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FREEDOM OF EXPRESSION AS A CORE VALUE OF CONTEMPORARY SOCIETY

Carmen MOLDOVAN[1]

Abstract

Freedom of expression is experiencing a variety of names – it is described as freedom of speech, freedom of communication, freedom of the press, freedom of association, right to assembly and various other rights - academic and artistic freedom - usually associated with the right to group communication. Due to the comprehensive scope of the term "expression", "word" , "speech" and the possibility of opposing interests it was important to show a special care on regulating the content of communication freedoms in all countries with a sophisticated constitutional culture of human rights. The result is the need to define this fundamental right and establish whether it is considered literally to be unlimited or not and to regulate the admissible restrictions carefully so that simultaneously the State to ensure the effective protection of freedom of expression and also to provide enough space for a multitude of other competing rights and interests.

The understanding of the concept of freedom of expression is extremely complex involving a thorough knowledge of constitutional values and constitutional tradition analysis of different legal systems and the international legal framework has been created by states under the influence of traditional constitutional values. At the same time, we need to balance freedom of expression with the value of other fundamental rights, resulting in the establishment of limits of expression, such as the criminalization of hate speech, incitement to violence, Holocaust denial, revisionism.

The present study aims to examine the regulation of the concept of freedom of expression in fundamental instruments belonging to different juridical spaces and to identify the scope of freedom of expression and types of speech excluded from protection.

There is an inseparable connection between the extent of the guarantee of the various forms of free expression and the penal limits on its exercise. This corresponds to the general rule that fundamental rights and freedoms set out in constitutional and international provisions most often are accompanied by the limits that may be imposed to the holders.

Keywords: *freedom of expression, conflicting rights, limits, non absolute right*

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1. Consecration of freedom of expression in UN international instruments

For the international law of human rights, freedom of expression is an essential fundamental value (Meron, (2003),: 422; Kentridge, (1996),:254; Dağlier, Schneider, (2007),:127) but it is not an absolute right, taking into consideration the possible and various limitations on its exercise. A feature of the international instruments that guarantee freedom of expression is the normative structure that contains the affirmation of the right and the regulation of the limits on the exercise (Schauer, (2005),:4; Heyman, (1998),:1316).

Article 19 of the Universal Declaration of Human Rights[2] guarantees freedom of expression as a fundamental right, Article 19 of the International Covenant on Civil and Political Rights[3] provides a more detailed definition than the Universal Declaration. Both universal instruments also set the limits of the exercise of freedom of expression.

Universal Declaration sets in Article 7 that "*All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination*". Provisions of Article 29 paragraph 2 of the Universal Declaration state that the rights guaranteed therein may be restricted, *e.g.,* "*for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society*". Similar limits are contained in Article 19 paragraph (3) of the International Covenant on Civil and Political Rights.

According to *General Comment no. 10 on freedom of expression: Article (19)*[4], adopted by the United Nations Human Rights Committee, para. 1 of Article 19 requires the protection of the right to express opinions

[2] Universal Declaration on Human Rights, December 1948, G. A. Res. 217 A (III), U.N. Doc. A/810, http://www.un.org/en/documents/udhr/.

[3] International Covenant on Civil and Political Rights, U.N. G.A. Res. 2200A (XXI), December 1966, 21 U.N.GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, in force since 23 March 1976, http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf.

[4] General Comment No. 10: freedom of expression (Art. 19) was adopted in 29 June 1983:
http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/2bb2f14bf558182ac12563ed0048df17?Opendocument.

without interference from the state, which must be interpreted as inadmissible without any exclusions or restrictions[5].

In accordance with para. 2 of Article 19 of the Covenant, there must be not be taken measures that would carry out control over the media on the components of freedom of expression, freedom to impart information and ideas and the freedom to seek and receive information without consideration of borders and regardless of how it is transmitted[6].

Para. 3 of Article 19 of the Covenant refers to the possibility of restricting freedom of expression, but this is permitted only subject to certain conditions: they must be prescribed by law, to be a legitimate aim and must be justified as necessary for the state to reach achieving those aims[7].

However, another provision of the International Covenant, Article 20 paragraph 2 contains a more detailed restriction of freedom of expression, which provides that "*any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*". Similar restricting clauses on the exercise of freedom of expression are provided by the European Convention on Human Rights, the American Convention on Human Rights and the Convention on the Elimination of All Forms of Racial Discrimination.

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[5] "1.Paragraph 1 requires protection of the "right to hold opinions without interference". This is a right to which the Covenant permits no exception or restriction. The Committee would welcome information from States parties concerning paragraph 1."

[6] "2. Paragraph 2 requires protection of the right to freedom of expression, which includes not only freedom to "impart information and ideas of all kinds", but also freedom to "seek" and "receive" them "regardless of frontiers" and in whatever medium, "either orally, in writing or in print, in the form of art, or through any other media of his choice". Not all States parties have provided information concerning all aspects of the freedom of expression. For instance, little attention has so far been given to the fact that, because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph 3."

[7] "4. Paragraph 3 expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being "necessary" for that State party for one of those purposes."

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The interpretation of Article 20 of the Covenant is subject to *General Comment no. 11 concerning the prohibition of propaganda for war and inciting national, racial or religious hatred*[8]. According to the interpretation of the Human Rights Committee of the UN, given in Section 2 of the Comment, the prohibitions covered by Article 20 of the Covenant are fully consistent with the guarantee of freedom of expression (Schmidt, Vojtovic, (2000),:153).

The scope of the prohibition set in para. 1 of Article 20 encompasses all forms of propaganda threatening or resulting in an act of aggression in violation of the UN Charter. The scope of para. 2 of Article 20 extends to all forms of supporting racial, national or ethnic hatred that constitutes incitement to discrimination, hostility or violence. The General Comment provides an extensive view of the categories of acts that constitute propaganda.

Meanwhile specifications are made on the acts that are excluded from the protection of Article 20 of the Covenant: advocating for the sovereign right of States to self-defence, the right to self-determination. Unlike General Comment no. 10, it is established for the States the obligation to regulate the acts of propaganda and impose sanctions for violation of these provisions[9].

[8] General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), adopted at 29 July 1983, available at: http://www.refworld.org/docid/453883f811.html;

[9] "Article 20 of the Covenant states that any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities. The prohibition under paragraph 1 extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations, while paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. The provisions of article 20, paragraph 1, do not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations. For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation. The Committee, therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained in article 20, and should themselves refrain from any such propaganda or advocacy."

2. Restrictions on the exercise of the right to freedom of expression

International instruments as well as national regulations have set the eventuality of conflicts between freedom of expression and other fundamental rights which resulted in the insertion therein of general and special clauses to restrict the exercise of freedom of expression.

Universal Declaration of Human Rights contains a general limitation clause in Article 29, which provides, *inter alia,* that the exercise of the rights and freedoms of the statement may be subject to limitations established by law in order to ensure recognition and respect for the rights and freedoms of others, to defend morality, public order and economic welfare of the society. Another limit is drawn in Article 7 prohibiting incitement to discrimination.

In regulating freedom of expression by the Universal Declaration the editors considered the constitutional definitions at that time on guaranteeing this right in a wide recognition and yet a relative character (Farrior, (1996),:13), being allowed the opportunity to limit its exercise. The original wording of the guarantee of freedom of expression was as follows: *Subject only to the laws governing slander and libel, there shall be freedom of speech and of expression by any means whatsoever, and there shall be reasonable access to all channels of communication. Censorship shall not be permitted."*

Subsequently the words "*by any means*" were removed at the request of Hebrew organizations who argued that freedom of expression does not include freedom to incite to hatred and violence against groups because of their race or religion (Farrior, (1996),:14).

International Covenant on Civil and Political Rights provides limits under Article 19, which contains the guarantee of freedom of expression as a fundamental right. Under the provision, freedom of expression carries "special duties and responsibilities" (Sudre, (2006),:501; Sudre, Marguénaud, Andriantsimbazovina, Gouttenoire, Levinet, (2008),:558; Gérard, (2005),:165). Restrictions on freedom of expression include those necessary for the rights or reputations of others, and the need to protect national security or public order.

Article 19 of the Covenant contains general standards of the restrictions that may be imposed to the freedom of expression and Article 20 contains a specific prohibition on the two forms of expression. Propaganda for war and supporting national hatred, racial or religious hatred that constitutes incitement to discrimination, hostility and violence shall be prohibited.

Drafting the final texts in question was the result of a long debate which reveals the complexity of the issues of freedom of expression. In its original form, the text contains a limitation clause more narrowly: "Any *advocacy of national, racial or religious hostility that constitutes an incitement to violence shall be prohibited by the law of the State"*[10] (Farrior, (1996):22).The provisions of Articles 2 and 20 para. (2) contain provisions that require the Member States to protect the holders of rights violations committed by private parties.

Freedom of expression is not an absolute right in the European Convention of Human Rights adopted by the Council of Europe[11], in accordance with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. In contrast, the content of the European Convention does not find an express prohibition of hate propaganda.

The Inter-American Convention on Human Rights[12] also contains express limitations on the exercise of freedom of expression under the same provisions that enshrine the right, in particular the limitation clause of Article 13 para. (5): "*Any propaganda for war and any advocacy of national hatred, racial or religious hatred that constitutes incitement to unlawful violence or other similar illegal action against a person or group of persons on account of race, colour, religion, language or national origin shall be considered as offenses punishable by law."*

The provisions of paragraph 2 of Article 13 prohibits prior censorship, but this is permitted by par. 4 of Article 13 for the sole purpose of regulating access to public entertainment for the moral protection of children and adolescents. Article 13 contains a general clause to restrict freedom of expression, similar in content to the requirements of other international instruments: the extent provided by law to protect the rights or reputation of others or to protect national security, public order or public health or morals.

[10] Draft International Covenant on Human Rights, Commission on Human Rights, U.N. Doc. E/CN/.4/77/ANNEX B (16 December 1947).

[11] Convention on the rights and freedoms of the Council of Europe was adopted in Rome on 4 November 1950 and entered into force on 3 September 1953. Romania ratified the Convention on 20 June 1994 under Law no. 30/1994, published in the "Monitorul Oficial al României", Part I, n. 135 of 31 May 1994.

[12] Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, entry into force: 18 July 1978, http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm

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Although the Inter-American Convention is subsequent to the European Convention in terms of content of the restriction clause is superior to the European framework established by case-law, *in concreto*, which may lead to divergent interpretations from one case to another and creating overall an unclear framework due to the lack of limitations fixed in advance.

3. Freedom of expression in the European Convention- jus communis for the European States

The wording of Article 10 para. 1 of the Convention reads as follows: "1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary ".*[13]

The rich jurisprudence of the European Court of Human Rights that recognized and guaranteed an extended protection for freedom of expression has been built and developed over a period of more than 50 years of activity.

The Court's rulings are generally given after an assessment *in concreto* of the factual bases[14]. Despite the variety of concrete situations in which the European Court had to decide it is possible to draw a number of general principles applied by the judges in giving a specific interpretation: freedom of expression constitutes an essential element of the conventional system and limitations brought by states should be considered restrictive; the safeguards established in Article 10 of the Convention aim to protect the "valuable speech" which make a significant contribution to public debate; the topic of the message and the person involved are relevant in analyzing the quality of the speech; freedom of

[13] http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm
[14] ECtHR, Prager and Oberschlick v. Austria, 26 April 1995; ECtHR, Perna v. Italy, 6 May 2003.

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expression and especially freedom of the press must be balanced with the public interest and other legitimate rights and interests of individuals (right to reputation, right to a fair trial and the presumption of innocence, the right to privacy) (Wildhaber, (2006),:221; Morange, (2004),:1247; Bignami, (2008),:220; Beck, (2007),:578; Wong, Savirimuthu, (2008),:245); Britton, (2008),:1412), the tendency of the Court is to invalidate the judgements given by the domestic courts imposing criminal or civil sanctions to the media; there seems to be a general tendency of national courts to justify their judgments through references to the European Court's interpretation (Zeno-Zencovich, (2008),:91-92).

Following the evolutive and autonomic interpretation of the conventional provisions by the Strasbourg Court it is possible to identify the distinguishable elements of the freedom of expression which is seen as a "summary right", a complex freedom or a multidimensional concept (R. Maruste, (2005):95) that includes actually more freedoms (Flauss, (2008),:97) although Article 10 refers expressly only to freedom of expression.

An important feature of freedom of expression that needs to be highlighted is its dual dimension: on the one hand - active and dynamic right referring to the right of persons to seek information, to do research, to be informed or receive information or news, to impart information and ideas - and on the other hand - as a passive right which involves a person's right to be informe (Lemmens, (2004),:137).

To highlight the relative nature of freedom of expression in the European Convention it appears necessary to mention that there are several types of restrictions that may be imposed on the exercise of this fundamental right by the domestic authorities. The first category is the need to protect the rights of others or in general to ensure coexistence between individuals (Gérard, (2005),:155).

The first text that supports this argument is Article 17 of the Convention which expressly includes individuals among the recipients. The text provides that no State, group of individuals or individual is entitled to the rights recognized by the Convention to carry out activities that may affect the rights and freedoms of others. At the same time the protection of the rights of others is complemented by the provisions of Article 10 para. 2.

The approach of the European Convention concerning free expression *lato sensu* is a liberal one that guarantees its exercise without

interference from public authorities, except those permitted by the restrictive conditions of para.1 and para. 2 of Article 10. The scope of Article 10 of the Convention is the largest in relation to other provisions since includes all varieties of messages regardless of content ranging from simple facts to different forms of expression of opinions and beliefs.

The conventional system of protection of individual freedom constantly emphasized the individual character of freedom of expression including freedom of information, which clearly distinguishes the democratic vision from totalitarian states that existed at the time of drafting the Convention, states where freedom of expression was subject to public interest and values promoted by the state (Cohen-Jonathan, (1999),:368).

The press may be considered a special holder of the right to freely disseminate information and ideas that must enjoy the prohibition of any prior authorization or censorship although the exercise of free press freedom is not unlimited. In case of exceeding the admissible limits the mechanism of civil or criminal liability is initiated and in exceptional circumstances even preventive control measures may be justified.

4. Is there a guarantee for the right to reply?

European Convention does not expressly guarantee the right of reply as a constituent element of freedom of expression. Its existence can be justified under the doctrine of positive obligations incumbent on the State to ensure the effective exercise of the right to free expression. Pursuant to this doctrine the State must create the means and procedures to ensure to interested parties the opportunity to obtain compensation for the damages incurred[15]. Recognition of a right to reply is consistent with the provisions of the Convention and with its object and purpose. In this respect the European vision is substantially different from the U.S. Supreme Court, which does not recognize a constitutional guarantee of the right of reply[16].

Justification for the existence of a right to reply and the publication of corrections through the doctrine of affirmative obligations incumbent to member States is determined by the specific circumstances involved: publications usually come from private persons and

[15] ECtHR, Ediciones Tiempo v. Spain, 12 July 1989.
[16] Miami Herald v. Tornillo, 418 US 241 (1974).

consequently the reply or correction must come also from a private individual.

It can be said that from the provisions of Article 10 of the Convention results the obligation of the State to regulate the obligation to publish a reply or correction and thus be provided the legal remedy upon a separate civil application in this respect or in combination with a criminal conviction for insult. Recognition and implementation of a right to reply does not constitute an unlawful interference of the State in the exercise of freedom of expression, its foundation is still reflected in Article 10 to justify the restriction to protect the interests of another person (van Dijk, van Hoof, van Rijn, Zwaak, (2006):787).

Despite the considerations set out that support the existence of a solid theory of freedom of expression, views contrary have been expressed, according to which there are no compelling reasons and arguments to assert the actual existence of a right to freedom of expression. The central argument of such assumption refers to the possibility open for the state authorities to issue legislation affecting freedom of expression and lead to civil or criminal liability if the content of the communication is prohibited, but these provisions are generally permissive to the aims of freedom of expression, and their existence is neither prohibited nor required by the theoretical guarantee of this right (Alexander, (2005):38, 42).

5. Conclusions

The importance of freedom of expression for the domestic law and international instruments requires no demonstration. Freedom of expression and freedom of communication, foundation of any modern democratic society based on the principle of pluralism, tolerance and openness, not only contributes to the spread of opinions and ideas but also to the personal development of different recipients of various types of speech. States have the obligation to ensure full respect for freedom of expression and its compatibility with other fundamental rights, following a difficult balancing process between all conflicting rights by legislative and judicial measures.

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