

Freedom of expression

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Abstract

In this paper "Freedom of expression" I've tried to explain the close relationship between freedom right and other constitutional freedoms, which have a direct impact on values consolidation in a democratic society and giving possibilities for the public to be active in the decision making process. The researches are based in three directions: the doctrine of international law, in Albanian literature; in native and foreign legislation and also in jurisprudence of Albanians courts and the European Court of Human Rights. The theme dedicates a wide space freedom of expression in the context of public debate, thereby guaranteeing the public's right to know. Many cases of interference in freedom of expression, has been given special importance in legal terms. This intervention must have a legitimate purpose to protect more than one of the public interests. All of this work focuses on sharing the idea that everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference, receive and impart information and ideas through any media and regardless of frontiers.

Keywords: *right, freedom of expression, media, information.*

JEL Classification: K19

I. Preliminary

The freedom of expression constitutes the rights' foundation stone and the fundamental freedoms. The freedom of expression is fundamental to the existence of a democratic society and to the creation of the possibility that the public to participate in the decision making process. The citizens cannot participate in the decision making process and to exercise their right to vote, if they do not enjoy free access for information and ideas and to express their views freely. The violation of freedom of expression causes the violation of other human rights and other freedoms such as gathering and organizing freedom².

In Article 22 of our Constitution is sanctioned a wider recognition of the freedom of expression. Placing it in an important plan, immediately after the freedom to live, makes us realize how important it is such freedom in a democratic system. Democratization of a legal order is proportional to the extent to which freedom of expression is recognized and put to implement.

In reality the freedom of expression is a criterion, on which can be realized other freedoms such as personal freedom the freedom, the freedom of residence, the freedom of association, the freedom of religion etc. Just the freedom of speech, i.e. the right to give and to spread news, opinions and reviews to ensure the right of

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² Jeta juridike, Altin Shkurti, Dhjetor 2005, fq 54

all citizens to express their ideas, their judgments and evaluations in the political, cultural, religious and economical field³.

The European Convention of Human Rights specifically protects freedom of expression, as a fundamental one. This freedom is provided in Article 10 that stipulates that:

1- Every person has the right to freedom of expression. This right includes the freedom of thought and freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States to establish the licensing of broadcasting undertakings of cinema or television.

2- The exercise of these freedoms that contain duties and responsibilities, may be subject to such formalities, conditions, restrictions or sanctions provided by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, protection of public order and prevention of crime, for the protection of health or morals, for the protection of reputation or rights of persons, to stop the spread of confidential data or to maintain the authority and impartiality of the judiciary⁴.

Freedom of expression is a key condition for the progress and development of each individual. The right on freedom of expression provided in the first paragraph of Article 10 of this Convention includes the freedom to hold opinions and to receive and impart information, ideas without interference by the state. While in the second paragraph of Article 10 are defined the restrictions on freedom of expression, which are necessary to promote democracy and to create the right balance between competing interests⁵.

The definition given in Article 10 of the European Convention on Human Rights on the protection of freedom of expression is also materialized in our Constitution as one of human rights and fundamental freedoms that enjoys special protection.

Article 22 of the Albanian Constitution provides:

1. Freedom of expression is guaranteed.
2. Freedom of press, radio and television is guaranteed.
3. Prior censorship on means of communication is prohibited.
4. Law may require the granting of authorization for the functioning of radio and television stations.

Restrictions on freedom of expression are defined in Article 17 of the Constitution of the Republic of Albania, along with all restrictions of freedoms and human rights.

The content of Article 17 states that:

1. Limitations of the rights and freedoms provided in this Constitution may be imposed by law for a public interest or for the protection of the rights of persons. Restriction must be proportionate to the situation that has dictated it.

³ E drejta kushtetuese, Aurela Anastasi, 2004, fq 87

⁴ Udhezues i shkurter I Konventes Europiane per te Drejtit e Njeriut, Danna Gomien, 2005, fq 101

⁵ Te drejtit dhe Lirite Themelore te Njeriut, Eni Cobani, 2002, fq 60

2. These limitations may not violate the essence of freedoms and rights, and in any case cannot exceed the limitations provided in the European Convention on Human Rights.

Freedom of expression includes the freedom to have opinions and impart information and ideas without interference by the state. Article 10 of the Convention protects not only the expression that is materialized through the words spoken or expressed, but also other tools used for its communication and materialization. Therefore, this freedom includes pictures, images, books, movies, radio interviews statements, informational pamphlets. Freedom of expression includes the hate racist language, pornography and electronic information system. Freedom of expression includes the right not to speak. Keeping opinions constitutes a precondition for the expression of the idea that is almost self-expression. The first paragraph of Article 10 of the Convention protects persons from adverse consequences for the opinions attributed to them, based on previous public expressions, while negative freedom protects them against liability to rival any opinion they have. The right to receive information includes the right to find it. This right does not go further, but to ask what is available. On the other hand, right to impart information includes the right to transmit information and making it known to other people.

Unlike freedom of speech and of the press, freedom of expression protects not only the right to impart information, but also the right to receive information. This is a broader definition than the previous one for protection, which protected only the speaker and writer, but not the communicator of ideas and opinions. Article 10 makes a distinction between information and ideas and makes it clear that freedom of expression is not limited to the factual verifiable data. It also includes opinions, criticism and assumptions⁶.

II. Freedom of expression in the context of public debate

The court gives a great value to exercise on freedom of expression by the elected members of legislature, arguing that they should be given a broad protection to speak about issues of interest to their constituents and in general to their public. Societies that choose to participate in debates should have a high degree of tolerance to criticism of their rivals. Political and public figures should be open to criticism from the media. The court has heard a number of issues, in which older members of the government or parliament have won by subject defamation litigation in the courts of their countries, and concluded that these actions are regularly made in violation of Article 10 of the Convention. Freedom of the press affords the public one of the best tools to detect and create an opinion around ideas and attitudes of political leaders. The freedom of political debate is central to the concept of a democratic society. In line with this, the limits of acceptable criticism are wider for a politician than a private individual. Unlike individual, the politician

⁶ Jeta juridike Nr 2, Altin Shkurti, 2005, fq 55

inevitably and knowingly exposed to a detailed reflection of his every word and action of his, both by journalists and by the wider public. Article 10, paragraph 2 makes possible, that the reputation of others to be protected, and this protection includes also the politicians, but in some cases the requirements for such protection should be measured in relation to the interests of open discussion of political issues. The court has reviewed a growing number of cases alleging violation of Article 10 where an author, editor or publisher is sentenced for inciting hatred, racial hatred, and incitement of violence, or speeches against the sovereignty or territorial integrity of the state.

With few exceptions, the Court has protected an individual's right to express the views were sentenced from local courts, by regularly ascertaining a violation of Article 10 where countries have convicted individuals who had expressed their views, that were considered a threat against the sovereignty, indivisibility and territorial integrity of the state, as long as the individuals had not been calling for violence or hate. Even if the state asserts that punishment was justified as an aspect of the war against terrorism, the Court emphasized that this statement does not permit the state to restrict unduly an individual's right to be informed about debatable viewpoints, by loading the weight of the criminal law to keep media.

In the same way, the Court has not supported states trying to prevent free debate, with political nature, by founding it as a violation of Article 10, where a state had prosecute a journalist for inciting racial hate, on reporting regarding to a young extremist movement. Some of the most important issues in the implementation of Article 10 dealing with journalists' rights on freedom of expression in the context of the discussion of issues of common interest for the public, in political and non-political context. In these issues, the Convention institutions carefully balance the interests of the press in its publications, against state interests on the limitation of obtaining information from the public⁷.

III. Available information for the public, disclosure of journalists' sources

If the information is available for the public, the Court will usually find a violation of Article 10 if journalists detained or punished for the use of such information. In the case of a periodical authority, editors printed a report on the activities of the internal security service, as consequence, was seized the relevant published edition of the periodical authority and editors have been arrested. The staff of periodic authority printed a different edition and distributed it the following day. The Court found a violation of Article 10.

An important aspect of wide protection, offered to media during the exercise of its right on the freedom of expression, is the protection of confidential sources of information that form the basis of investigative journalism. In the case

⁷ Udhezues i shkurtër i Konventës Europiane për të Drejtat e Njeriut, Danna Gomien, 2005, fq 102

where the government issued an injunction against the publication of an article and another order to reveal the sources of a journalist who reported about the business policies of a company, the Court held that the protection of the company constitute a legitimate aim. The means chosen to achieve that purpose were disproportionate to achieving the purpose. Even control cases of houses or bureaus of journalists lead to the violation of Article 10 of the Convention, if the authorities intend to reveal sources of obtaining information⁸.

IV. Intervention on the freedom of expression⁹

Interference with freedom of the press can occur before or after the publication of material, that transmits information or ideas. Censure prior to publication prohibits the transmission of information and ideas to those who want to take them. Measures before publication, such as the authorization of newspapers and previous court orders, are subject to full scrutiny because of their importance. Even temporary intervention may destroy or diminish the the values of the information being transmitted. Sanctions after publication include civil and criminal actions. The effect that these measures may provide can cause harm to the person. Criminal measures may entail the loss of freedom, and for this reason, it is the most serious. Civil measures consist in the payment of a sum of money as compensation for damages caused. At the same time, these measures may also influence on the future of free speech. Second paragraph of Article 10 of the European Convention of Human Rights makes clear that sanctions and restrictions must be justified. Thus, if a person is prosecuted or civilly forced to pay a large sum of money as a result of the exercise of freedom of expression, the state must justify the applicable national law according to article 10 of the European Convention of Human Rights.

Article 10/2 provides that, the exercise of freedom of expression contain obligations and responsibilities. Article 10/1 refers to the possibility of intervention, while article 10/2 contains the potential to limit the right to freedom of expression. The power of the state to carry out actions that restrict the right to freedom of expression under Article 10/2 of the Convention, must be taken into account among others and social position of the person who has limited this freedom.

Social position of military and public employees is among those that contain obligations and responsibilities, and for this reason, an intervention on their freedom of expression is justified. The state should establish a national law according to which has been authorized or mandated to intervene in the freedom of expression. Non-argument that the intervention on the freedom of expression predicted in the law, constitutes a violation of Article 10¹⁰.

⁸ Udhezues i shkurter i Konventes Europiane te te Drejtave te Njeriut, Danna Gomien, 2005, fq 107

⁹ Jeta juridike Nr 2, Altin Shkurti, 2005, fq 58

¹⁰ Jeta juridike Nr.2, Altin Shkurti, 2005, fq 59

In accordance with the definitions given in Article 10 of the European Convention, materialized in our Constitution, to guarantee this freedom, to Criminal Code of the Republic of Albania as criminal offenses are provided the insult (Article 119 of the Criminal Code) and defamation (article 120 of the Criminal Code). Our legislation provides for compensation of civilian property and non-property damage caused to a person by publication of false information (Article 617 of the Civil Code) or by infringement on honor and his personality (Article 625 of the Civil Code). So, our legal framework meets the criteria set out in the European Convention on Human Rights, to forecast the authorization by law or mandating for intervention on the freedom of expression.

Intervention on freedom of expression must to have a legitimate aim to protect one or more of the public interests, such as national security, territorial integrity or public safety, the protection of public order and the prevention of crime, protection of health or morals, ensuring authority and impartiality of the judiciary, etc. Limit that is allowed evaluation of the High Contracting Parties to limit the right to freedom of expression depends on the nature and purpose of the restriction, and on limited nature of expression. In accordance with the principle of boundary evaluation, the Court has given a higher level of protection to publications and lectures, which have effect on the social and political debates, than on expressions with commercial, artistic nature, etc.

In many cases, the court has intervened to protect the venerable interests of individuals and in accordance with the infringement that has become to personality of the damaged, has ordered the infringer of these interests to compensate the injured or refute the false publication¹¹.

Freedom of expression provided in the constitutions and other countries as one of the most important freedoms to the individual.

Anticipated also its limitations. German Constitution in its Article 5 states that:

1. Everyone has the right to express and disseminate his opinions freely by word, writing and pictures and to be informed without hindrance from sources open to all. Guaranteed freedom of the press and information through radio and cinematography. It cannot be placed any censorship.

2. These rights are limited by the provisions of general laws, by the legislative norms relating to the protection of young people from the right of the individual to his honor.

An important part of this right and its limitations, occupy also in Italian Constitution, specifically in Article 21.

All have the right to freely express their opinion in speech, writing or any other means of dissemination. The press should not be subject to authorization or censorship.

The press should not be subject to authorization or censorship.

¹¹ Jeta juridike Nr.2, Altin Shkurti, 2005, fq 60

Sequestration can be performed only by a justified act of judicial authority in case of criminal offenses for which the law expressly authorizes the press, or in case of violation of the provisions that the law itself provides for the determination of responsibilities.

In such cases, when there is absolute urgency and it is not possible timely intervention of the judicial authority, the seizure of periodical press can be performed by officers of the judicial police, who immediately, and always within 24 hours, shall so inform the court. If this latter does not sanction it within the next 24 hours, the seizure be withdrawn and without any effect.

Law may decide, by norms of overall character that make public the means financing of the periodical press.

Prohibited publications in press, shows and other events contrary to public morality. The law establishes appropriate measures to prevent and punish violations.

Although the Italian Constitution has given a significant place to this right in practice there are violations and abuse starting from the fact would prevail if the right to privacy of individuals, especially public persons to freedom of expression of journalists, who often find themselves in the position of the defendant for breach of privacy or defamation.

V. The positive obligations of the state and the necessity of intervention¹²

In recent years, the Court has established the principle that a state may have a positive obligation to protect journalists and press publishers from intimidations, infringements and violence. The Court found a violation of Article 10 in the case when the government did not protect a newspaper that had been the target of terrorist attacks. The state has an obligation to ensure a safe environment for exercising freedom of expression. Violation of Article 10 considered and the cases where journalists are injured, abused, and even killed and the government did not respond to the request for protection and investigation of these crimes. The Court has ascertained that the right to freedom of expression does not create an automatic right of access to a specific forum for the exercise of that right, by not founding any violation of Article 10 when the owners of a private supermarket, refused to allow applicants to distribute flyers, to collect signatures for a petition, or to develop an information campaign about an issue of public interest. The Court pointed out that if there is no communication to these viewpoints, in order to destroy the essence of the right protected, for the state can bear a positive obligation to regulate property rights to ensure such access.

The right to freedom of expression competes with other interests, for the protection of which the state may be required to act. First of all, the state should declare the causes of its intervention in the freedom of expression and then

¹² Udhezues i shkurter i Konventes Europiane te te Drejtave te Njeriut, Danna Gomien, 2005, fq 109

demonstrate the existence of adequate and sufficient reasons to perform this intervention. The Court has considered the necessity of the measures taken by the state when restricts the right to freedom of expression. To perform this Court takes into account and the balance between the right to freedom of expression and other interests of the state.

The European Court of Human Rights has defined categories of expressions, to which she referred to from time to time and has established the necessity to intervene in specific categories of exercising freedom of expression.

Speeches of a political nature have a privileged position compared to the other character speeches, due to the fact that political discourses constitute key feature of democratic society. Consequently, the interests of politicians in maintaining their private life enjoy less protection than others individuals. The Court has been expressed that the limits of acceptable criticism are wider when discussing about a politician, compared to other categories, to deal with the fact that politicians have allowed more space towards examination of press and public. Regardless of the fact that the private life of politicians, compared to other private interests of individuals is limited, national authorities may be justified in taking preventive measures or exposure to certain aspects of the private life of politicians. This excuse is allowed due to the fact that if you deviate from the private life of politicians, the public benefit from the knowledge of the mysteries of the life of politicians is very small¹³.

The Court supported the right of the press to convey ideas and information on matters of public interest even when it involves the publication of false and harmful statements to the privacy of individuals.

The Court has examined cases in which freedom of expression, materialized in works of art have been subject to state intervention. The Court has been less tempted in favor of artistic expressions. The artwork is not immune from state interference, but artistic trend in democratic society moves towards radicalism and challenges. Despite this fact, the power of the state to intervene in the production and exhibition of works of art should be limited, compared with the state government to deal mainly with the production materials to win or to have fun.

The Court has reviewed the cases of restriction of professional and commercial terms. In the majority part of them, have had issues related to the advertising of various professions. Interests in conflict have been freedom of expression, and ensuring equality between different enterprises and persons who exercise the same activity. Attitude of court has been that states have a wide margin of appreciation to restrict the freedom of expression in order to protect private business interests.

¹³ Fragmente kryesore, perzgjedhje e vendimeve gjyqesore te Gjykates Europiane te te Drejtave te Njeriut dhe vendimeve e raporteve te Komisionit European te te Drejtave te Njeriut, 1998, fq 123

VI. Freedom of electronic tools/means as a form of the freedom of expression¹⁴

The right of expression and audiovisual communication is an integral part of freedom of expression and of the press, freedom of information i.e. in broad terms. Press and audiovisual tools are essential parts of the means of communication. Freedom of communication by means of radio and television. Freedom of communication, freedom includes the freedom's right to create audiovisual enterprise, freedom to spread their emissions as well as listeners and viewers' freedom to pursue programs of their choice. This is a new right, which is the result of scientific and technological advances by recognizing new developments. Even in the old constitution it is not written, while in the major democracies is affirmed in various ways. In Albania, starting with the "Law for the private radio and television in the Republic of Albania", regime put an end to state monopoly of radio and television. In contrast to the freedom of the press, the issuance of authorizations required by law constitutes an express limitation of this right. The state is completely free to impose restrictions on the objective circumstances that arise, as in the case of frequency. However, there are some constitutional requirements that it should keep into consideration. This is a very important constitutional right, and therefore the issue of restrictions shall be subject to a binding great interest.

The constitutional requirement of pluralism has to do with two basic aspects, external pluralism of audiovisual media and with the pluralism in domestic programs and information. Respect of internal pluralism is open to different social and cultural currents. For the audiovisual media legislator sets the rules that guarantee pluralism in both the public and private sectors, in order to ensure the provision of programs of different nature. In the public sector is taken into account requirements deriving from the principle of equality and neutrality. Not only in the public sector but also in the private sector there is an obligation to ensure the free expression of pluralist ideas and diverse opinions, in order to ensure the removal of a dominant position. Freedom of audiovisual communication, unlike the freedom of the press is part to the group of those rights cannot exist without the context of a legal remedy. The legislator, in our case the Parliament, has to determine to which extend the boundaries of freedom of audiovisual communication. Since the frequencies available in the area legitimate restrictions on freedom of audiovisual communication, legislator installs a prior administrative regime. This is incompatible with the freedom of the press, then press prior censorship is a direct threat, and for the freedom of audiovisual communication is a guarantee. A number of restrictions imposed in the law, to avoid dominant position in the fields of communication tools. Law as an administrative authority, independent, who has significant control tasks and inspection defines national Council of Radio and Television. Pluralism, objectivity and neutrality are important principles and implemented through public and private competitions. So, passed from a monopoly regime of television service in competition between public service.

¹⁴ E drejta kushtetuese, Aurela Anastasi, 2004, fq 89

Conclusions

Albanian Constitution, in its Article 22, provides for freedom of expression as one of the rights and fundamental freedoms, which enjoys special protection. Despite the incomplete legal framework, in practice there are many cases where freedom of expression is violated, raped or deprived. In the proper interpretation of Article 10 of the European Convention on Human Rights, the Court is often confronted with the conflict between individual rights and public interest. On its confrontation, the Court was biased in favor of the freedom of expression and has formulated its standards of evaluation to determine whether the right to freedom of expression has been violated or not.

The request of the Court, for the existence of law as the basis of the intervention is elaborated and demand for socially urgent need to justify intervention is already defined. The Court, through its cases has contributed correctly in favor of the right to freedom of expression. Considering the fact that freedom of expression constitutes the cornerstone of human rights and fundamental freedoms, so that this freedom is the touchstone of democracy, may conclude that, through decisions Court has given a significant contribution to ensuring democracy. I think that it would be utopia to allege that Convention or the legislation of a country is an absolute guarantee of the protection of this right. Neither the Convention nor the constitutions of countries have not solved and will not solve all problems stemming from freedom of expression.

The Court has an important role to play not only for the protection of freedom of expression, but also in the consolidation of democracy, in the enjoyment of other rights and freedoms guaranteed by the Convention. Apart Court, also plays a crucial role an individual who at any moment that violated freedom of expression should not remain silent, but directed to the court, because he has the obligation to contribute in improving of democracy, taking as a starting point protection of his right.

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