

# Freedom of Expression - Aspects of Judicial Practice Regarding Expression in a Political Context and in Relation to the Right of Politicians to Dignity and Honor

Assistant professor Alexandru Cristian ROȘU<sup>1</sup>

## Abstract

From the ancient oratories and politicians of ancient Athenian democracy, it has been said that "there can be no greater misfortune for free people than the loss of freedom of speech"<sup>2</sup> (Demosthenes), and in this context, this fundamental right has always been related to nature. human rights, the development of society, including the possibility of human beings to live in a state governed by the rule of law where human rights are protected and guaranteed, or as stated in the jurisprudence of the European Court of Human Rights, freedom of expression is one of the basic conditions for the progress of society and for the development of every human being<sup>3</sup>.

**Keywords:** freedom of expression, restrictions and limitations, positive obligations, negative obligations.

**JEL Classification:** K15

## 1. Introduction

Currently, in Romania, this right enjoys a constitutional and civil regulation capable of protecting the expression in any way of thoughts, ideas, creations of any kind, regardless of how they are transmitted, through live words, pictures, images, sounds, whether made individually or collectively, through the media or through more limited means of transmission<sup>4</sup>.

For legal professionals and not only, it is important to analyze not only the content of the law itself, the interference, but also its placement in the context of respecting other fundamental rights, in other words, to understand the true limits of such a fundamental right<sup>5</sup>.

The European Convention on Human Rights, in Article 10, regulates at European level the framework for guaranteeing this right, establishing the general lines of protection of opinions, of the communication of information without the interference of public authorities, without taking into account the borders of states in the communication of messages and information.

## 2. Negative and positive obligations of the state to guarantee the right to free expression

The understanding of this fundamental right, as it is regulated at national level, must be related to the European and international framework that establish the general lines of content and protection, the domestic legislation must be interpreted according to the treaties to which Romania is a party.<sup>6</sup>

In this sense, any interference brought to this right must be analyzed from 3 perspectives:

a) if it is provided by law. By law we consider the broad meaning of the word, not only the act issued by Parliament, but also government decisions, ordinances, or acts that have a lower hierarchical character, such as statutes or regulations of the ministries.<sup>7</sup>

b) if it was intended to defend a legitimate aim. Legitimate purpose within the meaning of the

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<sup>1</sup> Alexandru Cristian Roșu - Romanian American University, Romania, alexandru.cristian.rosu@rau.ro.

<sup>2</sup> Demosthenes, see [https://en.wikipedia.org/wiki/Demosthenes#Rhetorical\\_legacy](https://en.wikipedia.org/wiki/Demosthenes#Rhetorical_legacy), consulted on 1.10.2022.

<sup>3</sup> Case of *Handyside v. The United Kingdom*, the judgment being available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57499%22%5D%7D>], consulted on 1.10.2022.

<sup>4</sup> For details see Art. 30 of the Romanian Constitution, normative text found at the following web address: [http://www.cdep.ro/pls/dic/site2015.page?den=act2\\_1&par1=2#t2c2s0sba30](http://www.cdep.ro/pls/dic/site2015.page?den=act2_1&par1=2#t2c2s0sba30), consulted on 1.10.2022.

<sup>5</sup> See Victor Ferreres Comella, *Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights*, in Wojciech Sadurski (ed.), *Political Rights Under Stress in 21<sup>st</sup> Century Europe*, Collected Courses of the Academy of European Law, Oxford, 2006, pp. 84-119.

<sup>6</sup> According to art. 20 of the Romanian Constitution: "the constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, the Covenants and other treaties to which Romania is a party."

<sup>7</sup> For details, see the case of *Ekin Association C. France Association*, in the case law of the European Court of Human Rights - <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-59603%22%5D%7D>], consulted on 1.10.2022.

European Court of Human Rights includes protection of national security, public safety, prevention of crime, protection of health and morals, protection of the reputation or rights of others, guarantee of authority and impartiality the judiciary. In the case of *Hadjianastassiou v. Greece*<sup>8</sup>, it was held that the expression and exchange of information to third parties concerning military defense secrets obtained as a result of duties is an interference aimed at protecting the defense capacity of the Greek State. In the case of *Surek v. Turkey*<sup>9</sup>, the interference with the right to freedom of expression was justified as long as the expression encouraged the use of violence (Kurdish war against the Turkish authorities for independence) in an area where several acts of terrorism had taken place. In *Rekvényi v. Hungary*<sup>10</sup>, it was noted that the political activities of police officers may be subject to limitations, as long as the aim is to depoliticize the police in order to consolidate and maintain democratic pluralism in Hungary. It was appreciated that people have the right to address police officers who are impartial in their duties, without them being engaged in a political vision on a particular subject. In order to protect the interests of children, their development in optimal and moral conditions, in the case of *Muller v. Switzerland*<sup>11</sup> it was found that it is perfectly legal for freedom of expression to be censored by removing paintings that graphically represented sex scenes such as zoophilia, sodomy and masturbation in an exhibition that allowed free and unrestricted entry. The images in those paintings had been printed on posters and in presentation catalogs, so that the Swiss authorities considered it a crime to publish obscene material and fined the author of the publication. Regarding the protection of morals and the right to privacy, a judgment in *MGN v. The United Kingdom*<sup>12</sup> reveals how a publication infringed the right to privacy by publishing an article entitled Naomi-a drug addict, along with pictures of her near a Narcotics Anonymous center. The article mentioned the medical treatment prescribed to a famous model, a public figure who was currently under medical treatment. The case is relevant in terms of the success fee that MGM had to pay to Naomi Campbell. In *Worm v. Austria*<sup>13</sup>, ECHR judges had to consider whether there was a violation of the right to freedom of expression when a journalist was convicted of publishing an article that could influence a judge to have a criminal verdict on a defendant. Austrian courts held that the journalist had replaced the judiciary at the time of publication of the article, a critical one aimed at Mr. Androsch's guilt, and thus the judiciary could be influenced.

c) if it was necessary in a democratic society. In this sense it must be analyzed if the restrictions on the right to free expression are relevant and sufficient, they are proportionate to the aim pursued. European legislation allows Member States to assess the extent to which expression may be limited in relation to the needs of society.

## 2.1. Positive obligations

With regard to these obligations, States must create an environment conducive to the observance of the right to freedom of expression, especially in special situations, of threatening journalists, when topics of public opinion are discussed in society, when the fear of expressing ideas and opinions exist. Thus, the state must not remain inactive, in passivity, but must act concretely, either by creating a criminal law framework to prevent the commission of crimes against vulnerable groups or persons, or by effective protection of persons.

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<sup>8</sup> Case of *Hadjianastassiou v. Greece*, available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57779%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57779%22]}), consulted on 1.10.2022

<sup>9</sup> Case of *Surek v. Turkey*, available at <http://hudoc.echr.coe.int/eng?i=001-58281>, consulted on 1.10.2022.

<sup>10</sup> Case of *Rekvényi v. Hungary*, available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22003-68452-68920%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-68452-68920%22]}), consulted on 1.10.2022.

<sup>11</sup> Case of *Muller v. Switzerland*, available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57487%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57487%22]}), consulted on 1.10.2022.

<sup>12</sup> Case of *MGM v. The United Kingdom* available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22003-3403357-3818992%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-3403357-3818992%22]}), consulted on 1.10.2022.

<sup>13</sup> Case of *Worm v. Austria*, available at <https://www.ucpi.org.uk/wp-content/uploads/2018/03/Worm-v-Austria-Application-No.-2271493-1998-25-E.H.R.R.-454.pdf>, consulted on 1.10.2022.

In the case of *Dink v. Turkey*<sup>14</sup>, the situation of a Turkish journalist who was assassinated by nationalists following the publication of an article on the Armenian genocide in 1915 is presented, although the article essentially referred to reconciliation between the two peoples in the context of this event historic. Mr. Firat Dink was shot dead, although two officers had been informed of the possibility of his killing, with Istanbul police refusing to take action as soon as he became aware of it.

### 3. Freedom of expression in a political context

The promotion of democracy at the global and continental levels remains a constant concern for international institutions as well as for each national government<sup>15</sup>. The United Nations, the European Union and many non-governmental organizations have stated their goal of consolidating this fundamental value for the citizen and for his development.

The UN system supports and contributes to the International Conferences on New or Restored Democracies (ICNRD), a process initiated in 1988 to support, in countries on all continents, the process of rebuilding or consolidating democracy. The Process of the Community of Democracies (CoD) is another global initiative, which took place in June 2000, with the organization of the first edition of the Ministerial Conference of the Community of Democracies in Warsaw<sup>16</sup>.

The foundation of any democracy is free elections, where the freedom of expression of political ideas and messages are transmitted to voters so that they can consciously and informedly express their political choice to form the majority that will lead and implement the constitutional tasks enunciated during the elections. Of course, all this exchange of ideas, information and communications must be done in a framework that allows the pluralism of ideas, of political parties, the information must flow freely and unrestricted.

In the case of *Orlovskaya Iskra v. Russia*<sup>17</sup>, the European Court of Human Rights ruled that there was a restriction on the right to freedom of expression and that Russia violated art. 10 paragraph 1 of the European Convention on Human Rights when a non-governmental organization has published several critical articles in a newspaper related to an election candidate. The newspaper, although mentioning the newspaper's political affiliation, was fined because it contained elements of an election campaign that had not been funded by national campaign funds, as required by Russian law. The Court held that Russia had violated the right to freedom of expression because, during the election campaign, opinions and information of any kind must flow freely and that there can be no interference in the editorial policy of an organization that seeks to criticize and inform the public. public interest.

Regarding the acceptable limits brought to this right, during the electoral period and with reference to the expression of political ideas and messages, Recommendation no. 15 of the Council of Europe (2007)<sup>18</sup> sets certain standards for any kind of election, whether general, local, presidential or referendum elections. In this regard, it is established that states must ensure the editorial independence of the print and audiovisual media, and in the event that public authorities own newspapers or television, they must ensure the presentation of the campaign to various candidates in a fair and impartial manner without favoring or disfavor any candidate or political party. If paid advertising is accepted in this type of media, owned by the authorities, then it must be ensured that all those who wish will have access in a non-discriminatory manner.

At the level of European jurisprudence, the European Court of Human Rights has analyzed

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<sup>14</sup> Case of *Dink v. Turkey*, see [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22003-3262169-3640194%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-3262169-3640194%22]}), consulted on 1.10.2022.

<sup>15</sup> Oljana Hoxhaj, *Freedom of expression*, in „Juridical Tribune - Tribuna Juridică”, Volume 3, Issue 2, December 2013, pp. 168-177.

<sup>16</sup> Promoting democracy, Ministry of Foreign Affairs website, <https://www.mae.ro/node/1524>, consulted on 1.10.2022.

<sup>17</sup> For more details see case of *Orlovskaya Iskra v. Russia*, available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22002-11391%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-11391%22]}), consulted on 1.10.2022.

<sup>18</sup> Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns, adopted by the Committee of Ministers on 7 November 2007 at the 1010<sup>th</sup> meeting of the Ministers' Deputies [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805d4a3d](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d4a3d), consulted on 1.10.2022.

various forms of expression for various areas of interest, and by far, the political discourse enjoys a high degree of protection, interference being minimal in this area, given the right of voters to be informed and to choose informed on any matter concerning the life of the citizens.

In *Castells v. Spain*, the Court held that “the limits of admissible criticism of a person are wider than those of the rulers than in the case of a private individual or even a politician. In a democratic system, its actions must be placed under the constant control not only of the legislature or the judiciary, but also of the press and public opinion. In addition, his dominant position requires him to be reluctant to use a criminal or civil action to respond to unjustified attacks and criticism by political opponents or the press. However, the State may adopt, as a guarantor of public order, measures to ensure the appropriate and non-excessive sanctioning of unfounded or unfounded defamatory accusations against state officials”<sup>19</sup>.

In another case, the European Court of Human Rights had to decide whether a message expressing an artistic act could be defended as a right to free expression of a political message, and should therefore enjoy special protection. Russia has convicted three members of a rock band (Pussy Riot) of hooliganism and incitement to religious hatred after performing a "punk prayer" in a Moscow Orthodox cathedral for the Blessed Virgin. Maria's "removal" from power of Russian President Vladimir Putin. The court ruled that the rock band's expression and speech concerned the political situation in Russia and that the act was merely a political opinion, so the Russian state should not take measures to convict and deprive the three singers of their liberty. The Judgment states that it is worrying not to observe appropriate behavior in a religious institution, but as long as sentences have been handed down for the execution of the sentence for dancing, for the language used, without analyzing the lyrics of the song or the context of the artistic act, this is considered extremely severe, in contradiction with art. 10 of the European Convention on Human Rights.

#### **4. Freedom of expression and the way it can affect the reputation and dignity of politicians**

This subject has always been sensitive in terms of equality of citizens, regardless of their position in society, but certain clarifications are required in relation to the particularities and actions of each person in this analysis.

In the case of *Lingens v. Austria*, the Court of Strasbourg, in its case-law, held that "the limits of acceptable criticism are wider in relation to politicians than in relation to ordinary individuals. Unlike the latter, politicians must inevitably and consciously accept the strict verification of every word and deed, both by journalists and the general public, and, consequently, must show a greater degree of tolerance."<sup>20</sup> Mr Lingens, as a journalist, published several articles in which he referred to the then Chancellor of Austria as being of the most detestable opportunism, "immoral" and "undignified". Following the published articles, following the Chancellor's complaint, the journalist was fined by the Austrian courts for insult, as the national courts considered that the reputation was damaged. The European Court has examined the context in which the articles were written after the general election before the formation of a governing coalition, and in these circumstances, politicians assume a greater degree of tolerance for the ideas and messages conveyed through the media when it comes to information of public interest.

In the case of *Oberschlick v. Austria*, the object of the analysis was "a term" used by a journalist - "idiot", a term describing a political speech of an Austrian politician. Although analyzed singularly, the term "idiot" could be considered a personal attack and gratuitous to address the dignity of a person, it is the court's obligation to, in case of a complaint in this regard, to analyze the entire

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<sup>19</sup> Case of *Castells v. Spain*. See <https://jurisprudencedo.com/Castells-contra-Spaniei-Dezbatere-politica-Admisibilitatea-unor-sanctiuni.html>, consulted on 1.10.2022.

<sup>20</sup> Case of *Lingens v. Austria*. See <https://jurisprudencedo.com/Jurnalst-acuzat-de-insulta-Lingens-contra-Austria.html>, consulted on 1.10.2022.

context in which this term was used.<sup>21</sup> In this case, the European Court of Human Rights understood that the term insulting was used to describe a political speech by Mr. Hayder, a political party leader, and that this word is a value judgment of the speech used by the politician, disproportionate to the message therefore, the protection of freedom of expression also applies to words that shock, offend or disturb.

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<sup>21</sup> Case of *Oberschlick v. Austria*. See <https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-57926&filename=CASE%20OF%20PRAGER%20AND%20OBERSCHLICK%20v.%20AUSTRIA.docx&logEvent=Fals>, consulted on 1.10.2022.