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Interference with Freedom of Expression

Gabriela NEMȚOI[1]

Abstract

Established as a personal right, the right to free speech implies obligations and duties, which may generate possible restrictions. Freedom of expression works correctly in a legal framework when it comes to a legitimate aim in a state law.
Article 10, paragraph 2, of the Convention explains the conditions under which the right to freedom of expression is justified by the need to protect certain public interests (such as those relating to national security, the territorial space of the state, public order, the prevention of crimes, the protection of health and social morals, the guarantee of authority and the impartiality of the judiciary) but also to protect certain private interests, such as reputation and the rights of others. persons or the need to prevent the publication of secret information.
This paragraph basically authorizes states to take certain measures to protect those interests, which materialize through rules and normative rules of the right to conscience, opinion and freedom of expression
States enjoy a margin of appreciation for establishing the need for such reactions in a state governed by the rule of law, but in the end it is also up to the European Court of Human Rights to rule on the compatibility of interference with the provisions of the Convention, assessing on a case-by-case basis if the interference arises as a result of the urgent social issues and whether it is fair.

Keywords: *Right to free expression, expression as information, expression as human dignity, limits of the right to expression.*

1. Introduction

Freedom of expression is personal, and is an absolutely necessary right for the realization of a complex of rights guaranteed by the Convention, such as the right to free association, being at the same time an individual right, part of the spiritual freedom of each individual, but also a collective right, which allows communication with other peers. (Sudre, 2006, p. 351)

Consecrated from two distinct rights, freedom of opinion and freedom of information, the right to free expression, is the exclusive generator of the individual's will to be heard in the context of the exercise of several rights.

Regulated both nationally, by art. 30 of the Romanian Constitution, as well

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as internationally, through art. 10 of the European Convention on Human Rights, this right is both a fundamental right for the realization of other guaranteed rights, by the mentioned normative spectrum.

Freedoms always bring with them a series of duties, responsibilities, which are subject to formalities, this fact delimits the degree of extension by building a predetermined conduct.

The freedom of expression provided in art. 10 of the Convention is one of those fundamental freedoms establishes a democratic spectrum in civil society, being classified, as a guarantee, an essential condition.

The research in question outlines in the initial phase the meaning that the right to free expression can give, structured in the two components: freedom of opinion and freedom of information.

Citizen's opinion it cannot be censored, but it works within the limits of good morals, being a personal action, while the right to information, conferred by Article 31 of the Constitution, translates into the right of the person to have access to public knowledge. The objective of the theme approached is to identify the limits of the exploitation of the right of expression.

In this regard, it is well known that an important and essential limitation is that the exercise of the right of expression is not prejudicial to other adjacent rights with which it functions, such as dignity, honor, privacy or the right to self-image.

2. Freedom of expression structured in two elements

2.1. Freedom of opinion

Connected to freedom of thought, conscience and religion presented in Article 9 of the Convention, freedom of opinion guarantees that any individual is free to form his own beliefs about the concept of living, the way he works in civil society by expressing opinions and respecting them, this phenomenon being a component of the pluralism of opinions advanced between individuals in a generous and free state.

Freedom of expression cannot function without first taking into account freedom of opinion, because the former is necessarily an external manifestation of the former. But the opinion that is not made known to other people cannot harm the rights of other members of society, and therefore freedom of opinion is not restricted, unlike its expression, which can prove, in some situations, harmful in the relationship with other fundamental values.

The expression of an opinion means the expression of a value judgment, which is of particular importance from an evidentiary point of view, because, as the Court has ruled in its case-law (Case De Haes et Gijsels/no. 19983/02, 2003) , the accuracy of value judgments cannot be demonstrated as concrete facts can be proved, and to claim such proof would inevitably lead to an impermissible restriction of freedom of opinion (Birsan, 2010, p. 778).

It is normal for each person to have the opportunity to form and express their own conceptions of life, social, political, or other areas of interest to each of

us. No one can and should not be punished for not sharing a certain opinion or for not wanting to express a certain opinion.

Moreover, as previously mentioned by art. 10 of the Convention, an article regulating "*freedom of expression which includes freedom of opinion, freedom to receive and communicate information and ideas without interference by public authority and regardless of frontier*s" (ECHR, art.10), cannot function individually but only in connection with other freedoms and rights.

Freedom of opinion is a precondition for other freedoms guaranteed by art. 10 and cannot be compressed even in the situations provided by art. 10 para. 2 for the simple reason that an opinion once formed and left in the mind of its author cannot harm other interests (Radu, 2018, p. 172).

2.2. Freedom of information

Freedom of information is the right to communicate information without restriction and at the same time the right to receive information. Of course, the term "information" refers not only to gross facts and news or matters of general interest, but also to deliberately produced information such as radio or media.

"The right to receive and communicate information" is ensured by the Convention only insofar as the holder of the information wishes to communicate it, since by art. 10 is not intended to ensure access to information that the holder does not wish to make public. At the same time, we note the extremely comprehensive manner in which the constituent legislator has chosen to regulate the right to free expression of the individual.

Thus, art. 30 para. (1) of the Constitution makes the following enumeration, establishing the effects of the right to expression: "thoughts, opinions, beliefs or freedom of creation orally or in writing or images, through sounds or other means of public communication".

In addition, both legal instruments also protect the media through which any type of information is transmitted, thus protecting the free movement of the latter. The phrase "other means of communication in public" covers any means of transmitting information to the public, whether general or private.

Freedom of information must be exercised without interference from the state, except for those provided by art. 10 part. 2 of the Convention. Both freedom of opinion and freedom of information give rise to obligations on the part of all state authorities. They have a negative obligation not to impede in any way the free exercise of these rights but also a positive obligation to ensure their exercise (Birsan, 2010, p. 779). The freedom to receive information is guaranteed, regardless of the form of exposure, audio-visual, written press, media, etc. The right to capture information should not be construed as an obligation of the state. (Case Magyar Helsinki Biyottsag, no. 18030/11, 2016)

This freedom also includes the right to seek and gather information from all possible and lawful sources (Macovei, 2003, p. 163).

This freedom does not give the right of access to information held by a public authority, nor does it impose on it an obligation to communicate it.

However, this obligation may arise only in the event of a judicial decision requiring the authority to disclose it or if access to that information is determined for propelling the right to information.

Of course, art. 10 does not protect ideas or opinions contrary to the values referred to in the Convention (Case Lehideux and Isorni). Under these considerations the Constitution agrees with the text of the Convention and with regard to the limits of this freedom, which is not an absolute one.

In this case, the Convention states that freedom of expression may not exceed the limits imposed by situations such as the prevention of criminal offenses, the protection of national security, the protection of the health, morals or rights of others. At the same time, the Romanian legislator chose to detail a set of values that cannot be harmed to the detriment of the free expression of opinions.

In order to resolve any dispute involving these values, the ECHR standard must be applied with priority, as it appears from the text of art. 11 and 20 of the Constitution. Thus, art. 11 of the Constitution, entitled "International law and domestic law" provides: "(1) The Romanian State undertakes to fulfil exactly and in good faith the obligations incumbent on it from the treaties to which it is a party. (2) The treaties ratified by the Parliament, according to the law, are part of the internal law. (3) If a treaty to which Romania is to become a party contains provisions contrary to the Constitution, its ratification may take place only after the revision of the Constitution", while art. 20 states that: "(1) The constitutional provisions regarding the rights and freedoms of citizens shall be interpreted and applied in accordance with the "Universal Declaration of Human Rights", the covenants and other treaties to which Romania is a party. (2) If there are inconsistencies between the pacts and treaties on fundamental human rights, to which Romania is a party, and domestic laws, international regulations have priority, unless the Constitution or domestic laws contain more favourable provisions", is justifiable.

Consequently, the interpretation refers to the norms of the Convention, which are implemented in the Constitution.

"Freedom of opinion" and freedom of information components of the right to expression are enshrined together, the interconditioning between the two is based on the fact that the expression of their own Beliefs come from access to information.

In my opinion, the connection of the two elements that define the right to free expression it comes down to the freedom of the citizen placed in in the free and democratic world.

3. Legitimacy of the right to free expression obligation of the state

The state has a number of positive and negative obligations. The positive obligation is between the permissiveness of the individual, in the use of freedom of expression in his relations with other people, without harming, through his actions and the negative obligation belongs to the state in order to channel the right to free expression in accordance with the rules. constitutional requirements. (Case Frasila &

Ciocirlan, 2012, p. 55).

The scope of obligations varies, depending on the diversity of situations in each state and the choices to be made regarding priorities on the one hand, and resources on the other. In that regard, that obligation must also not be interpreted as imposing an excessive or disproportionate burden on the authorities. It can be about the obligation to legislate or about the intervention in the relations between private individuals, so that the right is protected.

Negative obligation of the state, the right to free expression cannot be infringed or limited to such an extent that it exists only on a purely theoretical level. Thus, there are situations that materialize in a series of interferences in freedom of expression. In order for the interference to remain at this stage and not become a violation, there are a number of regulations in this regard. Thus, a first step would be to verify whether it is an interference, whether it is established for by law, whether it is moving towards a legitimate framework and whether it is necessary in a democratic state.

An interference with the right to freedom of expression does not contravene the Convention if it is provided by law, it pursues one or more of the legitimate purposes mentioned by the para. 2 and whether it is necessary in a democratic society to achieve these ends (Case Axel Springer, 2014, point 76). There may be preventive interference, embodied in acts of the authorities that do not allow the presentation of ideas and information, punitive interference, such as sanctioning journalists by national courts following the publication of an article in a local newspaper by condemning them and banning them to the profession of journalist (Case Cumpana and Mazare, 2004, p 84, p. 115, p. 118) or sanctioning by forcing the payment of damages and prohibiting the publication of certain materials (Case Axel Springer Ag., 2014, p. 75) or interference during the dissemination of information, for example the confiscation of books already on the market, when the aim is both to punish the circulation and to prevent the spread of materials (Alinak Application, 2003, p. 24). Interference must be provided for by law, i.e. found in an internal law.

The law must provide sufficient safeguards against arbitrariness. Accessible law is one whose text is public and known to any interested person. Another essential condition is that interference be necessary and proportionate in a free society with democratic values. Necessity refers to the correspondence between the incriminated interference and the "urgent social need" (Case Cumpana and Mazare, 2004, p. 88), following to verify the "relevance and sufficiency" of the arguments established by the national authorities to justify the interference. States benefit from a certain margin of appreciation when determining whether there is such a need, but this is compatible with European control, both in terms of the legislation and the decisions that apply it. A distinction must also be made between facts in the context in which materiality can be proved, and value judgments, the accuracy of which cannot be proved. If it lacks any factual basis, however, a value judgment will be excessive (Case Cumpana and Mazare, 2004, pp. 98-99). The condition of proportionality is respected if the intervention in freedom of expression is in a reasonable relationship with the legitimate aims pursued. Under these conditions,

the state will determine the volume of proportionality through the courts.

The proportionality is given by: the extent to which the subject approached in the disputed expression is of public interest, the gravity and context of the statements, the nature and of the sanction applied. In this context, the right balance between the right to freedom of expression (Article 10 of the Convention) and the right to respect for privacy (Article 8 of the Convention) is analysed.

The legitimate purpose in accordance with the second paragraph of art. 10 of ECHR, is given by defending national security, defending territorial integrity, protection public safety, protection order and preventing criminal acts, environmental protection, morals, reputation or rights of others, preventing the disclosure of confidential information, guaranteeing the authority and impartiality of the judiciary power.

4. Conditions for interference with the right to freedom of expression

Article 10, paragraph 2, of the Convention sets out the conditions under which interference with the right to freedom of expression is permitted, which may arise either from the need to protect certain public interests but also to protect some private interests, such as the reputation and rights of others or the need to prevent the disclosure of confidential information. This paragraph basically authorizes states to take certain measures to protect those interests, which materialize through an interference in the exercise of the right to free expression.

The exercise of the right to freedom of expression presupposes certain duties and responsibilities, which make possible restrictions, the imposition of conditions and these interferences must meet three characteristics: to be provided by law, follow a legal and moral purpose and be imperative to a democratic society, therefore to be in collaboration with the aim pursued.

a. The interference must be provided by law

In accordance with Article 10, paragraph 2, of the Convention, freedom of expression may be subject to "formalities", "conditions", "restrictions", "sanctions", with the condition that they are "provided by law". In this case, a rule to meet the conditions of legality must be accessible and predictable.

Accessibility is an imperative obligation of the state and in terms of predictability, it is generated by three factors: the content of the disputed rule, the area claimed to be covered, the number and status of the recipients of the rule (Case Piroglu and Karakya, 2006)

Under these conditions, the predictability of the norm cannot be absolute. The law must adapt to frequent changes in social life that contain formulations that can be interpreted in court. The normality of the interference is established precisely by the legality of the norm.

b. Interference to pursue a legitimate aim

The legitimate aim that must be scored is to protect general or individual interests. The Court of Justice can identify in a case several legitimate cases analysed

cumulatively. Some legitimate aims have been pointed out in the case law of the Court, such as: protection of national security, protection of territorial integrity (Case Piroglu and Karakya, 2006), protection of public order(Case Chorherr v. Austria, pp. 26-28), protection of morals (Case Handyside, 1976, p. 49), guarantee of authority and impartiality of the judiciary (Case Sunday Times, 1977, pp. 54-57) defense of public order and prevention of crime(Case Ekin Association, 2001, pp. 47-48,). The legitimate purpose outlines the positive nuance of the text of the law.

c. Interference to be necessary in a democratic society

The condition of necessity is particularly important as it can be decisive in determining whether or not there has been a violation of the Convention. However, the Court does not replaced national authorities but check whether the decisions respect the rights and freedoms guaranteed by the Convention. The state must prove the legitimacy and necessity of the interference, and the reasons given must be relevant.

d. Proportionality of interference

This legitimate condition is developed by the Court exclusively by jurisdiction. Proportionality analysis is done by taking into account all the circumstances of the case, balancing interest and purpose. The control of the Court in the matter of art. 10 has a variable geometry, depending on the content of the protected information, the way of exercising the freedom of expression but also the legitimate value it invokes to justify the interference.

The Court expressed its point of view in the context of this condition, analysing aspects such as the quality of the author (journalist, politician, opposition representative, military, lawyer, civil servant, private person), the type of speech (political, commercial, artistic, religious), the injured person (politician, magistrate, civil servant), the possibility to use other expressions, the means of dissemination and the impact of the message (written press, mass media, exhibitions), the location where the speech was given, the target group, the public.

5. Conclusions

Research findings exhaustively demonstrate that this right from a legal perspective, involves special obligations and responsibilities. Normally, the restriction of a constitutional right can only be achieved under the sanction of the fundamental rules of law, in other cases this action is constituted in an abusive aspect. Abusive exercise of freedom of expression can bring damages.

For this hypothesis ”The Constitution” provides that civil liability for information or for opinion or creation brought to the knowledge of the citizen belongs to the author.

It has been shown that freedom of speech may be subject in this case to a regulation of common law or may be subject to a special regulation, which may be a liberal one or an authoritarian one, conceived by a repressive or preventive system.

Freedom of expression is a fundamental right, protected by Article 10 of the

”European Convention on Human Rights”, but its exercise also requires compliance with certain conditions.

Deriving from the classical phrase "freedom of expression", the theme urges us to reformulate the concept under the name of "freedom of the word ”.

”Freedom the word” it has not only the role of guarantee a sphere of individual freedom, guaranteed against interference by the state, but also to ensure the climate indispensable for the normal functioning of parliamentary democracy.

”Freedom of expression” is an individual right which includes freedom of opinion and freedom of information, which must be exercised in such a way that it does not unduly infringe the rights and freedoms of others.

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