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THE RIGHT TO FREEDOM OF SPEECH: EVOLUTION IN THE DIGITAL AGE

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Abstract

The article examines changes in the possibilities of exercising the right to freedom of speech, caused by the widespread introduction of modern digital technologies. It is concluded that the evolution of the right to freedom of speech in the modern world has led to the fact that its implementation is increasingly dependent on various private companies - owners of multi-user information systems, primarily social networks. The current situation is in conflict with the needs of society in the free flow of information, in particular, of general significance. The need for the development of legislation that establishes guarantees of freedom of speech in multi-user information systems for the mass dissemination of information is substantiated. In particular, by analogy with the legislation establishing an exhaustive list of grounds for blocking (temporary or permanent) sites and accounts on social networks by state bodies, a list of similar grounds for the administrations of these systems should be established. Also, users should be given the opportunity to judicially challenge such actions on the part of the administration - if he believes that his right to freedom of speech was unlawfully limited. It is also advisable to attach a special regime for some accounts ("public accounts"). Public accounts can include accounts through which socially significant information is distributed. For public accounts, additional guarantees for the exercise of freedom of speech should be established.

Keywords: Freedom of speech; media, social networks, blocking of accounts, the right to the Internet

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1. Introduction

At the beginning of 2021, the blocking of accounts of US President D. Trump on social networks, as well as in a number of other services (Twitter, Facebook, Instagram, Reddit, Discord, TikTok, Twitch, Snapchat, YouTube) caused a great public outcry. Assessments of this fact are diametrically opposite: from full approval (Twitter 'permanently suspends' Trump's account, 2021) to accusations of violation of freedom of speech (European Commission condemns blocking of Trump's accounts on social networks, 2021). Moreover, as a result, some companies have already started blocking Twitter and Facebook in connection with the "censorship carried out by them" (ISP Blocks Twitter and Facebook to Protest Anti-Trump 'Censorship', 2021). This "war of companies" also negatively affects the right of citizens to freely receive and distribute information.

Meanwhile, blocking the accounts of D. Trump and his supporters on social networks is just one of the manifestations of the situation that has been taking place for many years: at present, a technology corporation can block (temporarily or permanently) a multi-year account of any user, guided solely by its internal rules, and without clear reasoning. Thus, the danger of restricting the right to freedom of speech, which is one of the universally recognized human rights, does not come primarily from the state, as has traditionally been the case, but from private companies. Freedom of speech regulation is moving from the public domain to the private domain. Is this a new manifestation of freedom or a new censorship? Is it generally possible to talk about censorship in relation to restrictions imposed by other subjects of law, except for the state?

2. Problem Statement

Freedom of speech (freedom of dissemination of information), being a component of freedom of information, at the same time acts as one of the basic principles of democracy. The Universal Declaration of Human Rights established that "everyone has the right to freedom of opinion and expression; this right includes the freedom to freely adhere to one's convictions and the freedom to seek, receive and impart information and ideas by any means and regardless of state borders (UN, 1984 art. 19)". Similar provisions are contained in Part 2 of Art. 19 of the International Covenant on Civil and Political Rights. Accordingly, the right to freedom of speech was reflected in the constitutions of most states of the world, adopted since the second half of the 20th century.

However, as you know, any right to proclaim is not enough. It is also necessary to ensure its implementation, taking into account the existing realities. The rapid development of information technology has given rise to a huge number of new ways of disseminating information that did not exist before. Modern digital technologies in themselves give citizens much more opportunities to disseminate information, however, as a result, restricting access to such technologies for any reason entails limiting the right to freedom of speech.

At the same time, in recent years, in relation to the dissemination of information using modern digital technologies, there has been another important trend - the issues of regulating access to sources of dissemination of information are increasingly being transferred from the jurisdiction of the state to private companies that create and maintain various multi-user information systems. Social networks and instant

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messengers, such as Twitter, Facebook, Telegram, etc., occupy a particularly important place in relation to this issue.

3. Research Questions

The subject of this article is to answer questions. Is the situation described above normal and in the interests of both individual users and society as a whole? Can it be considered a manifestation of a special kind of censorship or, on the contrary, the development of freedom of speech (freedom of dissemination of information)? Is government intervention required in this matter or should it remain an "internal affair" of private companies?

4. Purpose of the Study

The purpose of the work is to study the practice of implementing the right to freedom of speech using multi-user information systems, including social networks, and to determine the need, as well as possible ways of state intervention through the legal regulation of this area.

5. Research Methods

In preparing the article, various methods of legal science were used: description, comparison, classification, analysis and synthesis, which were aimed at identifying the current state of legal regulation in the field of information dissemination through multi-user information systems. The authors also used a comparative legal method aimed at studying legislation and judicial practice in this area in various states and regions of the world.

The systemic and structural method made it possible to systematize the basic requirements for the legal regulation of restrictions on the right to freedom of information dissemination through multi-user information systems, which should be enshrined in legislation.

6. Findings

The right to information in general includes various components: the right to access, the right to create, the right to transfer, the right to disseminate information, etc. Each of these components has its own implementation specifics, which must be taken into account in legal regulation.

Thus, the dissemination of information with a significant external resemblance to the transmission of information - in both cases, information is transmitted from one person to another (to other persons) - also has significant differences. The transfer of information always presupposes specific persons - its recipients, while "the dissemination of information is actions aimed at obtaining information by an indefinite circle of persons or transferring information to an indefinite circle of persons" (Federal Law No. 149, 2006, article 2). As a rule, when disseminating information, it is broadcast to a much larger circle of subjects than when it is transmitted. This predetermines special normative regulation of the dissemination of information and, in particular, the establishment of additional guarantees for its free dissemination.

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For a long period, the main source of information dissemination was the mass media. It is quite logical that in most states of the world the guarantees of the right to the free flow of information were linked exclusively with the formation of legislation on the mass media.

However, over the past decades, the vector of development of methods of disseminating mass information has changed significantly. Thanks to the evolution of mass media from traditional forms (print, audiovisual media, cinema, books, etc.) to new forms (electronic resources, websites, social networks), people have almost limitless opportunities to produce, receive information, share it, develop, learn, unite (Bendyurina, 2019). Networked media are increasingly replacing traditional media. Social networks make it possible to not only significantly speed up and simplify the process of disseminating information, but also to ensure the formation of horizontal communication links between their users. They begin to play a special role.

The latter circumstance made it possible to raise on a practical level the question of the formation of the so-called "right to communication", which was formulated back in the 70s of the XX century by the French researcher D' Arsi, (1980). In his opinion, the right to communication differs from the right to information in that, when exercising the right to communication, information flows in society are predominantly horizontal, rather than vertical.

It seems that at that time this right was largely theoretical. It began to play a noticeable role only with the advent of the Internet, and to an even greater extent, social networks. The latter are now largely replacing traditional mass media in the information field. At the same time, the specificity of a social network lies in the fact that each of its participants potentially acts as an independent generator and disseminator of information. Thus, the relative unity of the source of information in the traditional media is replaced by a multitude of subjects within the same social network, which, of course, can disseminate very different and often contradictory information. This aspect objectively raises the question of the need (and possibility) of regulating the dissemination of information through social networks, as well as other similar sources of mass information.

Most countries in the world have basic requirements for the dissemination of information in general and the dissemination of information on social networks in particular. However, these requirements are general in nature. In most cases, the state is limited only by the fact that it raises barriers to the dissemination of harmful, deliberately false or dangerous information for society. For example, the legislation of the Russian Federation prohibits the distribution of materials with pornographic images of minors; information on the methods, methods of development, manufacture and use of narcotic drugs; information on methods of committing suicide, as well as calls to commit suicide; etc. Germany passed the NetzDG (The Network Enforcement Act) in 2017, affecting social media, commercial ISPs and any internet platform that allows users to share any content with others. The law covers more than two dozen different offenses in the networks: from calls to violence and extremist statements to the dissemination of fake data. Since its entry into force, the largest platforms, including international ones (Facebook, YouTube, Twitter and many others), are required to block illegal content. In the United Kingdom, such requirements are enshrined in a special document called the Online Harms White Paper (In Russia, social networks were obliged to block illegal information. How will this affect people's lives?, 2020).

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The implementation of these prohibitive norms should be carried out mainly by the administrations of these technological platforms for the dissemination of information, which at the same time have a fairly wide margin of appreciation. Public authorities intervene only in case of inaction of the latter, and this process cannot be called simple and prompt (Churikova et al., 2021). As a result, the requirements of the legislation to stop the dissemination of harmful and (or) dangerous information are not always fulfilled, and, if they are, not immediately.

On the other hand, the state is currently rather weak in ensuring the right to freedom of speech for users of information dissemination systems.

As a result, the leverage over the dissemination of information is largely shifted from the state to those private companies that control these platforms. For example, the ability of a user of a social network to freely distribute information is only partially determined by the norms of legislation (mainly regarding information clearly prohibited for dissemination in the country), they are mainly determined by a user agreement concluded with the administration of the social network. The specified agreement, as a rule, defines all the most important rules for registration, use and termination of the user's account, while the user independently determines the boundary of his own behavior only within the limits allowed by these rules (Kirsanova, 2020). In addition, the basic rules set by default by the technologies used in the social network (the so-called lexinformatica) play an essential role in regulating the possible actions of the user (Amelin & Channov, 2020; Majorina, 2019; Reidenberg, 1998).

Thus, the bulk of legal regulation is shifting from the sphere of public law to the sphere of private law, as well as to the related sphere of "technological" regulation.

The wide scope of discretion of the owners of multi-user information systems for the dissemination of information allows them to intervene in the process of dissemination of information (mainly in terms of its limitation) much more and more often than is required of them by legal norms. For example, Facebook's Community Guidelines allow the blocking of information that would be deemed "cruel and tactless" (Community standards. Cruelty and insensitivity, 2021), namely Facebook removes posts that are "clear attempts to tease victims." At the same time, US legislation does not require the removal of such information, moreover, the US Constitution, namely the First Amendment, protects it from government interference. Thus, by establishing a rule that allows companies to remove "cruel and tactless" information, the Facebook administration allowed more restrictions on the freedom to disseminate information than the state did (Reade, 2020).

On the one hand, this flexibility helps prevent the dissemination of truly dangerous and harmful information in the absence of clearly established legal prohibitions. On the other hand, it can also lead (and, in the opinion of many, already leads) to abuse by these private companies and, ultimately, to infringement of freedom of speech.

It is characteristic that at the same time the companies themselves, as a rule, declare their adherence to the free flow of information. For example, the Facebook Community Guidelines states that their goal has always been to create a platform for self-expression and empower people to voice their opinions ... Building a community and bringing people together around the world is hard to imagine without the ability to share different opinions, experiences, ideas and information" (Community standards, 2021). Twitter is positioning itself as "the free speech wing of the free speech party". However, the practice of functioning

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of these and other companies often does not coincide with their declared values. Moderation of posts, temporary or permanent blocking of accounts at the subjective discretion of the administration has become the norm on the largest social networks in recent years.

How acceptable is this situation? There are several possible approaches to answering this question. On the one hand, Twitter, Facebook, Google, Telegram and others are private companies, and, as private companies, they quite reasonably have the right to decide which rules are in effect within the framework of the multi-user information systems they manage. Thus, Reade (2020) points out:

> Twitter and Facebook are private entities. They are neither branches of government nor controlled by the government; when they act, they do so privately ... Accordingly, they are the ones who have ultimate control over what happens on their websites. (p. 1493)

On the other hand, the private nature of a corporation in itself is not an obstacle to the establishment of the legal framework of its activities (including internal) and control by the state over their observance - if this is determined by the needs of society as a whole. The right to freedom of speech, it seems, is one of the areas where the requirements of public law (the need for free dissemination of meaningful information) come into competition with the establishment of private law (independent determination by the subjects of the latter of the internal rules of their activities).

We have already noted above that social networks are gradually replacing the so-called "traditional" media from the information field. At the same time, for a long time, the role of tech companies operating social networks in regulating the free flow of information has been largely ignored.

> As Callejon (2020) points out: That mediator has been hidden for a long time, to the point that it has been usual to think of social networks as an instrument of political communication without mediators (as opposed to traditional media), which is obviously not true. (p. 579)

According to the same author, due to the influence of these technology companies, "there are many areas in which social networks are generating dysfunctions from a constitutional and democratic point of view", which requires strengthening control over these companies by state, other public and supranational authorities (Callejon, 2020, p. 579).

The European Court of Human Rights, considering the complaint about the blocking of the account of the applicant - a citizen of the Russian Federation - on a social network and three entries on his blog (Decision of the ECHR in Kablis v. Russian Federation, 2019), noted that “due to its accessibility, as well as the ability to store and transmit huge amounts of information, the Internet plays an important role in expanding citizens' access to news and promoting information dissemination. The activities in the field of self-expression, carried out by users on the Internet, provide a unique platform for the exercise of their right to freedom of expression". On this basis, it concluded that the blocking of the applicant's social media account and three entries on his blog by the Deputy Prosecutor General of the Russian Federation constituted "interference by public authorities" with the applicant's right to freedom of expression, an integral part of which is the freedom to receive and transmit information. Such interference, in the Court's

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view, constitutes a violation of Article 10 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, unless it is “prescribed by law”, pursues one or more legitimate aims, and is “necessary in a democratic society” to achieve such goals. Let us note that in the case examined by the European Court, the blocking of an account on a social network was carried out not by a private corporation, but by the state. However, from our point of view, this does not affect the court's conceptual assessment of such blocking as restricting the freedom of dissemination of information, which should be carried out only within strict legislative framework and pursue a goal necessary in a democratic society.

The possibility and necessity of reducing the discretion of the administrations of multi-user information systems when making decisions on limiting the dissemination of information, including by moderating messages, blocking user accounts, etc., is due, in our opinion, also to the fact that the largest of them currently occupy a monopoly position in the information market. So, according to Morningstar, Google has 90 percent of the online search market, Facebook has 59 percent of the social networking market. Apple is leading the way in e-commerce and mobile applications (Jeans, 2020). According to the American political observer T. Carlson, "The main threat to our freedoms is now not the federal governments, but the IT monopoly" (as cited in How the Internet turned into a world censor, 2020). In turn, D. Soros in his speech emphasizes that the fact that Facebook and Google “are near- monopoly distributors makes them public utilities and should subject them to more stringent regulations, aimed at preserving competition, innovation, and fair and open universal access" (as cited in George Soros slams Google, Facebook, says they're a 'menace' to society, 2021, par. 5).

The legislation of most countries of the world is currently based on the need to limit monopolies and protect the interests of society from abuse on their part of their monopoly position (Belikova, 2007; Pisenko et al., 2010). This also applies to monopolies in the media market. So, for example, in countries such as the United States, Great Britain, Canada, Australia, France, Italy, Switzerland, South Africa, Brazil, and others, there are laws that prohibit or restrict cross-ownership of the media. Cross-media ownership is the ownership of different types of media by the same company in the same geographic location. Cross-ownership restriction is used as one of the tools to curb the process of media concentration, which has a negative impact on the level of freedom of speech, media diversity, content quality and its cost to the consumer (Nadirova, 2017). In the United States, there is "4 not allowed", which, in addition to limiting the concentration of the total circulation in the same hands, includes the impossibility of one person or group of persons to be the owners of a TV channel and a daily morning newspaper at the same time. By 30%, you cannot simultaneously own a TV and radio channel with more than 30% coinciding broadcasting.

In the practice of the US Supreme Court, there are examples of decisions when it came to the conclusion that if a monopoly in the field of media is natural, such a monopoly should be compensated by forcing these media outlets to provide equal opportunities for discussing socially significant issues to persons with different points of view. The most famous case is the Red Lion Broadcasting Co. v. Federal Communications Commission (Red Lion Broadcasting Co…, 1969), in which the Court rejected the broadcaster's allegations that the FCC Fairness Doctrine (an act of the Federal Communications Commission that enshrined these requirements) violates the First Amendment to the United States Constitution. This is because due to the very technological nature of broadcasting, only one radio frequency

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can be used for it implementation in a geographic region, and in return for giving the broadcaster a monopoly on the frequency, the state may interfere to some extent in its editorial policy.

This logic, it seems, should be applicable not only to print and audio- and audiovisual media, but also to multi-user information systems for disseminating information (primarily to social networks), at least to those holding a monopoly position in the information market. As modern researchers note, at present for many people, it is the information obtained from social networks that becomes more significant than that obtained from the mass media, as well as through official channels (Lipchanskaya, 2020). Accordingly, the state should regulate their activities in such a way as to ensure the exercise of the right to freedom of speech with their help.

With regard to the question of the status of social networks as a means of disseminating mass media of public importance, two decisions made by American courts in 2019 are of particular interest.

Thus, the Court of Appeals for the Fourth Circuit of the United States considered the lawsuit of a resident of Loudoun County, Virginia, Brian Davison against a public servant Phyllis Randall (Davison v. Randall…, 2019). The crux of his claim was that Randall deleted Davison's comment on his Facebook page and then blocked Davison. In satisfying Davison's claim, the court indicated that Randall created this page in order to provide official information about his activities. Thus, the specified page is not a private account, but a so-called "public forum", which is subject to special rules for the dissemination of information.

The concept of a public forum was formulated in the United States long before the advent of social media and the Internet, with the aim of a higher level of guaranteeing freedom of speech in relation to criticism of the state administration. A public forum is a specific place (originally, these were certain parks, squares, buildings, etc.) or communication channels designed to discuss socially important issues. In all public forums, any discrimination of any point of view is inadmissible. The Supreme Court has recognized three different categories of forums under its public forum analysis: traditional public forums, designated public forums, and nonpublic or “limited” public forums (Cornelius, 473 U.S. at 802, 1985). Each category retains different characteristics, and each category permits varying levels of speech restrictions (See Perry, 460 U.S. at 45–46, 1983).

In another similar case, the Court of Appeals for the Second Circuit ruled that then-incumbent President Donald Trump engaged in impermissible viewpoint discrimination when he blocked seven Twitter users from the view in his account because of the political views they expressed (Knight First Amendment Inst. at Columbia Univ. v. Trump…, 2019). Because President Trump had intentionally used his Twitter account for official government announcements, Trump had created a public forum with his Twitter account (Reade, 2020).

As you can see, both court decisions dealt with the protection of freedom of speech in relation to ensuring the right of citizens to express their opinion on the actions of public officials. Accordingly, these court decisions can hardly directly serve as precedents, for example, in deciding the legality of blocking accounts in social networks of Donald Trump himself. At the same time, in our opinion, the court decisions made allow us to draw the following important conclusion. An account on a social network in certain situations (for example, if it is used by a government official to convey official information) ceases to be a private source of information, but acquires the properties of a public distribution source significant information.

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Following this logic, in our opinion, it can be recognized that any restriction of access to such an account limits the ability of citizens to receive information that has a certain value for them. The blocking of D. Trump's accounts, carried out by a number of social networks, objectively entailed not only limiting his ability to convey his point of view, but also limiting the ability of others to receive certain information. Accordingly, without assessing the issue of the correctness of using blocking in this particular case, we note that, in our opinion, the adoption of such decisions should not remain a private issue for the administrations of social networks and other multi-user information systems for the mass dissemination of information.

Potentially, it seems that such an approach should be in demand for all cases of information dissemination by citizens through multi-user information systems, regardless of their status. As Velieva and Presnyakov (2020) correctly point out, “Freedom of speech requires neither to prevent a person to express his or her opinion nor to create conditions for this: at present time UNO attributes the right of Internet access to the “main” and “integral” rights” (p. 409). This right was first named as such at the official level in 2011 in a UN report, which stated that the right to access the Internet is recognized as an inalienable human right. Currently, it is already recognized in various official acts by many states, including France, Spain, Portugal, Greece, Estonia, Finland, Costa Rica, Mexico, etc.

Undoubtedly, the question of the independence of this right is still a subject for discussion. However, from our point of view, if it can be recognized as one of the human rights that should be guaranteed by the state, then as a right that is of a security nature in relation to other rights and, first of all, to the right to receive information and the right to freedom of speech (freedom to disseminate information). In fact, in the above-mentioned UN report it was named precisely in the latter capacity: "although the availability of the ability to connect to the Internet has not yet been recognized as a human right, there is a duty of states to promote the exercise of the right to freedom of expression through the Internet" (Report of the Special Rapporteur to the General Assembly on the right to freedom of opinion and expression exercised through the Internet, 2011, par 1).

The European Court, which in several of its decisions highlighted the right to access the Internet as an inalienable human right, in the judgment in the case "Ahmet Yildirim v. Turkey" (application no. 3111/10) highlighted that a violation of this right is blocking the applicant's website, which impeded his freedom of expression (Decision of the ECHR in Ahmet Yildirim v. Turkey, 2012).

It is quite logical that many experts directly attribute illegal and unjustified blocking of websites and individual accounts to a violation of the right to access the Internet (Levova et al., 2013; Talapina, 2020). It seems that this should also apply to cases of blocking sites and accounts not only by government agencies, but also by private companies.

Accordingly, states should develop legislation to protect the right of citizens to freely disseminate information from the actions of the administration of various multi-user information systems. The list of grounds for blocking accounts (both temporary and permanent; completely or in relation to individual messages) cannot be based only on the discretion of the administration, but must be defined in the law, be closed and extremely clear. Also, the possibility of judicial challenging the blocking should be provided.

In addition, for certain accounts, a special "public account" mode may be introduced, similar to the modes of public forums discussed above. Its peculiarity, accordingly, may consist in a greater amount of

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freedom of expression on it, consolidation of a narrower list of reasons for blocking and the use of a complicated blocking mechanism. As for the first aspect, we can talk, in particular, about the admissibility of statements in public accounts, including unproven and unverified information, especially if they relate to criticism of the activities of the government administration. Here it is appropriate to recall the position of the European Court of Human Rights, which has repeatedly stressed that "the boundaries of acceptable criticism are wider in relation to the government than in relation to a private person or even a politician" (Decision of the ECHR in Castells v. Spain, 1992; Decision of the ECHR in Dyuldin and Kislov v. Russian Federation, 2007; Decision of the ECHR in Incal v. Turkey, 1998). The criteria for classifying an account as public should also be generally defined by law, while, in our opinion, not only the accounts of civil servants, but also the accounts of politicians, other prominent public figures, etc. can be recognized as such.

When implementing these proposals, it is also necessary to take into account that such a transfer of the main body of regulation of freedom of speech from the private sphere (owners of multi-user information systems) to the public (state) will also require a commensurate reduction in responsibility. For example, if the administration of the system will not be able, within the framework of the current legislation, to block a specific account or a certain part of its content, it should be completely released from any responsibility for the information posted in it.

7. Conclusion

Modern digital technologies provide much greater opportunities to freely distribute information to any person than it was 20-30 years ago. At the same time restricting access to such technologies, for whatever reason entails restriction of the right to disseminate information (freedom of speech).

The evolution of the right to freedom of speech in the modern world has led, in particular, to the fact that its implementation is increasingly dependent on various private companies - owners of multi-user information systems, primarily social networks. At the same time, they have considerable discretion in resolving this issue (mainly in terms of restricting freedom of speech).

It seems that the current situation is in conflict with the needs of society in the free dissemination of information, in particular, socially significant. The right to freedom of expression is becoming an area where the claims of public law compete with the institutions of private law. The possibility and necessity of reducing the discretion of the administrations of multi-user information systems when making decisions on limiting the dissemination of information, including by moderating messages, blocking user accounts, etc., is due, in our opinion, also to the fact that the largest of them currently occupy a monopoly position in the information market. Meanwhile, the legislation of most countries of the world is currently based on the need to limit monopolies and protect the interests of society from abuse by them of their monopoly position.

Accordingly, in our opinion, there is an objective need for the development of legislation establishing guarantees of freedom of speech in multi-user information systems for the mass dissemination of information. In particular, by analogy with the legislation establishing an exhaustive list of grounds for blocking (temporary or permanent) sites and accounts on social networks by state bodies, a list of similar grounds for the administrations of these systems should be established (in principle, these lists should be, if not similar are close enough to each other). Also, users should be given the opportunity to judicially

challenge such actions on the part of the administration if he believes that his right to freedom of speech was unlawfully limited.

It is also advisable to attach a special regime for some accounts ("public accounts"). Public accounts can include accounts through which socially significant information is distributed. At the same time, the criteria for classifying accounts as public can be, for example, their management by a public administration official, a well-known politician or public figure; a significant number of subscribers to this account; the certain nature of the information posted on them, etc. (of course, these criteria should also be enshrined in regulatory enactments). For public accounts, additional guarantees for the exercise of freedom of speech should be established.

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