDITIONS OF INFORMATION TECHNOLOGIES DEVELOPMENT

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Abstract: The relevance of the study is stipulated by the need to rethink the essence and content of the right to Freedom of expression, which by virtue of the development of information technology has acquired new values in the information society. The development of the Internet has fostered the emergence of new human rights related to the right to Freedom of expression. The purpose of the article is to summarize existing approaches to understanding the Right to Freedom of expression, to identify correlation with other rights, taking into account the impact of information technology development on human rights, and to formulate provisions that may be basis for improving the legislation and activities of public authorities as to certain rights provision. The study is based on a dialectical approach, which necessitates the clarification of certain

aspects of the formation and development of the Right to Freedom of expression and its interrelation with other human rights. As a result of the study it is found that the Right to Freedom of expression was significantly influenced by the development of the Internet. The Internet has become a factor in the formation of a new generation of human rights, which are expedient to call digital rights. These rights include the right to be forgotten, the right to access to the Internet. The main provisions of the article can be used for further study of the right to Freedom of expression and digital rights, and can also be useful for non-governmental human rights organizations and public authorities to strengthen human rights guarantees.

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Keywords: human rights, the Internet, digital rights, criminal investigation, proportionality.

Introduction

The right to Freedom of expression is one of recognized internationally human rights. Freedom of expression is enshrined in the Universal Declaration of Human Rights (1948), the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), and the International Covenant on Civil and Political Rights (1966). Like any human right, Freedom of expression is fundamental, natural, and inalienable. The Right to Freedom of expression provides the implementation of fundamental needs, describes the autonomy of the individual. Without this right, a person ceases to be a person in a social sense (the axiological aspect of law and human rights has been systematically covered by A. Kuchuk, L. Serdiuk, and Y. Zavhorodnia (Kuchuk et al., 2019)). The Right to Freedom of expression is seen as a fundamental value in a democratic society (Restrepo, 2013), a means of political regulation and social control (Richard and John, 2019). Although it is worth emphasizing that there are some cultural differences in

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defining the role of Freedom of expression, in particular within individualist cultures and collectivist cultures. This provision became the basis of researches by M.J. Alvarez and M. Kimmelmeier (Alvarez and Kimmelmeier, 2018).

The Right to Freedom of expression ensures the pluralism of views within society, which is a factor for its improvement and development, preserves the multiculturalism in the world, allowing society to control public authorities. Democracy is not just about the participation of population in the elections of public authorities, and in the development of its institutions. Democracy envisages such social interaction, which creates opportunities for development not only of society but of every individual as well.

However, in the information society the Right to Freedom of expression acquires new connotations, which necessitates a rethinking of the content and essence of this right. Thus, the development of information technology has a predominantly positive impact on the implementation of human rights (including Freedom of expression), however, these technologies can also be used to limit human rights.

Human rights are exposed to additional risks because of the development of information technology (Coccoli, 2017). P. Astuti (2016) notes that it is the Internet that is the decisive factor in the election results in a number of states, and the development of technology can be a factor in restructuring political system. A. Zakharchenko, Y. Maksimtsova, V. Iurchenko, V. Shevchenko, S. Fedushko elucidated the impact of social networks on the 2019 presidential election in Ukraine (Zakharchenko et al., 2019). P.N. Howard, B. Kollanyi, S. Bradshaw, L.-M. Neudert explored the use of social networks to influence over the election of the President of the United States of America (Howard et al., 2017).

“The Internet is now perhaps the most important platform for the expression of opinions and the spread of information, and provides a multitude of opportunities for a wide variety of forms of association” – avouches J. Tomalty (2017). The issue of the emergence of a new generation of human rights – digital rights, is discussed in the scientific literature (Coccoli, 2017), Internet Access Rights (Penney, 2011; Tomalty, 2017), freedom to connect – to anyone, anytime, anywhere, for anything (Conners, 1997). Thus, the issue of the

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right to Freedom of expression in the context of information technology development is relevant and needs research. Particular attention is needed to such its aspects as essence, and correlation to other rights.

Therefore, the purpose of this article is to summarize existing approaches to understanding the Right to Freedom of expression (including the practice of the European Court of Human Rights), to identify correlation to other rights, taking into account the impact of information technology development on human rights, and to formulate provisions that may be the basis for improving the legislation and public authorities’ activities as to implementation of appropriate rights.

Research Methodology

The study is based on a dialectical approach, which necessitates the clarification of certain aspects of the formation and development of the Right to Freedom of expression and its interconnection with other human rights. The methodology of the Right to Freedom of expression is based on the provisions of the Natural School of Law, which interprets human rights as fundamental, natural, inalienable and

equal human being possibilities, which are necessary for a human being existence and development.

It is within the natural grasp of law that one is able to ascertain the essential nature of human rights. According to the normativistic understanding of law, which still prevails in the post-soviet space, human rights are perceived as a result of the will of the state enshrined in the law, so if there is a law, then there is law, if there is no the law – human right is absent. This approach denies also established in the Western legal tradition approach to the legitimacy of the restriction of human rights, which in addition to legality includes two other elements (legitimate aim and proportionality).

The use of a systemic approach allowed the Right to Freedom of expression to be linked to the right to education, the right to peaceful ownership of property, Freedom of assembly and association and Right to respect for private and family life, and to single out the Internet as a factor in shaping the new generation of human rights – digital rights.

The content of Right to Freedom of expression elucidation, formulation of the basic provisions and

conclusions are done using logical methods of analysis and synthesis.

The practice of the European Court of Human Rights was examined using the content analysis. The decisions of the European Court of Human Rights in cases against Azerbaijan, Finland, France, Germany, Greece, Poland, San Marino, Switzerland, Turkey, Ukraine, and the United Kingdom are analyzed in the paper.

The study of these decisions was also carried out using the hermeneutical method.

Results and Discussion

The Right to Freedom of expression is an integral part of democracy. This right is universal, fundamental, natural and inalienable. It is enshrined in a number of international treaties, including Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950). The Right to Freedom of expression is being in a constant focus of scientists' attention. (Restrepo, 2013; Tomalty, 2017; Richard and John, 2019). Without this right, the development of society is impossible, since development implies views pluralism.

The Right to Freedom of expression has been greatly influenced by the development of the Internet. It is possible to note the binary nature of this influence. On the one hand, the Internet has become an additional guarantee of the Right to Freedom of expression (by expanding ability to be heard, by increasing its target audience and by removing territorial limitations), and on the other hand, the Internet has furthered to hate speech spread within society, which exacerbates tension within society and granting public authority with the additional arguments to restrict the Right to Freedom of expression. The substantial influence of the Internet on the Right to Freedom of expression is related to the following its capabilities as globality, online mode, asynchrony, a large number of users.

The wide-ranging implementation of the Right to Freedom of expression in an information society places additional obligations of the control beyond the exercise of this right and to hold individuals accountable for their violation. The Right to Freedom of expression is not absolute. Public authorities may restrict it based on the following criteria: 1) Freedom of expression restriction should be based on

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the law; 2) there should be a legal purpose for such restriction; 3) there should be a real necessity of such a restriction within a democratic society. The practice of the European Court of Human Rights indicates that most often states do not comply with the third criterion. National authorities apply disproportionate restrictions on the implementation of Freedom of expression. The Right to Freedom of expression does not cover hate speech.

The Right to Freedom of expression is related to other rights, including the Right to respect for private and family life. The privacy of public persons is narrower than that of other people. The development of the Internet has become a factor in formation of a new generation of human rights, which are expedient to call digital rights. These rights include the right to be forgotten, the right to access to the Internet. The issue of digital rights should be the subject of scholarly analysis, since these rights necessitate a rethinking of human rights theory.

Essence of the Right to Freedom of Expression

Art. 19 of the Universal Declaration of Human Rights (1948)

states that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”. This provision is specified in Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and Art. 19 of the International Covenant on Civil and Political Rights (1966). Given a great number of judgments of the European Court of Human Rights under Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, it is this instrument that we focus our attention on.

It should be noted that the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provides for the Freedom of thought, conscience and religion protection (p. 9). This article guarantees freedom to observe or not to hold religious beliefs, to profess or not to profess religion (Case of Kokkinakis v. Greece..., 1993; Case of Buscarini and Others..., 1999), herewith freedom of thought, conscience and religion is “a precious asset for atheists, agnostics,

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sceptics and the unconcerned” (Case of Kokkinakis v. Greece..., 1993). Freedom of thought, conscience and religion is an important factor in shaping the world outlook; a means of a human being identity, as well as Freedom of expression is a crucial condition of a democratic society. However, if Freedom of thought, conscience and religion is confined to a worldview aspect, the Right to Freedom of expression provides for the opportunity to convey one's views to other people, to spread one's views among a significant number of individuals. Although the opportunity to profess one's religion also involves communicating one's religious beliefs to others, in this case, however, it is about a particular worldview subject. Therefore, the elucidation of Freedom of thought, conscience and religion goes beyond our study.

According to the established view, the essence of the Right to Freedom of expression comes down to the ability of a person to freely disseminate his beliefs, as well as to receive and transmit information. What is important is that these beliefs do not always correspond to the views of the majority of the population, moreover they are generally contrary to them, and

otherwise their spread would not be necessary. This is also due to the fact that the term “expression” rather than “information” is used in Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), and therefore guarantees of protection extend to the expression of assumptions, criticism. The necessity to prove the truth of the views expressed (the necessity to prove the truth relates only to common facts) may be interpreted as Art. 10 of the Convention on the Protection of Human Rights and Fundamental Freedoms violation.

With the development of information technology, the opportunities for the Right to Freedom of expression implementation increase. Every person with access to the Internet has far more opportunities to exercise this right than a person who does not have such access. “The Internet has become one of the most important issues that shape freedom of expression in today's human rights world. From the beginning of the current century, dramatic revolutionary changes have taken place in the media sector, especially” (Momen, 2019). The influence of the Internet on the implementation of the Right to Freedom

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of expression is stipulated by the following factors:

1. Globality. The emergence of the Internet allows to “overcome” the locality. Print media are restricted to a certain territory.

2. On-line mode. Each person, using the opportunities of the Internet, can express his views, express criticism in real time mode. As an example, you can mention social networks: Facebook, Instagram, Twitter, in which members can create posts, comment on posts from others, and complain about posts from other users.

3. Asynchrony. Information posted on the Internet is constantly accessible to users. All you have to do is search for specific words in search engines. To search for information in print media a year or two after their release, you should contact the libraries and archives.

4. A significant number of users, which increases the audience, among which the relevant views are distributed. Therefore, the Internet allows a person to participate in public life, to influence the political system. “Providing an unprecedented volume of resources for information and knowledge, the Internet opens up new

opportunities for expression and participation and holds enormous potential for development” (Karklins, 2011). Print media has limited circulation and requires a certain amount of money to be paid per copy.

These properties of the use of the Internet not only have a positive impact on the realization of human rights, but can harm some of them. Thus, the Internet can be a platform for spreading hate speech and racist views. Thus, T. Enarsson and S. Lindgren, when researching Twitter posts about hate speech, note the variability of discourse on particular populations (religious or ethnic): they were intolerant in treatment of Muslims and people of Jewish descent, and in recent years such a target group has been the Roma population (Enarsson and Lindgren, 2019).

Restrictions in the Right to Freedom of Expression

The Right to Freedom of expression provides the ability to spread views that can shock or offend. However, this right is not absolute. It can be restricted. In civil society, everyone should be tolerant of others, with caution when speaking out about others, based on moral principles. Respect for the right

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of others to have other point of view should be followed, since democracy and competition is the cornerstone of democracy. It is the responsibility of the state to determine the means of reconciling the pluralism of the interests of different persons and groups in regulating this sphere. The state itself should remain neutral. This allows pluralism as the basis of democracy to be preserved. To resolve the issue of presence or absence of violation of Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the European Court of Human Rights use the three-part test.

1. Freedom of expression restrictions should be based on the law. Accordingly, the national law of the States Parties to the Convention should include a comprehensive list of the grounds for the restriction of this right. At the same time, the European Court of Human Rights has recognized the legal restriction of the Right to Freedom of expression on the basis of common law rules or principles of international law in the following cases: Case of the Sunday Times v. the United Kingdom (1979), Case of Groppera Radio AG and Others v. Switzerland (1990), Case of Autronic AG v. Switzerland (1990).

In Case of the Sunday Times v. the United Kingdom (1979) the European Court of Human Rights has observed that the law should comply with the principle of legal certainty (it should be accessible, clearly worded, and on that basis a person should anticipate the consequences of his actions). In the Case of Gawęda v. Poland (2002) the European Court of Human Rights found violations of Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as national courts have forbidden registering periodicals because of titles that are “inconsistent with the real state of affairs.” This wording is “not formulated with sufficient precision to enable the applicant to regulate his conduct.”

It should be noted that regulating the Internet is quite difficult. Information posted on the Internet becomes available to a large number of people in all places where there is internet access. This raises issues about the level of legal regulation of the Internet: national or international. However, authoritarian regimes today are trying to control the Internet, and access to the Internet. “Freedom House research indicates that more repressive

governments are acquiring social media surveillance tools that employ artificial intelligence to identify perceived threats and silence undesirable expression” (Shahbaz and Funk, 2019).

2. Legitimate goal. The State may restrict the Right to Freedom of Expression to: 1) prevent rioting or crime, 2) protect health, 3) protect morale, 4) protect the reputation or rights of others, 5) prevent the disclosure of confidential information, 6) maintain authority and impartiality of the court; 7) ensure national security, territorial integrity or public security. This list is exhaustive. It is contained in Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

It should be noted that this goal should be real, not fictitious, that is, available in a particular case in a particular state. In the Case of Perrin v. the United Kingdom (2005), the applicant alleged a violation of the right to freedom of expression of his criminal responsibility for publishing indecent material on the site. The European Court of Human Rights found the statement inadmissible because the measures taken by the State were in line with the

legitimate aim of protecting the morals and rights of others.

3. The necessity within a democratic society. Usually states adhere to the previous two criteria of compliance / violation the Right to Freedom of expression. Most often, it is precisely because of the disproportionate measures taken by the State that the European Court of Human Rights find violation of Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. This requirement requires States to adhere to the principle of proportionality of the right to Freedom of expression restriction. And the court is required to find out whether the state has reasonably taken restrictive measures and whether these measures were proportionate. (Case of Leyla Şahin v. Turkey..., 2005).

The principle of proportionality implies the need to prove that interference with the right was necessary in a democratic society. Herewith this necessity is interpreted as the existence of a 'pressing social need' (Case of Observer and Guardian..., 1991). In the Case of Ahmet Yildirim v. Turkey (2012) the European Court of Human Rights found a violation of the

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applicant's right to freedom of expression because of a disproportionate restriction. The case involved blocking access to his website as part of a criminal investigation unrelated to that website. The Court once again emphasized the importance of the Internet in enhancing public access to information and facilitating the dissemination of information.

It should be noted that according to the settled practice of the European Court of Human Rights, criminal penalties for information offenses (including the exercise of the right to freedom of expression) will only be proportionate as an exception when significant harm to the protected rights of others is caused (Case of Mahmudov and Agazade..., 2008). The principle of proportionality requires finding out whether the nature of the right is not violated because of the state's measures as to its restriction, herewith the objectives attained should be consistent with the means taken (Case of Guerin v. France..., 1998). For the sake of discretion, the courts should check whether the reasons for the limitation of the right actions taken by the national authorities were crucial and sufficient (Case of Lyashko v. Ukraine..., 2006).

Relation to Other Rights

An analysis of the practice of the European Court of Human Rights leads to the conclusion that the issues of controversy between the Right to Freedom of Expression with the Right to Education, the Right to Peaceful Property, the Freedom of Assembly and Association and the Right to Respect for Private and Family Life are often resolved. However, most often it concerns the Right to Respect for Private and Family Life. The most typical case in this context is the Case of Von Hannover v. Germany (2004). The case concerned the distribution of photographs of the applicant, who is the eldest daughter of Prince Rainier III of Monaco. The European Court of Human Rights pointed to the link of Art. 8 and Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the necessity to strike a balance between the rights guaranteed by these articles.

The largest number of such cases concerns politicians who's right to privacy is more restricted than of other people. In such cases, the European Court often raises the issue of the balance of public interest and the right to

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privacy. This is emphasized in the Case of Ruusunen v. Finland (2014), which addressed the issue of publishing a book about a book author's love affair with a person who was the Prime Minister of Finland at the time. However, the emergence of new rights arising from the implementation of the Right to Freedom of expression over the Internet should attract the attention of scientists. We mean the right to be forgotten. Given the Internet above characteristics, it is difficult to retrieve information from the Internet (if possible at all). Today, this right applies mainly to people who have committed criminal offenses in the past and are not considered criminals (due to served criminal convictions) and who do not want to mention their mistakes, but the information on the internet about their actions is stored and anyone can easily obtain it. Some aspects of this issue were explored by F. Werro (2009).

The right to access to the Internet should also be mentioned. Today, the Internet can be seen as a means of helping a person to realize himself. And while human nature does not imply access to the Internet, it is unlikely that anyone will deny the importance of the Internet to a human being within the information society.

The Okinawa Charter on Global Information Society (2000) notes the important role of the Internet in the development of society in the 21st century: Information and Communications Technology “is fast becoming a vital engine of growth for the world economy. It is also enabling many enterprising individuals, firms and communities, in all parts of the globe, to address economic and social challenges with greater efficiency and imagination”. Therefore, by analogy, when considering Biotechnology as a Factor for the Fourth Generation of Human Rights Formation (Ivanii et al., 2020), the Internet can also be seen as a factor in the formation of a new generation of human rights – digital rights. The separation of these rights necessitates a rethinking of the essence and content of existing human rights.

Conclusion

Right to Freedom of expression is an important foundation of a democratic society and the basis of tolerance in a multicultural world. Offensive and shocking views are also under the guaranty of this right. However, the greater the limits of this right are, the greater is the responsibility for violating of the permissible limits.

The Right to Freedom of expression is not absolute and may be restricted. The lawfulness of the restriction of this right implies the presence of three components: legality, legitimate purpose and necessity in a democratic society. In a civilized society, the Right to Freedom of expression does not apply to hate speech. The limits of criticism of politicians are wider than of other people.

The issue of guaranteeing of the Right to Freedom of expression and adherence to its limits is of particular importance in the information society with the development of the Internet. The Internet has become a factor in forming a new generation of human rights. The results of the study may be useful to scientists for an in-depth study of 1) the issues of the nature and content of the Right to Freedom of expression in an information society terms; 2) the issues of forming a new generation of a new generation of human rights – the generation of digital rights. The main provisions of the study can be used by 1) non-governmental human rights organizations to justify the necessity to improve the public authorities activities; 2) by public authorities to strengthen the

guarantees of human rights in their activities.

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