

THE FREEDOM OF EXPRESSION IN MASS MEDIA, AUDIOVISUAL AND THE ONLINE ENVIRONMENT

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Abstract

Mass-media represents the main tool of a democratic society and it refers to two fundamental rights: the right to be informed and the freedom of expression. Beyond its functions, however, mass-media represents a product of the society which is formed and functions. In this framework characterised by freedom and participation, mass-media holds a consolidation role for the new society, it supports and monitors a true democracy, it takes part in a correct government and it leads to economic development. As “the fourth power in the state”, the press creates the new public opinion and the new civil society. The risks of fulfilling its duty and the audacity of applying its freedom of expression presented, at times, irreparable consequences. At the same time, the freedom of expression, both of the media and of the individual, represents a fundamental right. The freedom of expression can neither prejudice the dignity, honour, or the particular life of a individual, or the right to self-image. Exerting the right to free expression involves certain duties and responsibilities

Keywords: *the right to information, public opinion, self-image, the freedom of expression, civil society, democracy, lack of censorship.*

If I were to decide whether we should have a system of government without having newspaper or newspaper without having a system of government, I would not hesitate to prefer the second possibility.”

(Thomas Jefferson)

1. THE FREEDOM OF EXPRESSION - NOTION AND CONCEPT, GENERAL INTRODUCTORY ASPECTS

The concept of democracy is closely related to the notion of political and ideological pluralism. Pluralism represents a principle according to which the democracy of the society works, the action of a number of competing political and social forces. By using the types of pluralism as

the basis of manifestation for democracy, the political power does no longer govern the society, but it intersects with all the segments of the social structure within a mechanism summoned to work on legitimacy and freedom; Aristotle, therefore, said that: “*freedom represents the fundamental principle of a democratic government,*” a fact clearly proven.

In the phase of the bourgeois revolutions, when the transition to national sovereignty was made, certain rights and freedoms were outlined, against the background of the recognition of man as a concrete and not as an abstract being. As we very well know, they will proclaim themselves as “*declarations of human and citizen rights.*”

In order to be fulfilled, the nation has to exert power on the principle of freedom, including that of the citizen’s free expression, a principle acknowledged by all Western democracies.

The objective of the present paper is to analyse the regulation framework of the freedom of expression and that of the admissibility of the restrictions that can be applied at the national level, on the basis of international provisions.

The central idea of the paper relates to the relative character of the freedom of expression and the possibility of limiting its exercise, through measures adopted at the national level, measures that have to be in accordance with the compatibility exigencies provided by art. 10 of the European Constitution of Human Rights, subject to a restrictive interpretation by the European Court of Human Rights, in accordance with the principle of proportionality and the national discretion

The freedom of expression represents a right acknowledged for every person within a democratic society. Stipulated in the fundamental

Law of every democratic society and regulated in The Universal Declaration of Human Rights, the freedom of expression is essential today and it represents an authentic challenge, especially for the former communist countries, where censorship was usually present (MURARU, 1999).

Each of us has to understand what the freedom of expression stands for and we consider the fact there isn't even a single person who doesn't have the slightest idea about it. The simplest way to put it is that the freedom of expression means expressing yourself "without censorship," without restriction. The problem which arises here is that, under the pretext of this principle, many understand that they can say anything they want and act however they feel like, which is contrary to the to the rules of social coexistence.

This is why, there are all sorts of problems in the social relationships, because an absolute freedom of expression is not beneficial to a society. Being allowed an extremely large freedom of expression unavoidably leads to tensions regarding the affirmation of the other existing tensions within a society and which also have to be defended. In order to avoid this, it is necessary to take into account a certain "self-control" when we use this freedom of expression.

We therefore notice that the freedom of expression is valued differently from case to case. Anyone can express him or herself in any way he or she finds fit, freeing any thought, opinion, belief and freely manifesting itself under the pretext of the freedom of expression and although self-control should exist, mostly it does not occur (DAN, 1997).

The freedom of expression is part of the fundamental rights and freedoms of the individual, being stipulated as such in The Universal Declaration of the Human Rights, in significant documents of international law, such as The European Convention of Human Rights, and also in the national law of democratic states.

Therefore, the freedom of expression represents that expression of thoughts, opinions or beliefs, as well as the freedom of any sort of creation, orally, in writing, in images, in sounds or in other means of public communication, which are considered inviolable.

From the content of the regulations included in the international juridical tools of human

rights and because of the dispositions included in the constitutions of some countries, it results that freedom of expression is present, either under this name or under the name of "the right to the freedom or expression", or under the names of its aspects: the freedom of the word and the freedom of press. It is noteworthy that both notions of law and freedom are used, freedom of expression being a right and a freedom at the same time, as long as the majority opinion in the legal literature is in the sense of equivalence of the two notions.

Given that the freedom of expression is a right enshrined in both international and constitutional legal instruments, in the light of previous terminological explanations, the freedom of expression is both a human right, a public freedom and a fundamental right; and citizen. As all three notions refer to subjective rights, the right to freedom of expression is also a subjective right (SUDRE, 2006).

1.1 The freedom of expression - a fundamental right of the individual, a basic principle included in The Universal Declaration of the Human Rights and in The European Convention of the Human Rights (CEDO)

The frame-document at the international level, with the value of recommendation, which formulates "a common ideal towards which all people and nations have to tend," The Universal Declaration of the Human Rights refers, in Article 19, to only the right of each person to free expression and the freedom of exerting it, without presenting the limits of the right concerned. In essence, Article 19 speaks about the right of a person to have his or her own opinions, without them being influenced or conditioned from the outside, and about the liberty of expressing them according to its own convictions. Also, it deals with the freedom of accessing information and ideas and their freedom of expression, without conditionings related to the means and their political or geographical dissemination area.

Another frame-document from the area of international right is represented by The European Convention of Human Rights, a document signed in Rome on November 4, 1950. During the last 50

years, this tool evolved due to the interpretations of its dispositions by the European Court for Human Rights and the European Commission of Human Rights,¹ as well as due to the activity of the Council of Europe. The latter adopted additional protocols that extended the scope of the Convention, resolutions and recommendations, which developed and proposed rules of conduct for the Member States and imposed sanctions on the states that did not comply with the provisions of this instrument.

We also mention the fact that in order to guarantee the economic and social rights some Conventions have been adopted (The European Social Charter, including the 1988 Additional Protocol), as well as the 1964 European Code for social security, which recognize and guarantee the fundamental rights and liberties of the individual (VOICULESCU & BERNA, 2019).

1.2 The recognition of the principle of the freedom of expression within the Romanian legislation

Therefore, *The Constitution of Romania*, regulates, in Article 30 from Chapter II - "Fundamental rights and freedoms," Title II - "Fundamental rights, liberties and duties," "The freedom of expression:" The constitutional regulation of the freedom of expression has an ample and comprehensive character, given the fact that it covers the fundamental aspects of the field.

As it stems out from the international regulations and from the Romanian constitutional provisions, *the freedom of expression does not have an absolute value.*

A person can either be the individual subject or it may possess the quality of the public in the judicial communication relationships.

The content of the judicial communication report is made out of the rights and obligations which express or result from the fundamental rights proclaimed by the Constitution: the freedom of conscience, the freedom of expression, the freedom of information as well as other related rights which contribute to their achievement.

A contemporary characteristic of exerting the freedom of expression and the freedom of information consists in the fact that they are

mainly achieved through the means of mass communication. However, there are numerous situations which do not necessarily impose the use of the communication means or that cannot only be achieved with their help.

The freedom of expression tacitly or explicitly implies the right to inform. A person may present the quality of an active subject of the freedom of liberty, meaning the possibility of broadcasting information in different forms, either direct or through the means of mass communication regarding a large variety of fields, as well as about the self and about others (DRĂGANU, 1999).

A person's freedom of expression can take the form of some thoughts, creations, opinions, convictions, beliefs etc. Many aspects of the freedom of expression are regulated in detail by laws or other normative acts, according to the particularities of each field, establishing specific rights and obligations.

The freedom of expression assumes certain limits which represent the obligations of the subjects to uphold the rights of other people, such as the right to a private life, the secret of correspondence, the right to a personal image and others.

The freedom of expression *equally belongs to the representatives of the people*, since they are chosen and act under a seat. This opinion is also supported in the jurisprudence of the European Court of Human Rights, which considers that the freedom of expression of a person chosen by the people, when he or she acts under this quality, is extended and has to be efficiently protected.²

2. THE FREEDOM OF EXPRESSION IN THE MASS-MEDIA, THE AUDIOVISUAL AND IN THE ONLINE ENVIRONMENT

The freedom of expression of every citizen and of the media plays a fundamental role in the society, being regarded as one of the pillars of a democratic society and an essential prerequisite for ensuring the protection of the fundamental rights of each individual. In many European countries, the freedom of expression represents the cornerstone of the democratic order and this means that it is not possible to speak about

democracy in the absence of an efficient flux of ideas and of a comparison among them.

2.1 The freedom of expression in the media

Mass-media represents the fundamental tool of a democratic society and it implies two fundamental rights: the right to information and the freedom of expression. Beyond its functions, the media is a product of the society in which it forms itself and operates.

Within this framework characterised by freedom and participation, the media holds a consolidation role for the new societies, it supports and monitors an authentic democracy, it takes part in a fair government and economic development. In its quality as “the fourth power in the state,” the press creates a new public opinion and a new civil society. The risks of successfully fulfilling its duty and the audacity to express its freedom of expression had, at times, irreversible consequences (COMAN, 2005).

At the same time, the freedom of expression, both of the media and of the individual, asserts itself as a fundamental right. The freedom of expression cannot prejudice dignity, honour, an individual’s personal life or the right to self-image. Exercising the right to free speech entails duties and responsibilities.

As a participant at the sacred basement of human rights, the freedom of expression is mentioned in numerous treaties, conventions, or international agreements and it is guaranteed under different forms in almost every national constitution or legislation. The freedom of expression is considered to be one of the pillars of modern democratic society, being vital for the prevention process of censorship and a sine qua non requirement of the existence of a free and efficient media. However, at the level of its practice, this freedom of expression has to suffer. This fundamental right continues to be denied and, where there is no refusal, there are various particular threats (CERCELESCU, 2002).

2.2 The freedom of expression in the audiovisual environment

The public radio and television broadcasting service plays a significant role in the EU Member States. The fulfilment of this public service

mission means the insurance of cultural and linguistic diversity, entertainment, educational programmes, the correct and objective information of the public, the guarantee of opinion pluralism in broadcasting quality programmes, as well as the assurance of the TV producers and of their interlocutors, according to the legislation in force. The future of the dual radio and television public-private broadcasting system in Europe depends on the reconciliation of the role of the public service with the principles of a fair and applicable competition on the free audiovisual markets of the Member States.

The field of the audiovisual policies and strategies targets, on the one hand, *the freedom of expression and unrestricted access to information*, including in this principle that of the free circulation of services from the four meaning – free circulation of people, service, capitals and goods – which represent the basis for the Treaty of the European Union and, on the other hand, the fact the *audiovisual represents an endless spring of information*.

The freedom of expression and of information, without the interference of public authorities and without taking into account the boundaries, guaranteed by Article 10 of the Convention, represents an important pillar of democracy and, at the same time, one of its progress factors (FRIEDMAN, 1991).

2.3 The freedom of expression in online environment

The freedom of expression firstly has its general boundaries, meaning that the exercise sphere of this fundamental freedom is restricted by the limitations brought by the Constitution and by international legal acts. When it comes to *exerting the freedom of speech* in the online environment, one can say that it is guaranteed and it is subject to constitutional limitations. The explanation stems from article 30, paragraph 1 of the final thesis, according to which the means of communication (the speech channel) does not represent an obstacle in the exertion of the freedom of speech.

From this perspective, at European level, a series of documents applicable at the level of the Council of Europe/European Union have been

adopted, with the purpose of concretizing the legal coordinates within which the exercise of the freedom of expression in the online environment can be achieved. These steps appeared in the context in which, due to their nature or the destination given by the owner, the Webpages represent a transparent environment, accessible to everybody and therefore the exertion of the right to the freedom of speech has to be devoid of restriction on behalf of the state.

In reality, however, constitutional limitations do not manage to control the illicit and criminal phenomena from the online environment. The scope of issues regarding the restriction of the exercise of fundamental rights and freedoms in this environment includes, but is not limited to, children's access to pornography, the content of racist or xenophobic sites, anonymous expression, insults and slander.

Stopping the reception of these messages by the recipients is one of the difficulties faced by the legislator, as the number of pages and the volume of information increases exponentially and, therefore, the solution remains the approach of a technical regulation (RUNCAN, 1998).

3. THE FREEDOM OF EXPRESSION IN THE ROMANIAN LEGISLATION

3.1 The freedom of expression - The Constitution of Romania

Closely connected to the freedom of conscience, the freedom of expression, present in article 30 of the Constitution, represents the individual's possibility of expressing, orally, written, in sounds, through drawings or any other means of public communication, his thoughts, opinion, religious beliefs or any sort of spiritual creation.

As it is regulated at the constitutional level, the freedom of expression has a complex content. It is one of the oldest citizen freedoms, a traditional freedom known either under this name, or under the names of its different aspects, the freedom of the work or the freedom of the press.³

The constitution defines what exactly can be expressed freely and under what forms or means can this be achieved. Therefore, thoughts, opinions, beliefs or any sort of creation can be expressed freely. This broad formulation

expresses both the regulated realm and the impossibility of naming through the Constitution all the spiritual creations that the inquisitive mind of man can imagine and achieve, the human fantasy being immeasurable and unpredictable.

This is why, by stating any kind of creation, the constitutional text manages to be efficient and comprehensive. As for the forms and means of expression, the constitutional text is also comprehensive: oral, written, images, sounds, other means of public communication

3.2 The freedom of expression. The New Civil Code

Entered into force on October 1, 2011, The New Civil Code regulates *The right to free expression* in Art. 70 - (1) *Any person has the right to free expression and* (2) *The exercise of this right can be restricted only in the cases and limits provided in art. 75.*

Therefore, the New Civil Code express the will of the lawmaker to include an express legal background for the achievement of a balance between exercising, on the one side, the right to free expression and, on the other side, the other established non-patrimonial civil rights by art. 71-73. This balance is achieved through a thorough analysis of the elements of a concrete case by the addressees of the legal norm and / or the courts. The reference to the international conventions and pacts regarding human rights that Romania is a generous part of includes both the tools used at the level of the UN, as well as the regional ones. The interpretation of art. 75 should be done in light of art. 20 from the Constitution of Romania, which states that: (1) The constitutional dispositions regarding the rights and freedoms of the citizens will be interpreted and applied in accordance with The Universal Declaration of Human Rights, with the agreements and the other treaties to which Romania is part of; (2) If there are inconsistencies between the agreements and the treaties regarding the individual's fundamental rights, to which Romania is part of, and the internal laws, the international regulations have priority, with the exception of the situation in which the Constitution or the internal laws contain more favourable dispositions⁴.

At the same time, we emphasize the fact that the exception included in art. 75 is applied in relationship with the defensive means, with the provisional measures stipulated by art. 253 and 255, but also with tort liability in the new Civil Code.⁵

3.3 The freedom of expression. The New Penal Code.

Although initially approved by art. I point 56 of Law no. 278/2006, art. 205, 206 and 207 of the Criminal Code, the acts of insult and slander were no longer incriminated. On June 13, 2013, the Constitutional Court returned to the decriminalization of insult and slander, restoring, for the future, the general and binding effect of the Decision of the Constitutional Court no. 62/2007 and the application of the norms of incrimination of insult and slander contained in art. 205 and 206 of the Criminal Code, as well as the provisions of art. 207 of the Criminal Code regarding the proof of truth.

3.4 The freedom of expression. The Audiovisual Law no.504/2002.

Failure to respect the right to privacy and image of the person, non-respect of fundamental human rights and correct information of the public⁶ has often been sanctioned by the National Audiovisual Council according to its provisions, respectively Art. 3. - (1) By broadcasting and retransmitting program services political and social pluralism, cultural, linguistic and religious diversity, information, education and entertainment of the public, while respecting the fundamental freedoms and human rights, are achieved and ensured. (2) All audiovisual media service providers have the obligation to ensure the objective information of the public through the correct presentation of facts and events and to favour the free formation of opinions. (3) The responsibility for the content of the broadcasted program services, including the audiovisual commercial communications, rests, in accordance with the law, on the audiovisual media service provider.⁷

The ways in which television programmes understand to approach mundane topics, the controversial viewpoints presented, as well as

various TV headlines that prejudice both the image of an individual and of his family, and also the right to inform the public to whom information is not available on the basis of which they can form their own opinion in relation to the events presented, all of which must be sanctioned.⁸

3.5 The freedom of expression. Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination.

Messages with a nationalist propaganda character and the public nature of their Facebook posts⁹ are sanctioned by the National Council for Combating Discrimination (NCCD), respectively art. 15. - It constitutes a contravention, according to this ordinance, if the deed does not fall under the criminal law, any behaviour manifested in public, having the character of nationalist-chauvinist propaganda, incitement to racial or national hatred, or that behaviour that aims at damaging dignity or creating an atmosphere of intimidation, degradation, and humiliation or an offensive one, directed against a person, a group of people or a community and related to their belonging to a certain race, nationality, ethnicity, religion, social category or disadvantaged category or his beliefs, sex or sexual orientation.¹⁰

Thus, in applying these provisions, NCCD noted that, in principle, Facebook is a private community social network, which was created as a private enterprise. However, social networks are a personal page that can be viewed by several friends and in this case the information disseminated becomes public. Facebook is not a private space comparable to an electronic mailbox. The electronic mailbox can be controlled from the point of view of the transmitted information, instead Facebook is an open social network, a space of public and planetary expression. In the case of Facebook, there is always a small part of the content that is visible to the public

The restrictions regarding the freedom of expression stem from the need to keep peace and defend the moral rights of groups that have historically suffered discrimination. These limitations are legitimized by a form of struggle against any attempt to restore a totalitarian

ideology and by efforts to eliminate racial discrimination and denial. The European Court of Human Rights stated that certain writings could go against the fundamental values of the Convention, as mentioned in its Preamble, namely peace and justice (BERGER, 1966).

4. CONCLUSIONS

The freedom of expression includes many fundamental rights, being "*the mother freedom*" of all communication rights. It is closely connected to guaranteeing human dignity and it occupies an important position among the rights and freedoms of the individual and in that of the constitutional freedoms.

From the content of the regulations included in the international judicial tools regarding human rights and from dispositions it results the fact that the freedom of expression is designated either under this name, either under the name of "the right to the freedom of the expression," either under the names of some of its aspects: the freedom of the word and the freedom of the press. It is to be noticed that both notions are used, the freedom of expression being a right and a freedom at the same time, as long as, the opinion of the majority of law specialists is that there is an equivalence between the two notions.

Taking into account the fact that the freedom of expression represents a consecrated right, both by the international judicial tools, and by the constitutional level, due to the prior terminological explanations, one can conclude that the freedom of expression is at the same time: a right of the individual, a public freedom and a fundamental civil right. As all three notions refer to subjective rights, the right to the freedom of expression is also a subjective right.

Due to the clarifications offered by the literature on the fundamental rights and freedoms, we notice that the freedom of expression is a political right, which is part of the second generation of rights and freedoms, but at the same time it is also an individual right, which is related to the spiritual freedom of each person, as well as a collective right – or rather convivial – allowing communication with the others.

We can therefore conclude that, *the freedom of expression represents a right with a complex content*. The freedom of expression includes in its content other three freedoms: the freedom of opinion, the freedom of information and the freedom of the press. All three freedoms are independent, but neither can manifest itself if the others lack.

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Endnotes

¹In accordance with Additional Protocol no. 11 The European Commission and the European Court of Human Rights have formed a single body, the European Court of Human Rights.

²Law no. 52 from 21.01.2003, regarding decision-making transparency in public administration, M. Of. no. 70/3.II.2003.

³Details: <https://legeaz.net/constitutia-romaniei/articolul-30-Cnstituție>

⁴Delinquent liability for image damage caused by the press; protection of the non-patrimonial rights of the legal person; exception presented by Art. 75 from the Civil Code. With the help of the request addressed to the Court from District 6 in Bucharest, SC A sued B on grounds of Articles 1349, 1357-1359, 1381, 1385-1386 from the Civil Code (tortious civil liability for one's own deed), requesting moral damages in the amount of 100,000 lei representing the repair of the image

damage as a result of the denigrating statements brought by the publication of the article [...], the publication, within 15 days from the date of the final and irrevocable date of the judgment, at the defendant's expense, of a public letter of apology in three central dailies and two local dailies, the publication of the judgment in question, within 15 days from the date of its final and irrevocable stay, at the defendant's expense, in two local dailies and court costs.

⁵ Civil sentence no.10127 from November 21, 2012, Court of District 6 – Bucharest.

⁶Due to Decision no.110/28.02.2013, The National Audiovisual Council decided to sanction the TV station X following the reclamation from the Superior Council of Magistracy regarding the way in which the subjects regarding this institution were presented and analyzed on station [...], in January 2013.

⁷Due to decision no.15/10.01.2013, the National Audiovisual Council noticed that the TV station Y violated the provisions of art. 3 (1) from Audiovisual Law no. 504/2002 with subsequent amendments and of art. 33 (1), 45 (1), art. 64 (1) b) and (3) from Decision no. 220/2011 regarding the Regulation Code of the audiovisual content, with subsequent amendments and it was fined with 10.000 lei. In order to adopt this decision, the National Audiovisual Council noted that between January 4 and 5, 2013, the television station X broadcasted a series of news and debates which presented information regarding the death and the cremation of the stage director Sergiu Nicolaescu

and the manner in which this subject was treated was likely to violate the mentioned legal provisions, referring both to the private and family life of the person, as well as to the public's right to information.

⁸The TV station Z asked the Bucharest Court of Appeal to annul the Decision no. 15/2013 of the National Audiovisual Council. The Bucharest Court of Appeal rejected the request as unfounded, due to decision 1570/10.05.2013.

⁹Due to decision 60 from February 22, 2012, the National Council for Combating Discrimination (NCCD) decided that the notified issues fall under the provisions of art.2 paragraph 1 and art.15 of G.O. no. 137/2000 and imposed a fine of 1000 lei. In order to take such a decision, the NCCD analyzed whether or not the deed falls under the provisions of art 15 of G.O. no.137/2000, respectively if it constitutes a behavior manifested in public, this behavior has the character of nationalist propaganda and / or aims at achieving dignity or / and creating an atmosphere of intimidation or a hostile degrading offense directed against the group of protesters from Târgu Mureş and other cities of the country, and whether or not this behavior is connected to the beliefs of the group of protesters.

¹⁰A. addressed the Târgu Mureş appeal court, requesting the annulment of NCCD decision no.62/2012, forcing NCCD, in the case of annulling the decision, to publish the court order in a national newspaper and on its own internet page, for the non-pecuniary damage caused, as well as for the court costs.