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International experience in legal support of freedom of speech on the Internet

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Abstract

The relevance of the studied subject lies in the fact that freedom of speech is a fundamental human right that should be ensured at the legislative level. However, in the era of rapid development of information and communication technologies, it is necessary to find a balance between such provision and the protection of the rights of others. The purpose of the paper is to investigate the legal support of freedom of speech at the international level, and the experience of foreign countries in the legal regulation of this issue. The study utilises general theoretical methods of research, namely historical,

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abstract-logical, systemic-functional, analysis and synthesis, the method of theoretical generalisation to generalise the theoretical and legal foundations of ensuring freedom of speech existing in foreign countries and to systematise the components of the right to freedom of speech and criteria and conditions for restricting the right to freedom of speech and the right to express views and beliefs. Comparative legal method is used for the analysis and comparison of foreign legislation regulating freedom of speech and the right to express views and beliefs on the Internet. The paper substantiates that the problem of legal regulation of ensuring freedom of speech lies in the complexity of achieving an optimal balance between guaranteeing the right to freedom of speech and protecting others. It is revealed that the implementation of the right to freedom of speech on the Internet and in social networks in the United States, Japan, China, and Germany is regulated differently on the legislative level and various approaches are used. Special attention is paid to legislative provision of responsibility for spreading false information, protection of public safety, and protection of copyright on the Internet. The opinion is justified that the experience of Japan and Germany is the most acceptable for Ukraine. The practical importance of the study lies in the fact that the analysis of the legislation of foreign countries allowed identifying the features of legal regulation of the right to freedom of speech in individual states and establishing the advantages and disadvantages that may exist in this field

Keywords: freedom of expression; right to express views and beliefs; global information society; right to a fair trial; copyright; criminalisation

Introduction

The issue of legal protection of freedom of speech, the right to express views and beliefs, becomes increasingly relevant in all countries around the world, including Ukraine. This relevance has been driven by the development of information and communication technologies. The creation of the Internet network has led to the formation of a unified informational space in which citizens from different countries can instantly and freely communicate, share information, their views, and beliefs. Freedom of speech is one of the most important values that democratic society is built upon. Therefore, it is key to the formation of the information society. In a global information society, freedom of speech and the right to express views and beliefs must be fully ensured. This should be reflected in legislation that guarantees the right to freedom of speech, including prohibiting censorship,

not recognising any ideology as mandatory, and promoting ideological, political, and economic diversity. However, it is important to remember that ensuring the rights of some individuals should not violate the rights of others. Thus, the right to freedom of speech cannot be absolute.

The rapid development of information and communication technologies, in addition to enormous advantages, strengthening and facilitating the realisation of the right to freedom of speech, has also given rise to a number of new problems. Cases of abuse of freedom of speech and the right to express views and beliefs are becoming more frequent. This situation necessitates a reevaluation of priorities in state information policies and the legislative establishment of criteria for limiting freedom of speech, information, and the right to express views.

O. Yara et al. (2021) consider freedom of speech as a human right that allows individuals to express their views on past, present, or future events, facts, etc., and provide their assessment of them.

L. Yarmol (2017) emphasised that freedom of expression is a fundamental human right and proposes constitutional changes in Ukraine to provide citizens with more opportunities to express a probabilistic attitude to any phenomena, processes, events, and facts of the past, present, and future in any form.

V.C. Brannon (2019), L. Golovko et al. (2021), G. Spiegel (2018), focused on the need to implement legislative reforms in the field of ensuring the right to express views in social networks. S. Matsui (2021) argues for the need to restrict access of certain “undesirable” users to the Internet.

E. Ricknell (2020) highlights the importance of avoiding the promotion of harmful information on the Internet. B. Sander (2020) focused on the need to consider not only the private interests of owners of online platforms but also broader public interests.

Despite substantial coverage, there has been limited attention to investigating international legal regulation of freedom of speech in the context of the global information society. Therefore, this issue remains relevant.

Developed economies that entered the process of building an information society earlier have encountered the problem of misuse of freedom of speech and the right to express views on the Internet. Thus, analysing positive international experiences in balancing the right to express views and protecting the rights of others online is pertinent.

The purpose of the paper is to analyse the legal regulation of the right to express views and beliefs on the Internet in international documents and legislation of foreign countries to identify features, advantages, and drawbacks of such legal regulation in different countries.

The study employs various theoretical research methods, including historical, abstract-logical, systemic-functional, analysis and synthesis, and theoretical generalisation. The systemic-functional method, abstract-logical method, analysis and synthesis, and theoretical generalisation facilitated the summarization of theoretical and legal principles of ensuring freedom of speech existing in foreign countries, the systematisation of components of the right to freedom of speech, criteria and conditions for restricting the right to freedom of speech and the right to express views and beliefs.

The comparative legal method was used in the analysis and comparison of foreign legislation regulating freedom of speech and the right to express views and beliefs on the Internet. Key attention is paid to the legislation of the United States, Japan, China, and Germany. Through the analysis of foreign countries' legislation, particularities of legal regulation concerning the right to freedom of speech in specific nations were identified, including the advantages and disadvantages that might exist. Special attention was paid to the legislative consolidation of responsibility for the dissemination of false information on the Internet, the protection of public safety, and copyright protection on the Internet.

Legal support of freedom of speech in international treaties

According to Article 19 of the Universal Declaration of Human Rights (1948), every individual has the right to freedom of thought and the expression of those thoughts. This right encompasses the freedom to uphold one's beliefs and to seek, receive, and disseminate information and ideas by any means and regardless of national borders. Moreover, the document does not provide for restrictions on this right.

In line with Article 19 of the International Covenant on Civil and Political Rights (1966), every person possesses the right to express their views freely. This right includes the freedom to seek, obtain, and share information and ideas across borders, whether orally, in writing, through print, artistic expressions, or any other means of their choice. The paper specifies that exercising this right carries responsibilities, necessitating a heightened level of accountability. Moreover, the International Covenant permits states to impose restrictions on the exercise of the right to expression on a legislative level when necessary to protect the rights and reputations of others or for the preservation of national security, public order, health, or morality.

According to the Human Rights Committee General Comment No. 34 (2011), freedom of thought and the right to express views are essential conditions for the full development of the individual. They form the foundation for any democratic society. Freedom of thought and the right to express views are closely linked, and freedom of expression is a means of exchanging opinions and developing them.

In 2016, the United Nations Human Rights Council adopted the "Promotion, Protection and Enjoyment of Human Rights on the Internet" resolution, aiming to safeguard the right to express views online. According to the resolution, the rights that belong to a person offline should also be protected on the Internet.

Simultaneously, international documents have been adopted by the global community to prohibit expressions that propagate hatred and hostility on the Internet. For instance, the Additional Protocol to the Convention on Cybercrime concerning the criminalization of racist and xenophobic acts committed through computer systems (2003) prohibits any written or other

material that advocates, promotes, or incites discrimination or violence against any individual or group based on any characteristic.

Convention for the Protection of Human Rights and Fundamental Freedoms (1950) Article 10 provides for freedom of expression, which includes the freedom to adhere to one's views, receive and transmit information and ideas without interference from state authorities and regardless of borders. Similar to other international agreements, the Convention also allows for limitations established by law that are necessary in a democratic society for national security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals, protection of reputation or rights of others, prevention of disclosure of confidential information, or maintaining the authority and impartiality of the judiciary.

The Charter of Fundamental Rights of the European Union (2000) is an integral part of the legal system of the European Union. The Charter is binding on European institutions and member states and provides for the protection of freedom of speech in Article 11: "Everyone has the right to freedom of expression." This right encompasses the freedom to hold one's opinion, obtain and disseminate information and ideas without interference from public authorities and regardless of national borders. Furthermore, the Charter of EU Fundamental Rights requires the observance of freedom and pluralism of media outlets.

Thus, freedom of speech as a key right necessary in a democratic society is enshrined in a number of international treaties adopted within the UN, the Council of Europe, and the European Union. Nonetheless, the realisation of this right necessitates a sense of responsibility and the establishment of legislative constraints to safeguard the rights of others and maintain public safety.

Legal support of freedom of speech on the Internet in foreign countries

One of the first countries to adopt legislation in the field of legal regulation of freedom of speech on the Internet is the Federal Republic of Germany (hereinafter – Germany). On October 1, 2017, Germany adopted the Law of the Federal Republic of Germany “Network Enforcement Act” (2017). The Law defines a “social media provider” as a provider of telemedia services that operates an internet platform to allow users to share views with other users or make content publicly accessible. Exceptions apply to platforms that offer journalistic or editorial content, for which the service provider is responsible; platforms intended for individual communication or sharing specific content, and professional networks like LinkedIn. The law obliges providers of telemedia services to establish and ensure the operation of a system for handling complaints about illegal content. If the content is clearly illegal, the provider must block it within 24 hours. Other illegal content should usually be blocked within seven days of receiving a complaint. The seven-day period may be extended if the user who uploaded the content is given the opportunity to respond to the complaint or if a self-regulatory body is involved. Illegal content includes content that corresponds to certain violations of the Criminal Code of the Federal Republic of Germany (1998), including incitement to hatred, insults, and deliberate defamation. Fines for violating the obligation provided for by law can reach 50 million euros. In addition, providers of telemedia services are required to publish reports on their activities twice a year.

The Law of the Federal Republic of Germany “Network Enforcement Act” prompted providers of telemedia services to take measures against expressions that incite hatred or contain threats, etc. Therefore, the positive effect of this regulation

should not be underestimated. Meanwhile, German researchers have raised a number of critical points. For example, W. Schulz (2018) raises the question of the unclear status of providers of telemedia services. Furthermore, the main question, according to the researchers, is whether the creation of a complaint system provided for by law does not violate the basic rights of the provider. The main criticism from researchers relates to potential violations of freedom of speech in various ways. In practice, the obligation of social media platforms to remove clearly illegal content within 24 hours raised questions about potential over-blocking of content and the privatisation of judicial power through the interpretation and application of criminal law by private companies. These two elements together, in turn, could result in a significant restriction of freedom of speech, according to K. Klonick (2018) and N. Guggenberger (2017). A. Heldt (2019) argues that the question of whether content can be removed, as required by the “Consumer Protection in Social Media Act”, is not the main issue. Firstly, because the law requires the removal of illegal content, and secondly, because removal is still the most effective tool used by providers of telemedia services when it comes to expressions that incite aggression.

The Constitution of Japan (1946) prohibits censorship and protects freedom of speech, the press, and all other forms of expression, including the confidentiality of communication means. However, there are legal limitations established to protect the rights of others.

Japan has a number of regulatory acts aimed at safeguarding the country’s security, public order, and the rights of others on the Internet, through civil and criminal liability. For example, in 2014, the law on the protection of a specially defined secret came into force (Cabinet Secretariat, n.d.). The law grants certain officials the authority

for an unlimited period to restrict public information related to defence, diplomatic relations (the content of negotiations with the government of a foreign country or international organisation that is important for national security; prohibition on the import or export of goods or other measures taken by Japan for national security; important information related to protecting citizens' lives, maintaining territorial integrity, peace, and security of the international community, or information requiring protection based on a treaty or other international agreement gathered in connection with national security), prevention of certain harmful activities (important information related to protecting citizens' lives or information from the government of a foreign state or international organisation gathered in connection with preventing certain harmful activities), and prevention of terrorist activities (Cabinet Secretariat, n.d.). Those who possess such state classified information and have caused its deliberate leakage are punishable by up to 10 years imprisonment, and for unintentional leakage of information – up to 2 years. Persons who knowingly received such classified information from an administrative body are punishable by up to 5 years imprisonment for intentional disclosure and 1-year imprisonment for negligent disclosure (Freedom on the Net, 2016).

The protection of copyright on the Internet has gained particular importance. In 2020, the Japanese government made amendments to the Copyright Act, making it illegal to download or upload content that infringes on copyrights (Cabinet Secretariat, n.d.). Previously in 2010, the downloading or uploading of videos and music was criminalised if the person knew that they were doing so illegally. However, this area was limited to “videos and music” and did not cover books, magazines, and comics (manga). The 2020 amendment expanded the scope to cover all

types of copyrighted works (e.g., comics, books, documents, computer programmes) (Nakazaki *et al.*, 2023). Violators of the revised law face up to two years of imprisonment and/or a fine of up to 2 million yen (18,000 USD) (Freedom on the Net, 2021). In addition, Article 175 of the Penal Code of Japan (1907) prohibits the dissemination of indecent content. The distribution, sale, or display of indecent content (images, objects, etc.) is punishable by imprisonment for up to 2 years or a fine of up to 2.5 million yen.

The United States ranks third in the world in terms of the number of internet users. However, the regulation of the right to freedom of speech on the Internet and social media platforms is not governed by legislation there. Social networks are private companies. They themselves establish their own usage rules, which can include content censorship and restrictions on community membership rights.

In the United States, free speech infringement lawsuits filed against social media are usually dismissed. The main reason for rejection is that social networks are not state entities and their platforms are not public forums. Therefore, the First Amendment to the United States Constitution, which guarantees general citizen freedoms including freedom of speech (Constitution of The United States of America, 1787), does not apply to them. The overarching principle of freedom of speech under the First Amendment is that its protection is aimed at preventing restrictions on expression by the government. The First Amendment only prohibits the U.S. Congress from enacting laws that limit freedom of speech. This provision also applies to certain states and local authorities but does not extend to private companies. As noted by B.M. Pinkus (2021), only in rare cases have U.S. courts recognised social media platforms as public forums. An example of this is the decision

by a district court and subsequently an appeals court in the case of the Knight First Amendment Institute v. Donald Trump, where the courts ruled that the blocking of certain critical comments by the U.S. President on his official Twitter page violated citizens' right to freedom of speech as protected by the First Amendment to the Constitution, as the page was considered a public forum (Knight First Amendment Institute..., 2019).

Publication of false facts about an individual that damage their reputation can lead to civil (and very rarely criminal) defamation lawsuits in the United States. As noted by K.S. Park and A. Kuczerawy (n.d.), the legislation still considerably varies across individual states. However, to file a defamation lawsuit today, the plaintiff usually needs to prove, among other things, (1) that the defendant published a statement; (2) that the statement was a false fact (as opposed to true facts or opinion); and (3) that the defendant acted with a certain level of fault (this can be negligence or actual malice, meaning it is necessary for the defendant to have known that the statement was false at the time of its publication).

D. Wakabayashi (2020) draws attention to another flaw in US law. Section 230 of the federal Law of the United States of America, known as the "Communications Decency Act" (1995), has contributed to the prosperity of companies like Facebook, YouTube, Twitter, and numerous other internet companies. While the First Amendment to the Constitution of the United States of America (1787) safeguards freedom of speech, including hostile expressions, Section 230 shields websites from liability for content created by their users. This allows internet companies to moderate their sites without being responsible for the information they host. However, Section 230 does not provide complete protection from legal responsibility for certain criminal actions, such as

posting child pornography or infringing on intellectual property rights. Grounds for legal accountability can arise, for instance, with the passage of the Law of the United States of America "Allow States and Victims to Fight Online Sex Trafficking" (2018), which creates an exception to the application of Section 230 for websites that knowingly assist, promote, or support prostitution. However, it is necessary to note the complexity of legislative regulation of this issue. As noted by M. Sableman (2013), if internet service providers were potentially liable for every message posted on their platforms, it would be expensive and challenging for them to remove unacceptable or illegal content from the vast volume of information. In such a situation, service providers will probably simply delete most of the messages created by users. This general self-censorship could lead providers to delete any content that might trigger complaints, potentially resulting in the Internet not fulfilling its intended functions and advantages.

An example of a country that significantly restricts freedom of speech on the Internet is the people's Republic of China. Since 2015, the dissemination of false information that seriously disrupts public order is considered a crime in China, punishable by up to seven years in prison (Moynihan & Patel, 2021). In 2017, the government introduced the "Law of the People's Republic of China on Cybersecurity" (2017), requiring social media platforms to republish and reference news articles from state-approved media. Online platforms are required to adhere to state restrictions and cooperate in implementing strict limitations on political, social, and religious discourse in order to obtain operating permits. According to Article 6 of the Order of the Cyberspace Administration of China "Provisions on the Governance of the Online Information Content Ecosystem" (2019), which came into effect on March 1, 2020, producers of

online information content should not create, copy, or publish any unlawful information that includes violations of fundamental principles outlined in the Constitution of the People's Republic of China (1982), poses a threat to national security, undermines the reputation or interests of the state, distorts, slanders, defiles, or denies heroic deeds and spirit, propagates terrorism or extremism, incites any terrorist or extremist activities, fuels ethnic hostility or discrimination, promotes ideas harmful to state religious policies, spreads rumors to disrupt economic and social order, spreads indecent information, promotes criminal activity, demeans, slanders others or infringes on their reputation, confidentiality, and other lawful rights and interests, or any other content prohibited by laws and administrative regulations (Order of the Cyberspace Administration..., 2019). Network Information Departments at all levels monitor and verify the performance of information content management responsibilities on network information content service platforms and, if necessary, conduct special checks on the platforms. The Chinese cyberspace administration may suspend or close online platforms that are considered to violate the requirements contained in the regulation.

According to Article 176 of the Criminal Code of Ukraine (2001), unlawful reproduction, use, and distribution of scientific, literary, and artistic works, computer programmes and databases, other works, unlawful reproduction, use, and distribution of performances, phonograms, videograms, and broadcasting programs, their unlawful reproduction and distribution on audio and video cassettes, floppy disks, other information carriers, camcording, cardsharing, or other intentional copyright infringement and related rights, financing such actions, if they have caused significant material damage, are punishable by a fine ranging from three hundred to one thousand

untaxed minimum incomes, corrective labour for up to two years or imprisonment for the same term. The study concluded that this provision is insufficient, and it is proposed to adopt the experience of Japan and criminalise the uploading or downloading of videos and music if the person was aware that they were uploaded unlawfully. The experience of the United States is seen as not worth emulating, as internet companies in that country have the right to moderate their websites without being held responsible for the information they host. The responsibility model of Germany is worth considering.

Conclusions

The study examined the legal framework for the realisation of freedom of speech on the Internet and the experiences of foreign countries in ensuring its implementation at the national level. It has been established that at the international level, a considerable number of documents have been adopted to ensure the implementation of freedom of speech as a key element inherent in democratic societies. However, the development of information and communication technologies and the formation of a global information society have led to the need for further refinement and expansion of legal regulations in this area. Analysis of legislation in different countries confirms the existence of various approaches to addressing important tasks such as protecting the rights of others, respecting private life, morality, maintaining public order, security, preventing crimes and disturbances, and safeguarding copyright.

Copyright protection on the Internet remains relevant. Japan is a leader in this field, having made amendments to copyright protection legislation that render the unauthorised uploading or downloading of any copyright-infringing content illegal. It is worth agreeing with the necessity of

criminalising copyright infringements. Nevertheless, the question of the type and extent of penalties remains a subject of debate and requires further analysis.

In China, where substantial restrictions on the content of information posted on the Internet are legislatively established, these limitations concern not only information that threatens national security and public order but also harmful information for state religious policies and rumours that could disrupt economic and social order, among others. For violation of the law, serious sanctions are provided – up to seven years of imprisonment. The validity of such severe sanctions also remains debatable.

In the United States, social networks themselves set rules for using their communities, which may provide for censorship of the content of statements, and also have the right to restrict membership in communities. At the same time, the issue of preventing false statements remains unresolved, which is a prospect for further research.

The scientific originality of the study is that the analysis of foreign legislation in the field of legal support for the implementation of freedom of speech is conducted to identify positive experiences that can be used in Ukraine. It is concluded

that it is necessary to borrow the experience of Japan in the field of copyright protection and the experience of Germany in the field of control by internet companies of information that they post in order to prevent violations of the rights of others and public order.

The study is of practical value for researchers and practitioners who deal with the problems of legal support of freedom of speech, the right to express views and beliefs, for forecasting and planning scientific research, improving legislation, for teachers of higher education institutions in educational activities, and all interested parties.

With the development of information-communication technologies and the increasing use of the internet, new problems arise related to the implementation of this right online: protection of the rights of others, national security, public order, copyright protection, etc. All these issues require legislative regulation, and therefore can become topics for future research.

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Conflict of Interest

None.

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Міжнародний досвід правового забезпечення свободи слова в мережі «Інтернет»

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Анотація

Актуальність теми дослідження полягає в тому, що свобода слова – це природне право людини, яке має бути забезпеченим на законодавчому рівні, проте в період стрімкого розвитку інформаційно-комунікаційних технологій необхідно знайти баланс між таким забезпеченням і захистом прав інших осіб. Мета статті – провести дослідження правового забезпечення свободи слова на міжнародному рівні, а також досвіду зарубіжних країн щодо правового регулювання цієї проблематики. У роботі використано загальнотеоретичні методи наукових досліджень, а саме: історичний, абстрактно-логічний, системно-функціональний, аналізу і синтезу, а також метод теоретичного узагальнення, які дали змогу узагальнити теоретико-правові засади забезпечення свободи слова, які існують в зарубіжних країнах, а також систематизувати компоненти права на свободу слова й критерії та умови обмеження права на свободу слова й права на вираження поглядів та переконань. Порівняльно-правовий метод використано для аналізу й порівняння зарубіжного законодавства, що регулює свободу слова й право на вираження поглядів та переконань в мережі «Інтернет». У дослідженні обґрунтовано, що проблема правового регулювання забезпечення свободи слова полягає у складності досягнення

оптимального балансу між гарантуванням права на свободу слова й захистом інших осіб. Виявлено, що реалізація права на свободу слова в мережі «Інтернет» і в соціальних мережах США, Японії, Китаю, Німеччини на законодавчому рівні регулюється не однаково й використовуються різні підходи. Особливу увагу присвячено законодавчому закріпленню відповідальності за поширення неправдивої інформації, захисту громадської безпеки та захисту авторських прав в мережі «Інтернет». Обґрунтовано думку, що найбільш прийнятний для України досвід Японії та Німеччини. Практичне значення статті полягає в тому, що аналіз законодавства зарубіжних країн дав можливість виявити особливості правового регулювання права на свободу слова в окремих державах та встановити переваги та недоліки, які можуть існувати в цій сфері

Ключові слова: свобода вираження поглядів; право вираження поглядів і переконань; глобальне інформаційне суспільство; право на справедливий суд; авторське право; криміналізація
