

Changes of the ground of European Human Rights ideology caused by development of the Internet

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Abstract: The emergence of the Internet is a turning point in human history. However, being originally conceived as a tool for communication between scientists worldwide, the Internet rapidly has turned into its own virtual world living by its own laws and rules of the game, and its own original interpretation of the concept of human rights. Being initially a scientific product of Western scholars, the Internet is continuously impacting on liberal democracies. Moreover, development of the Internet changes the essence of liberal and democratic policy pursued by the EU member states.

The rapid growth of the socio-cultural complexities of society, also triggered by the fast development of scientific thought in the XXI century, in general, and the Internet, in particular, entails a sharp increase of the social diversity. This aspect is extremely important given that it creates very serious difficulties in the integration process. Modern European society could be considered as information and knowledge society.

Finally, the rapid development of Internet in Europe - is primarily challenge of identity, entailing the destruction of national ideologies. Identity moves from 'congenital' to 'situational' category This

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research considers the most important issues related to the rapid development of the social media and the user-governed websites in context of structural transformation of the human rights ideology and policy of the United Europe. It is also important to look through the user agreements establishing communities in cyberspace – being important part of the implementation of human rights online.

Basic roots of the European human rights policies

Human rights are understood in Europe as a cornerstone of all legal system of the European Union. It is based on the meaning of the essence of human being, dignity of humans, and individual freedom.

European Union member states need to be liberal and democratic. As Stanford University Professor Laura Donohue defines several criteria for states to be recognized a liberal democracy.

At first, state should recognize liberal values:

1. Individualistic approach: the ultimate importance of the individual, not society or state.
2. Individual rights: individuals have natural rights that are independent of and prior to state, community, society.
 - a. Aim of government is to protect these rights.
 - b. Fundamental rights: life, liberty, health, property.

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Also, states must be effective democracy, which means:

1. Effective political power vested in the people.
2. Previously reserved for systems in power directly exercised through general assemblies or referenda to decide the most important questions of law or policy.
3. More recently, broadened to also include what the Founding Fathers referred to as a republic: power exercised indirectly, through freely elected, representatives/government officials/delegates to a legislative assembly who are supposed to make government decisions according to the popular will, or at least according to the supposed values and interests of the population⁷.

European Union as entity has several institutions. All infrastructure of the Union is involved in cooperation in human rights protection, involving European Communities pillar of the Union.

The *Commission* - an appointed, non governmental body - is a major player in the making of EU law. In respect of 'political' law it is the formulator of legislative proposals and it exercises great influence over the progress of proposals as they make their way through the Council and the Parliament. In respect of 'administrative' law the Commission is itself the main decision-maker,

See Donohue, Laura. *Terrorism and the Liberal, Democratic state* // Stanford University Initiative of Distant Learning Programme, 2005.

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though its actions are monitored by, and can indeed usually be controlled by, committees of national government representatives.

The *Council of Ministers* can take many decisions on proposals for EU law by qualified majority vote. That is to say, many EU laws can be made against the wishes of one member state or a minority of member states.

The *European Parliament* is supranational by virtue of being composed of directly elected Members of the European Parliament (MEPs) rather than governmental representatives, by virtue of taking its decisions by majority - or, in some cases, by an absolute majority - vote, and by virtue of having real decision-making powers.

EU law takes precedence over national law should the two conflict. This long-established principle has inevitably become of ever-greater significance as EU law has steadily expanded in scope. There are now virtually no areas of public policy in which EU law does not have at least a foothold, and there are many in which it is either the main provider of law (notably external trade, agriculture, and various aspects of market regulation), or is a major provider of law (such as in the regional, social, and environmental policy spheres).

The *European Court of Justice (ECJ)* is the final authority on the interpretation of EU law and on 'boundary disputes' between EU law and national

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law. As EU law has broadened in scope so have the demands on the Court inevitably increased⁸.

The European commission developed several criteria for membership in the Union. This set of criteria has been developed in 1993 on summit in Copenhagen. One of them is political criterion meaning that the State should have stable institutions guaranteeing democracy, human rights, rule of law and protection of minorities. Besides measuring democracy in candidate states, these criteria must estimate how important basic values for Europe are.

Many international organizations, both of intergovernmental and non-governmental nature, are dealing with the issue of internet governance. Among the international intergovernmental organizations we could highlight, above all, the UN Forum on internet Governance, UNESCO, and regional international organizations such as the Council of Europe or Organization for Security and Cooperation in Europe (OSCE).

The UN internet Governance Forum holds annual international conferences in different parts of the world. Each of the conferences is aimed to establish and improve mechanisms for internet governance, with due account of international standards and principles in the sphere of human rights, such as the Universal Declaration of Human

See Neill Nugent, "Decision-Making," in *Developments in the European Union* eds. Laura Cram, Desmond Dinan, and Neill Nugent (New York: St. Martin's Press, 1999), 131.

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Rights (1948), the International Covenant on Civil and Political Rights (1966), and other fundamental documents in this area. Conferences are open for all stakeholders involved in global internet governance. In particular, at a conference held in 2008 in Hyderabad (India), it was stated that internet governance should be based, in all respects, on human rights, and primarily on the freedom of expression (IGF, 3rd meeting, 2008, P. 9).

The United Nations Educational, Scientific and Cultural Organization (UNESCO) plays a significant role in the development of international mechanisms of internet governance. In the process of implementation of intergovernmental programs, primarily *Information for All Programme (IFAP)*, the issues of freedom of expression and information accessibility rights are determined as strategic priorities.

It also spelled out the need to follow the principles of information ethics, to acknowledge that there are ethical, legal and social aspects of information and communication technologies (ICTs). Ethical principles for knowledge societies derive from the Universal Declaration of Human Rights, including freedom of expression, universal access to information, especially of public domain, the right to education, right to privacy and right to participate in cultural life. One of the most pressing issues is unequal access to ICTs from different countries, as well as urban and rural areas within countries (IFAP Strategic Plan, 2008, P. 10).

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In addition to global, there are also regional European initiatives on internet governance. The *European dialogue on internet governance* has been established and operating under the auspices of the Council of Europe. Second meeting of the Dialogue took place on 14-15 September 2009 in Geneva with the participation of about 200 representatives from the private sector, governments and parliaments of different countries, as well as the civil society. The dialogue participants noted with satisfaction that the forum was attended by representatives from all major groups of agents of internet governance, i.e. civil society, government, youth, academia, industry and parliamentarians. (EuroDIG Press release – 660 (2009)).

Human rights were treated as key issues in internet governance. Attention must be paid, in particular, to implementation and consolidation of existing human rights standards in the context of internet governance, especially in developing countries. The Dialogue promotes a developing idea of the internet as a public resource which also seeks to guarantee universal access to information.

In 2007, the Council of Europe and UNESCO, together with the National Commission of France for UNESCO hosted a conference titled “Ethics and Human Rights in the Information Society”. One of the pressing issues discussed at the Conference was effective regulation and enforcement of legal norms. It was stressed that society needs clear and precise rules and directives that internet users could observe and implement. Paradoxically,

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there was also a need for a dynamic and flexible international instrument drafted as a code of ethics of the internet with discovery of these principles, without any inhibition of future progress and new formats (Worhoff D., 2007, P. 37).

The position of the Organization for Security and Cooperation in Europe is that in a modern democratic civil society, citizens should be able to decide independently whether they want to have access to the internet. The right to disseminate and receive information is one of the fundamental human rights. Compulsory introduction of state filtering mechanisms assigning labels or blocking unacceptable content must be prohibited (OCSE, The Media Freedom internet Cookbook, 2004, P. 18).

Web 2.0 era provides new stage of the websites' content development. At present time the content of the most websites is created by their users. Internet is evolving to make all the content in future completely creative. Even today the most popular websites on the Internet are blogs (i.e. Livejournal), social networks (i.e. Facebook), video-hostings (i.e. Youtube), and other websites providing user-generated content.

Nowadays the Internet is characterized by ample opportunities for self-realization that continuously improves its value in society. Sometimes the internet is replacing traditional media and traditional channels of communication. It is a global trend, adjusted for the state of the information

environment, as well as the level of legal and information culture of Internet users.

Legal analysis of the user agreements of Internet resources in context of realization of basic human rights

There we should consider what would constitute the user agreement of web recourse, and what features of the internal rules of online communities could affect the exercise of freedom of speech and the right of access to information for individuals.

According to the I. Danilina, relations on the Internet can successfully be governed by internal rules. However, practice shows that different user agreements are necessary, but obviously insufficient condition, to set relationships in the Internet in legal framework⁹.

User Agreement (License Agreement, Terms of Service) is a document that regulates the entire spectrum of relations between the owner, administration, and users of web resource. According to I.M Rassolov, social (corporate) standards adopted by the subjects of Internet relationships are one of the socionormative regulators of relations on the Internet. They express the will of their subjects (participants) have the required value for them and, of course, regulate their behavior. In addition, they

See: *Danilina, I. V.* Information relationships in the Internet about the objects of copyright // *Laws of Russia: experience, analysis, and practice.* 2010, №4.

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provide the possibility of quasi-legal responsibility, established by special corporate group or an interested team. These rules do not come from any “central authority” (e.g. parliament) and can act as effective mean of regulation. Corporate norms, as a rule, regulate the social relations that are not covered by laws¹⁰.

Such User Agreements are legally binding contract concluded by public offer. According to opinion of the well-known constitutional law expert, professor of the Higher School of Economics, Andrey Medushevsky, in case of user agreements, such aspects of contract, as the will and its authenticity, are unclear. Could the expression of the will be understood in terms of the relevant provisions of the Civil Code, when it is transmitted over the Internet, in particular, in case of automated expression when it is carried out without direct human intervention in the process of expressing their will. Further, in terms of communication, could the error transmission of the will, be recognized as expression of the will in legal terms? There are two points of view: according to the first, this is not the will, but under certain conditions the person becomes obligated to pay damages. According to another, supported by a minority, existence of the will should not be questioned, but the will itself surely could be

See *Rassolov, I.M.* Law and the Internet. Theoretical problems. 2nd ed. Moscow: Norma, 2009. 384 p.

challenged. It is very important to separate the faulty expression from criminal intent¹¹.

It is important to reconsider the legal nature of these rules. The transaction that does not meet the requirements of law or other legislation, is negligible. Such transactions may limit freedom of speech and the right to access the information which is guaranteed by rules of international law.

S. Vasilyeva writes that in public-law relations, attributed to the subject of constitutional regulation, priority is given to human being as the basis of the constitutional model of relations between society, government and people. Public relations, defining the subject of the constitutional law, associated with a number of objective and subjective factors, such as historical traditions, level of economic development, political and legal consciousness of the ruling elite, legal culture of society, specific needs and interests of the state and society, etc. Constitutional law regulates the most significant relations for the state and society, in order to achieve the most important interests. Thus, the subject of constitutional regulation can be extended by the relations covered by the subject of other branches of law, like civil law¹².

See: *Medushevsky A. Law and New Technologies: parameters regulating the Internet (Runet) // Comparative Constitutional Review, 2006, № 1.*

See: *Constitutional Law of Russia: Textbook / S.Vassilieva, V. Vinogradov, V. Mazaev. Moscow, Eksmo-press, 2010. – 560 p.*

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It is seen that general protection of users' rights is only available for paid services of websites. Paid services are subject to the protection according to the civil law. Free-of-charge resources are used by «as is» mode. LiveJournal leads to a categorical position, stating that “You agree to indemnify, defend and hold harmless LiveJournal, as well as any of his associates and affiliated entities, its divisions and subsidiaries, as well as employees, agents, co-owners of a trademark, and other partners from any third party claims, including legal costs arising from third parties, and (or) arising from the content of your blog, your use of the Service, your involvement in development of LiveJournal services, failure to comply with this Agreement or your violation of any other rights of third parties, not depending on whether you are a registered user or not”¹³.

New understanding of jurisdiction in cyberspace

For Internet resources registered in foreign country there is a problem of mismatch of jurisdiction between their users and the administration. Relations between them are governed by the laws of the country where the resource is registered and the server is located. Generally conflict of laws rules couldn't be applied. Thus, the relationship between users and Google are governed

See: LiveJournal Terms of Use – URL: <http://www.livejournal.com/legal/tos-russian-translation.bml> (accessed: 02.20.2011).

by the laws of England. Any disputes with Google are in the exclusive jurisdiction of the English courts¹⁴. LiveJournal Terms of Service are governed by the laws of the State of California, without regard to the conflict of law rules¹⁵.

Existing standards of user agreements on jurisdiction substantially complicate lives of users from countries other than the one in which the resource is registered, makes it difficult or virtually impossible to protect the rights of those users legally. Even from the standpoint of civil law, presupposes the equal rights of contractors, such contractual inequality is questionable. If we consider that, by using of these resources, people could realize their constitutional freedom of expression, they become members of the constitutional relationships, as well as they could incur criminal liability for illegal content. It is clear that website user and the author of the custom content in this case states as figure whose rights are not really protected by the law.

User must agree with the text of the user agreement by registering on the website. Register serves as the user acceptance of a public offer.

In case of creation, deployment and use of user-generated content site users are prohibited to make certain acts for which liability may be imposed. Liability may range from denying access to

See: Google Terms of Service. – URL: <http://www.google.ru/accounts/TOS> (accessed: 02.20.2011)

See: LiveJournal Terms of Use – URL: <http://www.livejournal.com/legal/tos-russian-translation.bml> (accessed: 02.20.2011).

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the site (temporary or permanent), to more serious measures, like civil and criminal liability. In particular, on most websites, prohibited actions are: discrimination on racial, ethnic and social grounds, libel and insult, harm to minors, copyright infringement and illegal commercial activity, using websites for committing other crimes, as well as for collecting and storing personal data of other persons.

User agreements of many Internet resources provide possibility of pre-moderation and post-moderation of the user-generated content of resources. So, Google reserves the right (but not obliged) to pre-screen, review, mark up, select, edit, do not allow for placement or remove any or all of the content of any services. For some services Google may provide means for excluding information of explicit sexual content. Such means may include preferential SafeSearch settings. In addition, there are other services and software available on commercial terms, to restrict access to information you may find unacceptable.

Unclear wording and definitions create the illusion of informality and absence of the mandatory force of the rules, which can be easily circumvented. This fact endangers rights and interests of websites users, as well as other people. It is inconsistent with the Constitution and laws, as well as with international principles and norms governing human rights. Sufficiently the powers of administration of resources could be loosely interpreted. This fact leads to confrontation between users and

administration on these resources. Very often there is no mechanism for resolving disputes.

Only one website demonstrates the best practice of self-regulation. Wikipedia, which has 30 million active users, has unique in the Russian segment of Internet community of active users. This community set their own principles of conduct with a low degree of formalization, proclaiming only “five pillars” of Wikipedia, governing relationship between its participants. Even formal registration is not required for fully-functional service of the website. Also Wikipedia has specially designated institutions of self-governance, like conflict commissions.

The rules are not rigid and designed by the user community. Even users who have not participated in the creation of rules, could monitor their compliance. Also here established a hierarchy of users, having rights higher than rights of the average user. Access to the logs (history of changes) of each Wikipedia article is available to all users – so that all users may keep track of each other's work on updating articles.

YouTube broadcasts also declares that it has created a full-fledged community of users. Its user agreement setting principles of community based on mutual respect and activity of users of the resource¹⁶.

See: YouTube Community Guidelines. – URL: http://www.youtube.com/t/community_guidelines (accessed: 20.02.2011).

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***Delineation of responsibilities between users
and content providers***

The problem of the delineation of responsibility for the content of messages on the Internet is another important aspect which requires detailed consideration.

From a legal point of view of relationships on the Internet is relationship between the user (physical or legal entity) and provider, legal entity providing access to Internet or Internet resources. In this case, the problem arises in connection with the division of responsibility for the dissemination of information between the author (for instance, a user who placed a comment on the forum website of electronic media) and the administrator of the resource, *i.e.* the owner of the domain name of the website or its representative. It is the administrator of the resource in this context, we call the provider because it provides users with access to both the content of website, and the possibility to make change of the content.

Content provider should be distinguished from the provider of Internet access as a service connection. These services relate to the telematic services, organization of which are outside the scope of the consideration in this paper.

The website owner is usually not economically viable to sue end users for Internet violations, which in any case can not be a good advertisement for the respective site. Therefore, many owners of intellectual property rights are

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claiming for protection of their rights against the owners of the site, rather than users.

Owners of sites hosting user-generated content, usually seek the appropriate safeguards in order to obtain compensation from the users, but in most cases it is inefficient – most often no compensation could be achieved. Therefore, when the IP-address of the holder of illegal content is challenged, the administration of the resource usually uses secure conditions of the “removal” of illegal content, provided by the law of the European Union or the United States¹⁷.

Thus, the European Directive on electronic commerce provides that the administration of websites should:

- Promptly remove infringing content;
- To be passive, that is not directly participate in the activities of the user;
- Does not control user;
- Tend to receive remuneration for services rendered.

Conclusions

1. The need to streamline regulation. In our point of view, following a three-tier division of Internet governance (supranational, national, and community level) in order to realize freedom of

See: Directive 2000/31/EC of the European Parliament and Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

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expression and the right to access information, it is necessary to provide necessary conditions for participation of online communities in the governance on separate web resources. For that reason it is required to streamline regulation of the rules of behavior on these resources, and introduce strict system of monitoring.

2. Revaluation of the legal nature of user agreements. It is possible to challenge the civil-law nature of the user agreements. The realization of the freedom of expression and the right to access information on the Internet is undoubted constitutional law value. Civil law cannot settle number of public law by nature of social relations connected with the implementation of human rights and freedoms, if freedom of expression on the Internet could be considered in this context. According to Article 9 of the Civil Code of Russia, the refusal of citizens and legal entities from exercising their rights does not entail the termination of those rights, except for what is provided by law. In accordance with article 168 of the Civil Code, a deal which doesn't meet requirements of law or other legislation, is negligible. Such deals may include transactions that illegally limit realization of the freedom of expression and the right to access information guaranteed by the Constitution of the Russian Federation and provisions of the international law.

3. New understanding of jurisdiction in cyberspace. Cyberspace should be treated as separate jurisdiction with their own rules, which

reflect its unique character. Internal rules were designed as horizontal, in which the subjects of law are standing as their creators. Consequently, there is need for a new understanding of the Internet governance and territoriality in cyberspace.

4. Establishment of the web communities.

In social networks and other sites hosting user-generated content, user agreements do not contribute to the establishment of competent user communities. In this case, the term ‘competent’ includes such community of users, which user agreements have links to legislation and universally recognized principles and rules of the international law, as well as clear procedures for resolution of disputes by the appointment of responsible persons in an open and democratic manner. In this context it is also required to increase level of legal and information culture of users and administration of web resources.

5. Revision of the standards of responsibility. Rules on liability in the Internet, which existed in the era of ‘static’ web, should be reconsidered, because of the significance of the user-generated content. Resource owner is often just provides technical conditions for the activities of users. Thus, the responsibility of the owner of the resource is his need to establish rules of the website, to draft such rules for discussion of interested stakeholders, and comply with the conditions for their implementation. These rules shall not conflict with the law and impede the realization of the freedom of expression and the right to access information on the Internet. The administration of the

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resource is an intermediary between the owner and resource users. Its main task is monitoring of the implementation of user agreements, avoiding abuse of the freedom of expression and the right to access information on the Internet.