

PENAL LIMITS TO THE FREEDOM OF EXPRESSION

PhD Thesis

ABSTRACT

The thesis has a bipartite structure. Part I, called *Normative recognition of the principle of freedom of expression* analysis the expanse of freedom of expression in different legal systems through national and international regulations and interpretations of national and international courts, especially the case-law of the European Court of Human Rights. The second part, called *Interdisciplinary analysis of the principle of freedom of expression* examines the relative nature of freedom of expression and identifies the permissible conditions of restrictions on its exercise, in reference to criminalization in domestic law and the elements of comparative law.

Key words: *freedom of expression, constitutional protection, interpretation of international courts, relativity, admissibility of the national interference, proportionality, criminal restrictions, legitimate objectives, types of speech excluded, domestic margin of appreciation*

PART I. NORMATIVE RECOGNITION OF THE PRINCIPLE OF FREEDOM OF EXPRESSION

Freedom of expression is a fundamental right at the core values that define the notion of a “democratic society”, role constantly stressed in the case-law of the European Court of Human Rights to which the European States refer to in receiving conventional principles deriving from the provisions of the *European Convention on Human Rights*. This feature is not only characteristic for the European vision, but it is a general or rather universal one, being found in national regulations on all continents. Recognition of freedom of expression and its role is indisputable, even if a legal system does not have a written constitution (United Kingdom) or national provisions do not contain an express guarantee of freedom of expression (Australia).

A detailed analysis of the concept of freedom of expression and its scope in different legal systems shows that the freedom of expression is present in all legal systems with particular aspects. In a hierarchy of fundamental rights, states have placed it in different positions. Germany, by the case-law of the Federal Constitutional Court, has evolved in the

interpretation of the concept of freedom of expression. Initially, it was said that this right is an absolute one and afterwards, by the change of interpretation, the German court of constitutional control, constantly underlined the need to balance the relationship between freedom of expression and other fundamental rights, most often the object of analysis being represented by the conflict between expression and human dignity. The latter is regarded as the supreme value in the constitutional system and the German Federal Constitutional Court claims the firm attachment to it and goes even further, affirming its prevalence even after the death of the recipient (*Mephisto Case*).

In the constitutional system of the United States of America, the ratio is reversed: the preferred value is the freedom of expression. Its scope extends to forms of manifestation that from the European perspective would be excluded from constitutional protection. Both the German and American interpretation recognizes the notion of *collective dignity* and *group libel* when externalized message offend individuals who identify with a group (concepts that the Romanian penal system does not protect).

Generally, when constitutional provisions expressly enshrine freedom of expression the extent of protection is determined by the complexity of the content and its components: freedom of speech, freedom of information, freedom of press, artistic freedom or academic freedom. Beyond the disparity in interpretation due to a national hierarchy of fundamental freedoms given the constitutional traditions in different states, the concept of freedom of expression appears as having a non-absolute character. The limiting reasons are enshrined in general terms in the limitation clauses established in international instruments (International Covenant on Civil and Political Rights, European Convention on Human Rights, Inter-American Convention on Human Rights) taken by national legislation. Even in the American constitutional system where the text of the *First Amendment* to the U.S. Constitution contains very eloquent and imperative terms (*Congress shall make no law ... that will affect freedom of speech...*) it is established that freedom of speech cannot be seen as unlimited. The process of establishing a balance between freedom of expression and other fundamental rights is a difficult one in Europe is an operation *in concreto* and not an *a priori* rapport as it tends to

be in the United States. Romanian constitutional theory of freedom of expression is consistent with the coordinates set by international instruments to which Romania is a party and in particular with the requirements of the European Convention on Human Rights and the principles established in the European Court of Human Rights` case law that the legal system perceived and integrated them into domestic law.

Protection of freedom of expression constitutes a constitutional principle in other several states and the analysis focuses on Canada, Spain, Belgium, Austria and South Africa.

PART II INTERDISCIPLINARY ANALYSIS OF THE PRINCIPLE OF FREEDOM OF EXPRESSION

Interferences of the States in the exercise of freedom of expression are under strict control of the Strasbourg Court. Under the general principle of subsidiarity, the national authorities enjoy a *margin of appreciation* which varies from one case to another, depending on the purpose and nature of action taken. Given this principle, there are situations in which the national margin of discretion is absent or conversely very high. Participation in political debate or in issues of general interest and media companies have an

indispensable role in a democratic society and they enjoy a special status and therefore states are entitled to limited discretion in setting restrictions on them.

The analysis of particular applications of the principle of proportionality in the jurisprudence of the European Court of Human Rights does not reveal a clear, coherent and objective pattern the national margin of discretion and the proportionality being two variables, aspect that explains the criticism of their development. If freedom of communication does not contribute to the debate of general interest and is situated in the context of absence of a consensus of States therefore there is an extensive discretion of the State. The control of the European Court of Human Rights concerns the reasonableness and proportionality of the interference (the use of freedom of expression to commercial purposes, the disclosure of information affecting national security, protection of public morality).

The intemperate language in various forms (written, oral, in articles published in newspapers, television reports, illustrations, public speeches) could affect not only the personal attributes of persons, in particular human dignity, but may affect the general interests of society- national

security, protection of morality and judicial authority. The principle of freedom of expression can be restricted to protect national security, public order and security, by criminalization of criminal offenses in the Criminal Code or special laws: the propaganda of the totalitarian state (Article 166 of the Criminal Code), actions against the constitutional order (Article 166¹ of the Criminal Code), communication of false information (article 168¹ of the Criminal Code), disclosure of secrets that endanger State security (Article 169 of the Criminal Code), public incitement and glorification of offenses (Article 324 of the Criminal Code), defeatism (Article 349 of the Criminal Code), war propaganda (Article 356 of the Criminal Code).

Protection of the authority of the judiciary as the limits of freedom of expression is accomplished by criminalizing offenses of contempt of the judiciary (Article 272¹ of the Criminal Code), offenses against the representative of a foreign State (Article 171 of the Criminal Code), the disclosure of professional secrecy (Article 196 of the Criminal Code).

Protection of morals and public order are also reasons to limit the exercise of freedom of expression. To protect the

dignity, decency and public morals, the *Act 96/2003 on preventing and fighting against pornography* includes a series of coercive measures in accordance with the requirements of paragraph 2 of Article 10 of the Convention. The wording of Article 11 of the Act criminalizes the distribution of obscene materials the presentation of images of minors having explicit sexual behaviour.

An important part of the case-law has as object the analysis the *conflict between freedom of speech and human dignity*. The criminalization of *insult* and *defamation* corresponds to the need to protect this essential attribute. In Romania, by decision of the High Court of Cassation and Justice, the offenses are decriminalized and therefore these values are outside the criminal protection, contrary to the common European vision.

The collective dimension of human dignity is protected by the international ban of *hate speech*, criminalized by the offence of *incitement to discrimination* (Article 317 of the Criminal Code).