

## Freedom Of Expression In The View Of Community Law

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### **Abstract**

Even if freedom of expression is one of the most disputed topics in the last few years, it's also true that a democratic society cannot be conceived without respecting this fundamental right. Its regulation was in hands of the doctrine but also of the legal practice and the recent international bodies have given sustained attention through the European Convention on Human Rights: the Treaty of Establishment of a Constitution for Europe; the Constitutions of the democratic countries and of Romania, the special laws: the Civil Code, the Criminal Code or the Press Law No. 9/1996 but also the article 30 of the Constitution. Freedom of speech does not include the excess of journalists too, that is why there are also limits in the disclosures made under this right that has to provide legitimate interest, the pronouncement of a court, the right of a sanctioned journalist to appeal to a higher court.

**Key words:** law, freedom, Europe, expression

### **8. General considerations**

Any truly democratic society is designed only to satisfy one of the most important human needs, this consists in receiving ideas and information but also in expressing any personal ideas and concepts. Rightly considered to be the most powerful protection weapon of rights and freedoms of a person against any kind of anti-democratic manifestation, since the beginning of the first millennium, the notion received a legal regulation and at the middle of the last century the regulation turned into a more detailed one, when the European Convention of Human Rights as found on the article 10 "freedom of expression", having the legal support in the Art. 19. Of the Universal Declaration of Human Rights, of 1948 but also in the provisions of the International Covenant regarding Civil and Political Rights of UN. If the first paragraph of Art. 10 guarantees this right and determines its content, the second one specifies the limits of its exercitation. The convention consecrates freedom of expression, of reception and of transmission of information, of ideas, without any interference of public authorities and regardless of frontiers. In the content of the term "expression", the European Court of Human Rights has incorporated also the freedom of artistic expression, allowing the public exchange of information and cultural, political and social or any kind of ideas, stating that freedom of expression constitutes one of the essential foundations of a democratic society and a primary condition of its progress. Still at a community level, the right of freedom of expression is stipulated also in the Treaty of establishment of a Constitution for Europe, according to which any person of the European Union can enjoy freedom of expression, right that includes freedom of opinion, freedom to receive or to transmit information or ideas, recognizing also the pluralism of media.

## **9. Freedom of expression – content**

In line with the European Convention, Romania's Constitution in Art. 30 provides that freedom of expression is intangible, meaning that they can express themselves freely: thoughts, opinions, beliefs and creations of any kind, clarifying the forms of expression: through speech, writing, images, sounds. With a constant concern for the statutory regulation, the Romanian legislator in line with the European law took into account the urgent need to find right balance that has to exist between the right of freedom of expression, the protection of social interests and of individual rights that belong to other persons. As a precaution, having the communist censorship still present in our memory, the Romanian legislator makes an express constitutional provision of interdiction of any kind of censor and of suppression of publications.

Freedom of expression allows citizens to participate at the political, social and cultural life, in this way being able to express their thoughts, opinions and beliefs. Wherefore freedom of opinion, as a typical form of freedom of expression, presumes that no one should be prosecuted or convicted for his/her opinion because for a person to have the possibility of having and expressing a minority opinion is an essential component of any democratic society that is based on pluralism, tolerance and spirit of openness. Both freedom of opinion and expression are tightly linked to each other because the freedom of expression includes the beforehand opinions of a person. Therefore, if the freedom of opinion cannot be limited, because an opinion formed but still present in the memory of its author cannot injure a value or a person, expressing an opinion can become the subject of a limitation, even for the conformation to the rights of other subjects of law, but without prejudicing the respect for beliefs that represent the base of freedom of thought. The second main element of freedom of expression, under the European Convention, is freedom to information. Present in Romania's Constitution in Art. 31 of the international legal instruments, this is a new fundamental right for Romanian law. If the terms of the Convention are "receive" and "communication" when referring to freedom to information, it is about to freedom of receiving information freely and from different sources and to give information without the interference of public authorities, for sure. But this freedom, given the society, cannot exist without limits, that is why its content implies responsibility too, meaning some limits that refer to the defense of social values, rights and reputation of other persons. When these limits are broken, people become subjects to legal liability that may attract civil, administrative or even criminal liability of the guilty.

Despite the prohibition of any interference from the authorities, the right to information is necessary both for the public authorities and for any natural or legal person because state authorities have a duty to ensure the observance of the right of opinion and information, hence it results that the state does not have to stay in the way of the free exercise of these rights and it has to ensure their exercise to complete the pluralism of opinions and ideas. This constitutes the guarantee of an objective information, despite the form or the finality, applicable both in media and the creators of scientific, literary and artistic fields.

A defining role in establishing the importance of freedom of communication in democratic societies, including the information transmitted by media, especially those of general interest, went to the European Court of Justice which in its jurisprudence showed that guarantees for the press have an essential importance, that its function which is to dispel is also added to the public right of receiving the information and that the press is rightfully called the watchdog of the democratic society, with the role of informing, controlling and reporting about all the fields of public interest, from those with political responsibilities, the functioning of institutions and of public services, up to the appreciation of the opportunity to benefit of the night veterinary services. The right to information also contains the right of a person to be informed in time and correctly about the measures taken by the public authorities, about the free access to the sources of political, scientific, technical, social, cultural, sports information, the possibility to normally

pick up the radio and television shows, the obligation of the public authorities to create the legal conditions to broadcast wide and free any kind of information.

### **10. The limits of freedom of expression**

Starting from the principle that freedom of expression is in the same time a potentially invasive right, which in absence of the control of appropriate legislative mechanisms could lead to undermining other rights, the legislator provided certain limits that should guarantee the real purpose of pluralism according to the social, cultural and political evolution of a nation. Romania's Constitution in Art. 53 presents the exceptions that justify the limitation of this freedom, such as: national security, public order, health, public morality when conducting a criminal investigation. These restrictions must, however, pass the double test: of the necessity and proportionality of the interference in accordance with the European Court. In this context, public servants, magistrates, lawyers have a moderation obligation in accordance with their status so that the magistrates have the obligation of retention on the critical function of justice through public manifestations or the lawyer has to be responsible when making public declarations, especially in the press. Regarding the need of honor and dignity protection of a person, against the attacks more than allowed in the press, limits of freedom of expression have been pushed excessively, leading to the abolition of insult and defamation from the Romanian Criminal Code. The injury to reputation can be fixed only morally on civil ways. If Art. 10 of the Convention provides that any restriction must be prescribed by law, that has to be accessible to the ordinary citizen and formulated with sufficient precision to enable the person to whom it is addressed to regulate the social conduct and be able to provide in reasonable conditions the consequences of a specific act. The Constitution based on the same requirements rule out the defamation of the country and the nation, any instigations to a war of aggression, to national, racial, class, religious hatred, incitation to discrimination, territorial separatism or public violence or obscene conduct.

### **11. Freedom of expression in the view of the Penal Code**

Since the constitutional permissiveness of freedom of expression could receive significant prejudices of other persons besides the constitutional limitations of Art. 57, the Romanian legislator provided legal classification through special laws for certain intentional invasions. Thus, in Art. 368 of the Criminal Code, the acts of public instigation of breaking the law or the ones that make the apology of a crime are incriminated; but also the acts of treason by transmitting the state secrets to a foreign power or organization and to their agents, in Art. 394 of the Criminal Code; The Propaganda in favor of the totalitarian state and the change of constitutional order, Art. 397; the outrage against morality in Art. 375 and the disturbing public order in Art. 371; nationalist-chauvinist propaganda in Art. 369.

### **12. Freedom of expression through press**

Freedom of expression is part of the control mechanism that society builds to limit the government act. Press freedom is a particular case of freedom of expression. What individualizes it is, on one hand, the way of expression and on the other hand the purpose of the communication act. Based on the Art. 10 of the Convention, the Court held that the restrictions on the media are dangerous for the freedom of expression, so they require a thorough examination by that Court, because the information is a perishable asset and its delay even for a short period of time, is very likely to deprive it of any value and interest. The guarantee of Art. 10 is under the condition that the interested one should act in good faith, so as to provide accurate and believable information

in respect of the professional deontology specific to the journalists. However, the European Court held that freedom of expression of journalists implies a possible degree of exaggeration or even of instigation regarding the value judgment that they formulate, stating that it's not conceivable for a journalist to be able to formulate critical value judgments if the reality cannot be proved. Ethical principles that have to be respected by the journalists throughout Europe, were affirmed by the Parliamentary Assembly of the Council of Europe by Resolution No. 1003 adopted on July 1, 1993, on journalism ethics. In the same time, it was adopted the Resolution 1215/1993 whereby the Parliamentary Assembly recommended that the Committee of Ministers, inter alia, to invite the governments of the member states to ensure that laws guarantee the organization of public information, so that they can ensure the neutrality of information, the pluralism of opinions and the gender equality and also the right of response of each citizen who has been the subject to allegations, to adopt a declaration regarding the journalistic ethics and to promote the application of these basic principles in the member states of the Council of Europe.

Romanian Parliament recommended journalists to apply ethical principles of the European resolutions. The Resolution 1003/1993 stated: 'The profession of a journalist involves rights and obligations, freedoms and responsibilities and the media has a moral responsibility for citizens and society because it plays a very important role in terms of both formation of individual attitude of the citizen and the evolution of the society and of the democratic life'. It follows that journalists should not confuse freedom of expression with arbitrariness, superficiality, bias and the basic principle of any ethical evaluation of journalists is the distinction between news and opinions, without making any confusions between them. In fact, the same resolution, in section 21 recommends that the journalists, drawing information and opinions must respect the presumption of innocence and should be reserved in formulating verdicts. Referring to media justice, the Court warned: 'If we get used with the show of the fake trials from media, we could observe, on long term, the existence of some adverse consequences on the admission of the Courts as qualified bodies, to judge the guilt or innocence in case of criminal charge.'

### **13. The regulation of protecting the sources**

An important aspect of freedom of expression is to protect the sources of information. The legal basis is found both in national legal rules and ethical codes of international documents, such as: Recommendation. R. (2000)7 adopted by the EU Council of March 8, 2008 which provides the principles with which public authorities have to ensure the protection of the confidential sources of the journalists; the Resolution adopted by the European Ministerial Conference on Media Policy in Prague, December 7-8, 1994; European Parliament Resolution on non-disclosure of journalistic sources of information on January 18, 1994.

The Court's position in this matter is the following: the lack of such a protection might discourage those who help the media to inform the public on matters of public interest, the press could see its role of defender of democracy diminishing and its role to provide accurate and credible information would appear weak.

Such a provision whereby a journalist would be required to disclose the source, would have a negative effect on this exercise of freedom. Such a measure, according to the Court, could not appear as being in line with Art. 10 of the Convention, unless it would justify by an overriding public interest. Keeping the confidentiality, usually constitutes a precondition for making disclosures for fear of possible retortions. The Recommendation R (2000)7 states under what conditions the source can be disclose:

5. Entering an action to compel disclosure of information that identifies the source can be done only by persons who have a direct legitimate interest.
6. The competent authorities shall inform journalists about their right of not disclosing an information that identifies a source.

7. Punishing journalists for disclosing information that identify a source, it will be decided only by the Court , through a trial, in which, in accordance with Art. 6 of the European Convention, the journalists is questioned and given the right to appeal.
8. When giving journalists a request for disclosure of information that leads to identifying the source, according to Art. 6 ECHR (European Court of Human Rights), the authorities have a duty to limit the extent of disclosure, such as not making it public.

#### 14. Conclusions

Freedom of expression is one of the oldest known civil freedoms which was included in the first declarations of human rights under the name of press freedom, freedom of speech, freedom of information. The social importance of this right stems from the fact that freedom of expression is a covered subject in more international acts on human rights and fundamental freedoms. This kind of freedom is the barometer of a democratic society.

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