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# ABSTRACT of the Ph.D. THESIS

# *FREEDOM OF EXPRESSION*

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## ABSTRACT

The PhD thesis called "*Freedom of Expression"* is conceived as a comprehensive study of the evolution and substance of the freedom of expression, having among its starting points the famous quote of Voltaire '*I do not agree with what you have to say, but I'll defend to the death your right to say it*[1].

Thereby, our concern in this PhD research was to answer to the question whether the information and ideas in a democratic society may be shared and disseminated in any format, to anyone and on anybody as the reason of reviewing it stems out of the fact that the word is privileged in democratic regimes and that the very existence and functioning of the democratic society relies on public debates and the sharing of ideas and opinions.

A mere glance at the title may lead us to the idea that the research area for this PhD thesis is quite large, but our approach aims at making a critical and comparative analysis of the progress in legal terms of the freedom of expression, from a first generation freedom conceived as far as the 18th century as an essential freedom, the 'heart' of the theory of human rights, a direct extension of the individual freedom indissolubly linked to one's autonomy, to a freedom which must nowadays be read in conjunction with the 'exception', namely against its limitations and inevitably against other fundamental freedoms or principles.

The selected methods include both the historical approach required to investigate the origin, evolution, functions or configuration of the concept, as well as the comparative law approach crediting the idea that many legal phenomena may be cleared and explained by using the formal and legal logic of arguments.

Moreover, our approach is critical and relies on the review of current notions of freedom of expression content or of governmental standards. As the media and not only quotes many times as precedent and wishes to implement the American model without knowing that the philosophy backgrounds of the European Law and of the US Law are fundamentally different, our aim was to analyze or highlight, as appropriate, the applicable practice or literature precisely for emphasizing the specific similarities or differences between the two, as well as the lasting issues.


[1] Apocryphal quote, actually an extrapolation inferred from the work "*Questions sur l'Encyclopédie"*.

As the EU institutions paid greater attention to the freedom of position and freedom of information and taking into account the national reforms which most of the times occur as a result of the state obligation to adopt European regulations, our research makes constant reference to European requirements.

Therefore, the work revolves upon two research axes (titles). The first seeks to create an image as complex as possible of the evolution and complexity of the freedom of expression while the second aims at proving that the freedom of expression must neither be defined nor reviewed in terms of the constitutional and abstract declarative content asserted a priori, but rather in circumstantial terms according to the type of restriction occurring in a given period. Thus, our analysis was achieved in regard to state standards and this makes the novelty of this approach.

The PhD thesis is composed of two titles further divided into chapters and sections within which any issue may be tackled with in a distinct manner, however taking into account the connections between them.

*Title I* of this work, called 'The Evolution and Complexity of the Freedom of Expression', aims at preparing the basic analysis of the theme by describing first the significant points in the chronological evolution of the concept of freedom (Chapter I) and then the notion of freedom of expression in order to further identify the thematic directions through to the definition of the content of the freedom of expression as outlined in the current doctrine and objectified in the European and Romanian legal realities (Chapter II).

Furthermore, *Chapter II* called 'The Freedom of Expression – Crucial Freedom' is composed of 4 sections enlarging upon the current evolution stage of the freedom of expression as inferred from the national and international laws, the foundations and safeguards of the freedom of expression, as well as the content of the freedom of expression, as described in the laws and in the literature. Taking these benchmarks into account, the last section aims at defining whether the 18$^{th}$ century international principles of the freedom of expression are still anchored to reality.

The freedom of expression presumes the liberty to search for, receive and spread information and ideas of any kind irrespectively of frontiers, whether verbally, in writing, in printed or artistic format or by any channel of choice, without any intrusion by public bodies, irrespectively of frontiers. Our constitutional statement is restrictive and makes exclusive

reference to publications understood as written media periodicals and notwithstanding the editing part as stipulated in the 1923 Constitution.

This secured freedom involves anyone's right to choose the terms seen as reflecting the expression of thoughts to the best. The freedom of expression supposes first of all the passive neutrality of the State towards the diversity of expression forms which urge respect for one's opinions. On the other side, the State must secure the compliance with the plurality of opinions, thoughts and beliefs.

The freedom of expression is one of the major features of human personality and one of the oldest citizen freedoms known either under this name or as freedom of speech or freedom of the press. The founding principles of the freedom of expression and the notion of freedom as a whole, as conveyed in the 18th century, have been laid historically and politically in a time the State was seen as the sole obstacle to the freedom of expression through both its authoritarian criminal laws and censorship, the latter being considered to limit the thinking and the development of the human personality.

The two texts laying the foundation for this essential freedom are the First Amendment of the US Constitution of 1789 and the French Declaration of 1789, although divergent and not similar in goals. The 1789 Declaration fosters the positive right of the lawmaker to set the required limits and the task of implementing the principle. Alternatively, the First Amendment fosters a negative right in the sense that the lawmaker is forced not to step in. both the US Declaration of Independence of July 4th, 1776 and the 1789 Declaration of Human Rights enshrines a freedom – opposition materialized in the right of the individual to hang on and make a stand against repression, „natural, imprescriptible and sacred right" (Article 2, Declaration of Human Rights). Nowadays, the system for the protection of rights is changed as these are no longer mere rights against the State.

The freedom of expression is increasingly recognized as respect for the dignity of the speaker, therefore more similar to human rights, which theory differs from that of the 18th century because human rights also rely on one's dignity, not only on one's freedom.

Safeguarding the freedom of expression, as further enshrined in the European Convention of Human Rights, in the Handyside case, mostly relies on the right of the general public to know: *not only do the media the task if imparting such information and ideas; the public also has the right to receive it.* Political pluralism and implicitly the pluralism of ideas and concepts is the

cornerstone of the European modern society, therefore Article 10 of the European Convention of Human Rights advocates not only neutral ideas, but also those shocking or disturbing the State or a particular segment of the population.

Although the freedom of opinion and the freedom of expression are treated separately in the Romanian Constitution, namely in Article 29 'Freedom of Consciousness' and in Article 30 'Freedom of Expression', it does not mean that these two freedoms cannot include or exclude one another. The information accounts for the dissemination of pieces of knowledge, opinions and arguments addressing the wit of the receiver and enabling the same to express his/her own views. Per a contrario, communication is synonymous to publicity or propaganda and addresses one's emotions and not one's reason or wit, having as ultimate goal the verb 'to sell'. The right to information includes both the right *to impart* and *to disseminate* information, as well as the right of the public to *receive* it. Information may generally affect both one's private life and the public concern. Thus, the right to information is relatively different from the right to receive information, conveyed by the European Court of Human Rights as correlative to the freedom of expression. The protection set forth in Article 31 of the Romanian Constitution covers only the right to receive information of public concern which does not necessarily derive from the freedom of expression.

We cannot help but notice the defective legislative technique or rather the lack of a legislative technique in the assimilation of the right to freedom of expression to the right to private life and to dignity as subdivision of the right to private life, taking into account the limitations imposed upon the freedom of expression up against the right to private life and the right to dignity. Paragraph (1) in Article 70 of the New Civil Law asserts one's right to free expression, whilst the following paragraph makes reference to the restrictions in the practice of this right, although the provisions in the Constitution which govern the freedom of expression are much more explicit and comprehensive. Since the interest of the lawmaker in regulating the article is primarily attached to the right to private life and the dispositions on intrusions upon this right (Article 74 in the New Civil Law) specifically address, one may say, the ways in which the freedom of expression is abusively exercised in practice, we may conclude upon review of the entire section and of the context that the reason behind the introduction or the reassertion of the right to freedom of expression served more to the regulation of the right to private life which is not clearly regulated in the Constitution.

The actual tendency of working the human rights again into the private law following the hue and cry against the economic crisis and of the financial market respectively may be due, as Lucian Bojin critically observes in 'Noua Revistă a Drepturilor Omului' no. 4/2012, to a drive for the horizontalization of human rights by diverting from the common and fundamental element of all rights and particularly the rights against the State as holder of the correlative obligation to protect, which ended in a change of the rights protection system.

Another phenomenon which is worth noticing is the conversion of the freedom of expression from a freedom seen in certain aspects as a solitary freedom into a communication of the masses. Consequently, another challenge is prompted by the change of the traditional communication system at the dawn of technology, Internet and its various applications, as well as of the channels used by the freedom of expression. One may say that the new era of technology brings people closer and lets them know the events in real time and rapidly shares ideas and opinions. However, there is a negative side such as the excessive use of symbols instead of words and the resulting confusion of social values and functions.

Moreover, the verity of information or opinions, most of the times concealed behind aliases or names more or less true or disseminated in TV shows and vulgar or gossip tabloids is also questioned. A weak point is the change in the values scale. If a journalist or a book is deemed good or valuable in terms of competence and ideas, these values nowadays are unfortunately inspired by what we watch on TV. In this train of thoughts, reliable opinion leaders are no longer the same. Mediacracy turns into a synonym of mediocrity with affectivity and emotion prevailing over reason and instead of the 'communication of thoughts and opinions', two notions conveying the classical freedom of expression.

*Title Two* called 'Contextual Analysis of the Freedom of Expression' carries forward this idea of evolution of the freedom of expression which leads to the impossibility to assess its content by its abstract, a priori definition. To do this, a contextual analysis related to actual facts is required according to the type of limitation prescribed in a given period.

In this connection, we shall analyze the notion of freedom of expression in contextual terms (Chapter I) against the applicable type of limitation, in a given period, with the view to protect the private concern and the public concern (Chapter II), and later on we shall analyze the liabilities applicable when breaching another right or freedom (Chapter III).

Thereby, *Chapter I* called 'The Circumstantial Content of the Freedom of Expression' answers to the legitimate question whether the information and ideas of any kind may be shared in a democratic society in any format, whenever and to whomever, by acknowledging that, as far as the content of the freedom of expression is concerned, we must not strictly related to the abstract notion of freedom of expression, but rather to the limits administered by the State to secure the protection of certain individual or collective rights according to the type of actual breach of one or the other value.

The new legal guarantees rely first of all on international or regional organizations, as well as on the State through its bodies. Thus, the freedom of expression needs to be a regulated freedom, the State being compelled to protect by its laws the individual rights to honor and to private life and certain community interests, as well as the organization of justice so that lawsuits are adjudicated in a fair and impartial way.

The intrusion of the public authority upon the freedom of expression must be strictly limited and non-arbitrarily practice on objective criteria as giving priority in general to one of the rights instead of another being wrong.

The public opinion in early 18$^{th}$ century mostly opted for a limited interference of the State in the area of the freedom of expression. The State warrants the even compliance with the rights of any individual and cannot interfere with the debate of ideas because to maintain the impartiality and to avoid imposing an official ideology are needed in order to preserve the pluralism which is one of the values cherished in the democracy.

The ideological neutrality that must be intruded upon the notion makes the content of the freedom of expression impossible to define in a generalized way. Therefore, a definition cannot be set otherwise than in a negative way, through the actual and a priori substitution of the content for an assessment of its possible infringements. The ideological neutrality seeks to appreciate the freedom of expression as being inherent to the human being or to the social system and autonomous in relation to the variations in the public opinion or ethics.

In the process of establishing the rules for community or individual life, we do not make reference a priori only to fields such as politics, economics, health or government, but to any field like advertising and even pornography. Therefore, state standards must neither be absolute nor abstract, but rather regarded as indicative in nature so that their enforcement is related to the circumstances of each legal case, *in casus* and *in concreto*.

The intrusion of the public authority upon the freedom of expression must be strictly limited and non-arbitrarily practice on objective criteria as giving priority in general to one of the rights instead of another being wrong. Limitations in the practice of certain rights or liberties may be set in the limited number of special circumstances provided for in the Constitution while the consideration of the way in which the individual freedom must be understood in a liberal democracy, i.e. as *the opportunity to do all that does not affect the rights or the freedoms of the other* being of essence.

The freedom of expression has various out-of-court facets, contexts and meanings. The case law emphasizes the *unity* of this freedom as no form of expression is excluded a priori, the judge being given the authority to make a decision on a case-to-case basis according to the cultural and historical context and the social aspirations.

We may notice a close link between the type of expression, whether political, artistic or commercial and the public concern. Our Constitution fails in providing a classification of the types of expressions by content or by the positions of its holders or beneficiaries.

The early case law of the Strasbourg Court as regards the political expression is characterized by the priority given to this expression to the detriment of all other forms of expression insofar as the assessment margin of state interference was much more limited, being appreciated that 'the freedom of expression is all the more valuable for an elected of the people', politicians inevitably and consciously lay themselves open to close scrutiny of facts and gestures 'by both journalists and the citizens at large' (in the cases Lingens v. Austria, the judgment rendered on July 8$^{th}$, 1986, Castells versus Spain in 1992) or in respect to political parties, including their members (in the case Desjardin versus France of 2003, Incal versus Turkey in 1998).

Consequently, the intrusion of States towards the limitation of the freedom of expression must rely on 'extremely severe and stringent grounds'. The appreciation margin is no longer comprehensive in case of statements or asserting stirring violence or those prejudicing human dignity or private life.

Audiovisual commercial communications must stick to certain conditions in order to protect the minors and the human dignity or to secure the interests of consumers. As for the religious expression, there are cases when the religious manifestation stands for both freedom of expression and religious freedom (case Kokkinakis versus Greece, the religious element

strengthens the protection granted by ECHR) and there is the reverse when the Court favors the protection of the religious feeling leading to a limitation of the freedom of expression in circumstances where it would not have been normally accepted. (case Otto Preminger versus Austria), or cases when manifestation is concurrently held as the exercise of the freedom of expression and of the religious freedom, although not fully consistent with the scale of values rated by the Constitution (case of Muslim shawls or case Leila Sahin versus Turkey).

The exercise of artistic freedom conflicts often with other rights and freedoms, the most sensitive issue being probably the conflict with the right to respect of beliefs, obscenity and public morals. The relationship between the artistic freedom and obscenity is hard to achieve considering the protection of the freedom of expression on one side and the metalegal notion of obscenity on the other side, also weighted up by its evolution in geographic or cultural terms, not only in time.

According to the local practice, the court must relate in its interpretation of the 'public policy' or 'principles of morality' with social life rules and public perception in place at the time and on the territory where the judgment of the case is rendered and must define whether fear, discomfort or reasonable resentment is felt in the context of contemporary social values. Moreover, identifying whether the limits of the freedom of creation are violated or not in relating the artistic creation to *public morals* is not the happiest solution if we consider the very history of art, the major artistic tendencies which occur from the very expression of ideas, experiences, feelings or conceptions in a way which is not accepted by the major part of the community at the time.

The notion of 'obscene' must not be thus related to the public morals but rather be a neutral concept resting on the idea of the protection of morally-vulnerable people as minor children are. In the dissemination of materials deemed to be obscene, public morals, in order to be called upon, must address the safeguarding of minors' rights and not the defense of grown-ups because we would face a situation when the case law must argue if the concerned material is a work of art or not.

As for the academic expression, we wanted to underline that the university must continue to be a space where the dialogue, the critics and enquiries should freely express themselves without any pressure of being punished for the non-compliance with certain disciplinary rules of

conduct through the research, teaching and definition of revolutionary theories defying the trend, rules whose classification and definition are still completely vague and possibly even limiting.

Graduate education also requires encouraging students to express their opinions by not imposing state doctrines or curricula precisely to help protect the freedom of students to search for, receive and impart information indispensable to the academic circles and implicitly the right of the student to choose what knowledge or information he/she wants to know or study thoroughly according to the principle of the free development of personality.

*Section Two* describes the notion of State standards, i.e. the special restrictions prescribed by the national law, namely by Article 30, paragraphs 6 and 7 of the Constitution and by Article 53 of the Romanian Constitution and Article 10, paragraph 2 of the European Convention for the Protection of Human rights and Fundamental Freedoms, which must not be held in absolute or abstract terms, but rather deemed indicative by nature so that their application is related with the specific circumstances of each legal case *in casus* and *in concreto*.

The judge examines whether an expression is legal or not by qualifying the message, namely whether it has relevance or not for *the general concern or the public concern*. The degree of public concern helps differentiate between the various instances of expression within the same group, with the proviso that not only the political expression relates to a public concern as information originating from other sectors may related to such concern in some cases. In elaborating the rules of community or individual life, we must not relate a priori only to areas such as the politics, economics, health or government, but also to any other field like advertising and even pornography.

The freedom of expression is not an intangible right admitting no restriction. It must be most of the times reconciled with other demands of the same normative value. The control may be exerted according to constitutional requirements. No absolute hierarchy can therefore be set among these two values other than by relating to the actual facts. The main criteria considered address: the actual situation, the type of right, the presence of proper and sufficient guarantees and the legitimate purpose sought for, the type of restrictive measures enforced as their intensity, the appreciation margin known to states and the need for interference in a democratic society.

It has been correctly asserted that the analysis by the Constitutional Court of the reasons underlying the limitation of certain rights is made on an ‘objective and judicious’ ground, although what we have is a ‘reasonable’ ground. Our local practice is objectionable taking into

account the almost automatic validation of the limitation to freedom by the Constitutional Court without the control of proportionality and that the mere anticipation of the possibility of such limitation is enough by itself. Consequently, any limitation to the freedom of expression must be made only after an actual control of the proportionality between the goal aimed at and the means used in respect of an actual situation is performed according to the rules stipulated in Article 53 of the Constitution.

To that effect, the PhD thesis reviews the conditions which must be met to appraise the legality and the reasonableness of an intrusion by the State into the freedom of expression: the interference must be prescribed by law and must be substantiated by one of the purposes listed in the second paragraph of Article 10 of the Convention (if the reasons provided by national authorities to justify it are *pertinent* and *sufficient* and if the incriminated measures were 'proportionate to the legitimate purposes sought for), the restriction to be necessary in a democratic society.

The limitations to the freedom of expression are sundry and constantly evolving so that *Chapter Two* called 'Limitations to the Freedom of Expression' have been theoretically approached, especially in relation to the actual practice, by their grouping in terms of end purpose and the protection of the individual, such as: i) respect to the freedom of the other (respect to private life and family life, to health secrecy, to the dignity of the other, the prohibition of propaganda in favor of war, the instigation to national, racist or religious hatred which is an instigation to discrimination, to hostility or to violence, as well as the impartiality of the power of the judiciary and the protection of the rights of litigants) and ii) the protection of the society: the authority and the security of the State and the impartiality of the judiciary.

The 1789 Declaration of Human Rights assessed that a restriction of a fundamental freedom is possible, but only to warrant a concise and determined right of the others or, in other words, according to the theory of John Rawls, a basic freedom as the freedom of expression is which cannot be limited other than for another basic freedom.

Therefore, we think that the individual freedom lying at the foundations of the liberal state should not be put side by side or limited for a general concern like national security or public morals, which are otherwise two extremely vague and permitting notions in the enforcement of a restriction, as regulated at the constitutional and European level.

The rejection of state intrusion was ever since the 18th century assimilated most of the times to a rejection of censorship. Nowadays, censorship is often understood as the body of excessive limitations with regard to the freedom of expression. The most powerful legal tool to exercise control over words or utterances was censorship which was gradually replaced by liability.

Thus, *in the Third Chapter,* we set ourselves to examine contradicting elements of the freedom of expression consisting in the prior control of publications and of press offences to finally end in seeing which liability, the civil or the criminal liability, would be best applied as regards the freedom of expression.

The infliction of the sanction in terms of proportionality can only be justified if there is no other way to ensure the protection of a right guaranteed by the Convention. The European Court of Human Rights puts forward the subsidiarity of the use of criminal law by favoring other protective mechanisms for the rights of people instead of the criminal dispositions. A punishing system so harsh for investigative journalists might prompt their reserve in playing their part as watchdog of democracy and of the proper functioning of the democratic regime. The imprisonment ruled for an offence perpetrated in the field of the press would only be consistent with the journalists' freedom of expression guaranteed by Article 12 of the Convention when other fundamental rights would be severely prejudiced.

A relevant drafting of the law on the print media must address the definition of certain vital concepts on the freedom of expression and respect for the truth, the responsibility of journalist for their own signature, the objectivity, the liability towards the sources, the refusal of undue benefits, the relationships between editorial offices, the protection of dignity and of private life and the penalties which may be inflicted.

The rule of the law requires the acknowledgment of the freedom of expression in the Constitution. Moreover, turning the freedom of expression constitutional in a democracy raises the question of its relationship with the other freedoms. Currently, taking into account the actual evolution of its legal status over other fundamental freedoms or principles which shows a fragile balance, the freedom of expression appears more and more often to be a fragmented freedom. Although a first generation human right, it is increasingly depending on the representative economic, social and cultural rights for the second generation.

**Keywords:** *freedom, expression, contextual analysis*, *the acceptable limits of criticism, facts and value judgments, liability regimes.*