

PRESENT STATUS OF FREEDOM OF EXPRESSION UNDER THE NEW ROMANIAN LEGAL ORDER

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Abstract: *Freedom of expression constitutes a sine qua non element of a democratic society and of the European legal order. The European Convention on Human Rights and its interpretation by the European Court of Human Rights is considered as jus communis for the Member States who, directly or indirectly, must comply with the principles stated in its case law. Over the recent years, an intense debate took place in Romania concerning the imperious need to decriminalize libel and slander, which were deemed an exaggerate interference in the exercise of freedom of expression. The main argument of this point of view was that the case law of the European Court of Human Rights imposes such an obligation for the Member States. The New Criminal Code entered into force in 2014 and decriminalized libel and slander. The present article aims to analyze if there are substantial changes in the Romanian legal framework of freedom of expression, if the changes were necessary under the influence of the European Court of Human Rights case law and to identify the restrictions that may be imposed o its exercise.*

Keywords: *Freedom of expression, national interferences, legal status, limits.*

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THE CONSTITUTIONAL FRAMEWORK ON FREEDOM OF EXPRESSION

Freedom of expression is enshrined in Article 30 of the Romanian Constitution (Republished in 2003), which reads as follows: “(1) *Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, whether by spoken words, in writing, in pictures, by sounds or any other means of communication in public, is inviolable. (2) Any kind of censorship is prohibited. (3) Freedom of the press also involves free founding of publications. (4) No publication may be suppressed. (5) The law may require that the mass media disclose their financing sources. (6) Freedom of expression shall not be prejudicial to dignity, honour, privacy of person, nor to one's right for his own image. (7) Defamation of Country and Nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morals are forbidden by law. (8) Civil liability for any information or creation released for the public falls upon the publisher or producer, author, producer of an artistic performance, owner of copying*

facilities, or radio or television stations, subject to the law. Indictable offences of the press shall be established by law.”

These constitutional provisions establish a synthesis fundamental right (Deleanu, 2006: 503) with a complex content and scope (Moldovan, 2012: 86) having a series of components: freedom of speech, press freedom, freedom of broadcasting and cinema. The Basic Law provides the legal framework of what constitutes admissible discourse and expression irrespective of the concrete externalized form: by words, in writing, images or sounds. Also, the reading of the provisions mentioned above clearly describes a limited freedom of expression. The Romanian Constitution does not guarantee an absolute freedom of expression. Instead, its abusive exercise may justify interferences from the State bodies in order to protect individual rights (such as honour, human dignity, private life, the right to protect its own image) or general interest (such as the unity of the country, interdiction of defamation of the nation, incitement to a war of aggression, incitement to hate based on reasons such as nationality, race, religion, incitement to discriminate, to territorial separatism, public violence or to obscene manifestations). An abusive exercise of freedom of expression by breaking the boundaries set in these provisions may open the issue of legal liability in two forms: civil and criminal.

The possibility of imposing limits to the exercise of freedom of expression is well known and established by all the international instruments that guarantee fundamental rights – Universal Declaration On Human Rights, International Covenant on Civil and Political Rights, European Convention on Human Rights, Charter of Fundamental Rights of the European Union.

Article 10 of the European Convention on Human Rights provides in its paragraph 2 the restriction clause of the freedom of expression and the legality requirements of the national interference. Firstly, the national law must prescribe the interference. Secondly, the interference must pursue a legitimate aim which may consist in protecting a public interest - “the national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals”, or “for maintaining the authority and impartiality of the judiciary” – or an individual right – “the protection of the reputation or rights, for preventing the disclosure of information received in confidence”.

A comparison of the two legal texts reveals the evident similarities in setting the limits to the exercise of freedom of expression. This situation is due to the high influence of the European Convention for the national legal systems of the Member States (van Dijk et al., 2006).

The Strasbourg Court has a very rich case law concerning freedom of expression and its limits proving to Member States substantial principles in solving the conflict between this value and other fundamental rights. The approach of this court is of a great importance due to the lack of an express hierarchy between different fundamental rights and liberties. However, its interpretation can not be seen as absolute and must be applied case by case.

THE STATUS AND LIMITS OF FREEDOM OF EXPRESSION FROM THE CIVIL PERSPECTIVE

As a novelty of the present legal order, the right to free expression is guaranteed by the 2009 Civil Code that entered into force at 1 October 2011. Article 70 [Freedom of expression] is contained in Section 3, Chapter II of Title II and it reads as follows: “(1) *Everyone has the right to freedom of expression. (2) The exercise of this right can not be restricted except in the cases and limits laid down in Article 75* “.

This clause has a declaratory nature; it does not contain a definition of the freedom of expression nor elements that could be used to identify its scope. Therefore, this concept should be interpreted in the most extensive manner, taking into consideration the terms of the Basic Law as interpreted by the Romanian Constitutional Court including all forms of communication of ideas and information and also, the interpretation given to Article 10 from the European Convention by the Strasbourg Court.

By analyzing the topography of the legal provisions of Title II [The individual], Chapter II [The respect due to the human being and its inherent rights], Section 3 [Respect of privacy and human Dignity] and the fundamental rights mentioned after Article 70 – the right to privacy in Article 71, the right to its own image in Article 73, one could draw the conclusion of an hierarchy between freedom of expression and the other fundamental rights mentioned, having on top of it the freedom of expression. The reasoning behind this wording and normative architecture could be that the legislator acknowledged the thorough relationship between free expression and other fundamental rights inherent to the individual and decided to regulate them in the same section.

The solution adopted by the Romanian legislature is an interesting one. However, we can not consider that this status is a direct consequence of the interpretation given by the European Court, by which it constantly avoided to establish a relationship between freedom of expression and other fundamental rights and affirmed that “defending the reputation and rights of others” constitutes a legitimate restriction provided by Article 10 paragraph 2 of the European Convention (*Tournacheau and July v. France*).

The Romanian Civil Code contains a general clause of limitation, in Article 75, which reads as follows: “(1)*It is not a violation of the rights provided in this section the interference that is permitted by law or international conventions and covenants on human rights to which Romania is a member. (2)The exercise of constitutional rights and freedoms in good faith and in compliance with the covenants and conventions on human rights to which Romania is a member does not constitute a violation of the rights provided under this section*”.

These provisions basically make reference to the principles to be applied to restrict the exercise of fundamental rights established by international legal instruments and interpreted by international bodies, the most direct link being with the European Convention on Human Rights. There are also differences, as paragraph 2 of Article 75 explicitly makes reference to the requirement of good faith in exercising fundamental rights, which is not found in Article 10 of the European Convention, instead it has been developed in the Court’s jurisprudence (*Bladet Tromsø and Stensaas v. Norway*).

Being a general limitation clause, it has the criticisable disadvantage of permitting restrictions on the right to human dignity, which is seen as an absolute right in the European Convention. On the other hand, in contrast to the European instrument, the Romanian legislature chose to provide protection for the memory of the deceased person in Section 4 [The respect due to the person after his death].

One can easily observe that the Civil Code does not contain special provisions concerning press freedom, the coordinates of journalists' work and conditions on their liability, as mentioned in Article 30 paragraph 8 of the Basic Law. Therefore, a vacuum continues to exist in this regard, creating favourable conditions for the abuse of freedom of expression by the media. However, the hypothesis of an unlimited free speech in this case has no legal support since the press activity cannot be conceived as being outside the law, general rules and principles applicable to all subjects should be applied in its case (Moldovan, 2013).

THE LIMITS OF FREEDOM OF EXPRESSION FROM THE CRIMINAL LAW PERSPECTIVE

1.1 Decriminalizing libel and slander

Currently, the Romanian Criminal Code [Law no.286 of 17 July 2009, entered into force at 1st February 2014] decriminalized libel and slander, leaving human dignity, honour and reputation to be protected only by civil means, despite the wording of Article 1 of the Basic Law that considers human dignity as a supreme value of the Romanian legal system. The previous recent history of libel and slander under the 1968 Criminal Code which regulated libel and slander in Articles 205-207, took an interesting twist in 2006. By Article I of the Law no. 278/2006 amending the Criminal Code, Articles 205-206 were abolished. The Romanian Constitutional Court by Decision no. 62/2007 (published in the Official Gazette no.104 of 12 February 2007), held that Article I of the Law no. 278/2006 was unconstitutional. According to the Romanian Basic Law, the rulings of the Constitutional Court are generally applicable and compulsory. This finding was overturned by the High Court of Justice, which held by Decision no. VIII of 18 October 2010 (published in the Official Gazette no. 416 of 14 June 2011) that Articles 205-206 of the Criminal Code were no longer in force. This situation determined intense academic debates on the relationship between the rulings given by the Constitutional Court and those of the High Court of Justice, debates that completed with the entry into force of the new Criminal Code.

In reality, by adopting this solution, the legislature did not comply with a positive obligation stated by the European Court of Human Rights. A thorough analysis of its case-law on this aim of restricting freedom of expression reveals that this court established in many cases that deprivation of liberty for insult and slander constitutes a disproportionate sanction (*Cumpăna and Mazăre v. Romania*). However, the Court did not impose the obligation to modify the Romanian legal order by decriminalizing these offences.

In the recent Case of *Morar v. Romania* (7 July 2015- Case no. 25217/06), the European Court ruled that the conviction for slander of the Applicant, who was a satirical journalist constituted an unnecessary interference in the exercise of the press freedom, taking into consideration all the circumstances of the case (the satirical nature of the journal, the general interest of the issue addressed in the article, the high amount of the civil damages to which he was convicted by the national courts). In its judgement, the Court did not analyze the opportunity of the existence of the legal provisions. Therefore, sustaining the idea of a necessity to decriminalize these offences as a result of the constant interpretation of the European Court may be surprising.

The Romanian legislature chose to defend by criminal means the right to magistrates' reputation, as a part of the direct protection of authority and impartiality of the judiciary (expressly provided as a legitimate aim in Article 10 of the European Convention). The control exercised by the European Court for this type of limitation is more severe than in case of protection of morality or national security (*Oberschlick v. Austria*).

Article 278 of the Criminal Code regulates the *violation of the hearing solemnity* which consists of "*the use of insulting or obscene words or gestures likely to disrupt the work of the court by a person who participates or assists in proceedings taking place in court.*" The Explanatory Memorandum to the new Criminal Code notes that the existence of this offence is the result of decriminalizing libel and slander. Moreover, it is underlined that by primarily protecting the solemnity and proper conduct of court proceedings, the incriminating text does not aim to protect the honour and reputation of the judicial authority representatives.

Unlike the previous Criminal Code which in Article 271 -1 protected at a secondary level the dignity and honour of judicial bodies, the present provision seeks to sanction the insulting manifestations against any person – judge, prosecutor, registrar, parties, representatives of the parties, attorney - who is in a court room, whether or not directly participating in the procedures. From this perspective, it appears that the present normative text enjoys a more extensive scope.

1.2 Protection of privacy as a limit of the freedom of expression

The Criminal Code explicitly guarantees protection of privacy by criminalizing the offense of violation of privacy, in Article 226, Chapter IX [Criminal offenses affecting home and private life], as a result of the reception of the principles stated in the jurisprudence of the European Court in balancing the conflict between freedom of expression and privacy. Moreover, the same aim is pursued by criminalizing the offense of disclosure of legal professional privilege, in Article 227 and harassment in Article 208.

Under Article 227 (1) of the new Criminal Code the offense of disclosure of professional secrets consists in "*the illegal disclosure of data or information on the private life of a person likely to cause injury to a person, by the one who has knowledge of it by virtue of his profession or position and who has an obligation to maintain the confidentiality of these data.*"

The text explicitly relates to data or information about a person's private life, on which there is an obligation of professional secrecy. The most important feature of this offence's content is that it does not require harm or prejudice to occur to the person that provided the information or to the person to which the data or information relates to.

1.3 Secrecy of the criminal procedure

The new Criminal Procedure Code states the principle of benefit of the doubt in Article 4 paragraph 1. This relates to Article 285 paragraph 2 which states that "*The procedure during the criminal investigation is not public*", thus being created the framework to exclude the disclosure to the public of information obtained in this phase of the criminal trial, as stated in the case law of the Strasbourg Court (Worn v. Austria).

This provision is strongly related to the offences of placing pressure on justice, contained in Article 276 and undermining justice, as defined by Article 277 of the Criminal Code. According to Article 276, the offence consists of "*The act of an individual who, during an ongoing legal proceeding, makes false public statements regarding the commission, by the judge or by the criminal investigation authorities, of an offense or of a serious disciplinary violation related to the investigation of the cause in question, in order to influence or intimidate them (...)*."

The offence of undermining justice refers to acts of unlawful revealing of confidential information concerning a criminal investigation, made by a magistrate or by another public servant who has become aware thereof by virtue of their office (paragraph 1) or unlawful disclosure of confidential information in a criminal case, by a witness, expert or interpreter, when a prohibition to do so is set out in the criminal procedure law.

2. CONCLUSIONS

The rich case law of the European Human Rights Court regarding the balance between freedom of expression and other fundamental rights includes principles to be applied in such circumstances. However, they cannot be considered as absolute and abstract and must be applied case by case. The recent changes in the Romanian legal system largely perceived these principles and set clearer requirements of the restrictions on the exercise of freedom of expression. A criticism to the present legal status of freedom of expression is that it may appear as an absolute fundamental right, as result of the exclusion of protection by criminal means of dignity through libel and slander and by the continuous lack of provisions on press activity. Such a hypothesis is contrary to the relative character of freedom of speech universally recognized and also to the interpretation of the European Court of Human Rights which does not provide positive obligations for Member States to decriminalize libel and slander.

References

- [1] The Constitution of Romania, as amended and supplemented by the Law on Revision of the Constitution of Romania, No. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003
- [2] Deleanu, I. (2006). *Instituții și proceduri constituționale – în dreptul român și dreptul comparat-*, București: Editura C.H. Beck.
- [3] Moldovan, C. (2012). *Libertatea de exprimare. Principii. Restricții. Jurisprudență*, București: Editura CH Beck.
- [4] van Dijk, P.; van Hoof, F.; van Rijn, A.; Zwaak, L. (2006). *Theory and Practice of the European Convention on Human Rights*, Fourth Edition, Antwerpen-Oxford ;Intersentia.
- [5] EtCHR, Tournacheau and Jully v. France. Retrieved from hudoc.echr.coe.int.r
- [6] EtCHR, Bladet Tromsø and Stensaas v. Norway. Retrieved from hudoc.echr.coe.int.
- [7] Moldovan C. (2013). Soluții ale conflictului dintre libertatea de exprimare și alte drepturi fundamentale. Reflectarea jurisprudenței CEDO în noile Coduri, Știință și codificare în România, *Comunicări prezentate la Sesiunea științifică a Institutului de Cercetări Juridice*, București: Universul Juridic.
- [8] ECtHR [GC], Cumpăna and Mazăre v. Romania. Retrieved from hudoc.echr.coe.int.
- [9] ECtHR, Morar v. Romania. Retrieved from hudoc.echr.coe.int.
- [10] Law no. 286 of 17 July 2009 of the Criminal Code
- [11] Romanian Constitutional Court by Decision no. 62/2007 (published in the Official Gazette no. 104 of 12 February 2007)
- [12] High Court of Justice, Decision no. VIII of 18 October 2010 (published in the Official Gazette no. 416 of 14 June 2011)
- [13] ECtHR, Oberschlick v. Austria. Retrieved from hudoc.echr.coe.int.
- [14] ECtHR, Worn v. Austria. Retrieved from hudoc.echr.coe.int.