

# CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION IN THE CONTEXT OF INFORMATION TECHNOLOGY

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## **Abstract**

*Few legal, philosophical, or theological categories have given rise to such a great interest as the issue of human freedom. It is natural to be so because freedom is not only a concept, but rather an ontological dimension of man viewed as a person but also in the social environment.*

*Freedom of expression is an important form of human freedom, which is transposed into a legal form and becomes a fundamental constitutional right.*

*In this study we analyze the main doctrinal and jurisprudence aspects of freedom of expression. As a novelty aspect to other similar studies, the correlations between the legal form and some theological and philosophical interpretations of freedom of expression are analyzed.*

*In the context of the development of information technology in the field of communication, important aspects of constitutional jurisprudence regarding the protection of freedom of expression are analyzed, especially in the situation where the exercise of this fundamental right could be conditioned or restricted.*

**Key Words:** *significances of human freedom, freedom of expression as a fundamental right, theological and philosophical reflections on freedom of expression, aspects of jurisprudence regarding the protection of freedom of expression.*

**JEL Classification:** [K38]

## **1. Reflections on the social phenomenality of man**

The report and, moreover, the dialectics between “being” and “existence” do not overlap completely with the relation and dialectics of essence and the phenomenon, because the sense and meanings of the being, both in philosophy as in theology, are not identical to the category of essence. Without going into detail, we note that the being has an ontological dimension that manifests itself in its becoming, unlike the category of essence, accepted predominantly in the theory of

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knowledge in order to distinguish the phenomenal appearance of the profound reality on which relies the existential exteriority.

For our scientific approach, we note therefore the ontological dimension of the relationship between being and existence, so that on this basis to present briefly the correspondence between man in individuality and the depth of his being, and on the other hand, his existence as a sphere of his deeds and manifestations that would exteriorize the depth of being, which, in case of genuine Christian experiences, should be a natural continuation of what is deeper than ourselves.

It is an aspect that has long been accepted in the thinking that the social phenomenality of man, we would say of his being, is a reality and this cannot be ignored. We emphasize that the social dimension of man is one of its nature and not one built or imposed by historical factors in the evolution of the forms of sociability and socialization of man. The subject does not allow a wider discussion on this, but we believe that are relevant the ideas of the great philosopher Kant, which emphasized very well the social nature of man: “We admit that the impulse to society is natural to man; the aptitude and tendency toward that, that is, sociability, are necessary for man, a creature destined to live in society, therefore these are the attributes of humanity”. (Kant, 2007: 243)

The “expression” and everything related to the guarantee of its freedom is nothing else but the social dimension of the human being, the way in which he builds oneself and becomes at the same time in relation to others, and not only in relationship to oneself. Therefore, this concept can be understood by what philosophy and theology refer to as “deeds” and “perpetration”. The deeds of man, in the terminology we are referring to “its expression”, are those that define the being in his social existence. In this sense, one can say that the social expression of the human being is the very individuality of man in his concreteness. Father Arsenie Boca very well synthesizes this reality in the famous and unique painting from Drăgănescu by saying: “*You are in us*”. There is therefore a continuation that should be natural between the inwardness of the human being, and on the other hand, the expression of man in the exteriority of his social existence. This continuity has the dimension of the natural, therefore it is “of the nature”, as long as the social expression of man is a value that is constituted in the complex dialectic process of becoming into the spiritual personality of man, which he has inborn, as his first nature, as son of God, by grace. If man’s social expressiveness is not a continuation of the depth of his spiritual being, then it is in contradiction with the authentic being of man, unable to contribute to his becoming into self-conscious, the man remains only in the precariousness of his social existence whose expression is inappropriate, not being included in a values sphere and not having as target the destination of man, which is his perfection. Man, in his ontological discontinuity between the depth of his being and his social expressiveness, is the man fallen into exteriority, the one for which there is no values meaning, nor the becoming from the state of individual to the spiritual person.

We also note that what we are able to know about man, otherwise said the scientific knowledge of man no matter how it is achieved through any of the social sciences, including legal or philosophical ones, remain at the level of his expressiveness in the social environment and cannot reach the deeper inner being of man, who remains outside any scientific conceptualization. The depth of the human being in its singularity and indefiniteness can be contemplated and intuited or can be revealed but cannot be known by means of the usual approach belonging to the sensible or rational knowledge. This aspect was very well emphasized by Father Professor Dumitru Stăniloae, who said that “*Man is mystery and light; is a mystery of light*”. It is, in fact, the distinction that the great philosopher Kant realizes between the phenomenon that can be contained in the sensitive intuition in the concepts of intellect and in the concepts of reasoning, and on the other hand, the “thing in itself”, which cannot be conceptualized and known. The depth of man's individual being and its reflection in self-consciousness express “the hidden man of the heart in his perfect purity. “The existential depth of the human being, that “something deeper than ourselves” means the spiritual singularity, may mean loneliness, but in no way can lead to loneliness as an accepted ontological dimension for the existence of man. Even in the depth of his being, man's self-consciousness exists only in relation to another who is his fellow man and at the same time with God. This report progresses indefinitely by what characterizes it and represents its content, that is, the depth of love and humility.

A third aspect that we want to note is that only the expressiveness and social dimension of the human being can be the subject to the normative order, thus said, it denotes, *inter alia*, what we call the “legal status of man's existence”.

It is noteworthy that in the legal concepts it is taken into consideration not only the freedom of speech, but the freedom of expression, that is, the ensemble of the social manifestations of man, which can form the object of normativity, but also of scientific knowledge. There is a natural continuity between consciousness and the forms of social expression of man, or, in other words, between freedom of conscience and freedom of expression. If the freedom of expression confirms what we can call the consciousness of the self, that is to say, of man who considers himself sufficient, then the man remains at the level of the individual in the inevitable fall into the exteriority of his existential precariousness. In case the human expressiveness is a natural continuation of his values self-consciousness, which is built only in the infinite and indefinite relationship of love for God and his fellow man, then the deeds and the perpetration of man are in their true value. Father Arsenie Boca notices this man's ontological sustainability, talking about the self-love of man sacrificing people, and on the other hand, the self-sacrifice that leads to the consciousness of the love of men.

These modest considerations we consider to be necessary to understand the freedom of expression in its legal phenomenality, not only at the level of formal structures and concepts with normative or jurisprudential character, also in the

authenticity of the value that derives directly from the nature of man, from his existence which is, firstly, ontic, and later becomes ontological.

The deep connection, we call it even dialectical, between the inner and outer dimension of man's being outlines another truth, namely, the infinite opening towards the existence of man, including the supersensible existence and the unacceptability of non-existence and nothingness. This fact was noticed by the Greek antiquity philosophers who did not have a conscience of the non-existence, but also by the contemporary philosophy based on the truths of faith. Bergson notes in this sense that non-existence or nothingness are only "ontological" constructs and have no ontological significance, otherwise said they are forms of human consciousness and thinking that remain in his existential precariousness.

To be authentic, man's expressiveness at the level of his social being must be free, that is, not be subjected to constraints that are outside the natural order that social existence demands. However, human reasoning is inherently binding through the logical laws that it implies. The rational constraint together with the freedom of the reasoning is part of the natural order of the social dimension of human being. In this dialectical report the freedom of reasoning is the dominant term and the rational constraint is the recessive term. This is natural, because the being of man, both in his interiority and in his social expression, is self-evident only as freedom, only in an order whose foundation is freedom.

The freedom of expression, including at the level of the word, is not beyond the responsibilities. Father Arsenie Boca said *"Prohibited words misinterpret or disorient. Therefore, you must be above the words of men: neither praise nor reproach in them should touch you. The words are living beings, able to do the job to which they have been sent. And because they are living beings, life out of life, the one who created them, they accompany to the Last Judgment, as his children, with all their consequences"*.

In the following we want to highlight some aspects of the juridical phenomenality of the freedom of expression, noting that the juridical state of man cannot exhaust all that means wealth and, we would say, the inexhaustibility of the forms and content of human expression within the natural and social environment.

## **2. Reflections on the legal significance of the freedom of expression**

As stated in the literature in specialty, that tries to highlight the specificity of this right, the freedom of expression - as stated in Article 19 of the United Nations Universal Declaration of Human Rights in 1948 - constitutes an unusual legal phenomenon: equally a right in itself and an indispensable one or, as the case may be, prejudicial for the realization of the other rights. Thus, the freedom of expression and information is necessary for the freedom of meetings, but at the same time constitutes a threat to the right to respect private life, family life or intimate life, that is, all that represents the interiority of human being.

It is also an individual right that pertains to the freedom of conscience or the spiritual freedom of each person, but also a collective right, because by its essence it exists only in the phenomenal, social manifestation of man. At the same time, it is the foundation of the structure of social existence, because only through the forms of expression and the guaranteeing of their freedom, man communicates with other peers, and at the same time constitutes the foundations of community and communion, including in the spiritual meaning of the latter one.

These realities have also been underlined since the 18<sup>th</sup> century when, in Article 11 of the French Declaration of Human and Citizen Rights adopted in 1789, the freedom of expression was “a democratic right by excellence and characterized as one of the most the valued rights of man”.

Such ideas are also highlighted in the jurisprudence of the European Court in Strasbourg, since 1976 (The Handyside case against the United Kingdom) emphasizing that freedom of expression is “one of the essential foundations of a democratic society, one of the primordial conditions for its progress and the fulfillment of each person”. At the same time, the freedom of information and freedom of expression “are the foundation stones of any free and democratic society”.

The exercising of this right obviously implies duties and responsibilities. Therefore, as we shall see below, the freedom of expression, at least in the legal sense, is not absolute, intangible, but may be subjected to the conditions, limits, limitations or even derogations naturally arising from the limits of the human being in relationship with his fellow men. The social dimension of the human being is always legally defined, because it can be contained within quantifiable limits and determined by the legal order, unlike self-consciousness and interiority of the human being, characterized by depth, infinity, but only in a relationship of humbleness and love with God and others.

The modern legal theory reveals the complex content of the freedom of expression, which obviously does not reduce itself only to the freedom of speech. Without going into detail, there are three components of the legal content specific to the freedom of expression: *a. Freedom of opinion; b. Freedom of information; c. Freedom of the press.*

Romanian Constitution consecrates and guarantees this fundamental freedom in the provisions of art. 30 par. 1-8. The constitutional consecration and of the freedom of expression is based on the fact that any opinion, creation, idea, theoretical conception, etc. enter into the legal circuit only if they are communicated, expressed. Communication and expression of the thoughts is not only a possibility but at the same time a necessary condition of human existence, of society organized according to civilization criteria determined historically. That's why the freedom of expression is a natural right, to be found as such since the very first documents of constitutional value. The freedom of expression is the ability of man to express his or her thoughts aloud by writing, by images, by sounds or by

other means of communication. Spiritual creations of any kind, thoughts, opinions, feelings, religious beliefs, etc. can be expressed.

From the perspective of the constitutional right, it is a fundamental right with a complex content and one of the highest values of citizens' freedom. The constitutional content refers to the following:

a. The content of communication: thoughts, opinions, religious beliefs, etc., as well as the means by which communication is realized, through live speech, sounds, images, writing.

b. The right is inviolable and cannot be arbitrarily restricted. The state authorities have the obligation to respect the right to expression of any subject of law, if realized under the conditions provided by the law.

c. The freedom of expression is interpreted in the sense of the concept of communication and must therefore be made public. The legal meaning of this notion is that conferred by the provisions of Article 152 of the Criminal Code.

d. It is forbidden the censure of any kind on the free communication in the sense that no publication can be suppressed and secondly that the state authorities cannot exercise a prior control over the content of the communication for political or other reasons. Romanian Constitution does not explicitly prohibit the suspension of publications. We consider that this restrictive measure could be taken only under the conditions of a special law expressing this possibility and the legal conditions for its exercise.

e. The freedom of expression also implies the freedom to set up publications and the freedom to set up organizational structures to support the possibility of communication: radio and television studios, publishers, editors, etc. The law may require such organizational structures to make the source of funding public, which is a guarantee of the freedom of expression.

f. The freedom of expression cannot be absolute but is subjected to the principles of legal and moral responsibility. In this regard, the International Treaty on Civil and Political Rights establishes that the exercise of the freedom of expression entails special duties and special responsibilities and may be subjected to restrictions. The Constitution prohibits expressions that seek to prejudice the human dignity, the individual's private life and his right to his or her own image. It is also forbidden to defame the country, to indulge in war, to aggression, to national hatred, class or religious hatred, to discrimination, to territorial separations, to political violence or obscenities against good morals.

The legal responsibility for exceeding these limits can be civil or criminal, as the case may be, the civil liability, namely the obligation to pay material or moral damages to the injured person, is in the order stipulated by the Constitution: to the editor of to the publisher, the author, the organizer of the manifestation, the owner of the means of reproduction of the radio or television station under the law. The criminal liability is governed by the Criminal Code or other special laws. It is always personal and can intervene when crimes of insult, slander, outrage, offense to authority, the spread of obscene material, etc. are committed.

### **3. Some aspects of jurisprudence regarding the guarantee of the freedom of expression**

*The freedom of expression* is a consecrated right guaranteed by Article 10<sup>1</sup> of the European Convention on Human Rights, adopted in Rome in 1950, according to which the jurisprudence of the European Court of Human Rights (ECHR) has contributed to the application and understanding of the conditions and limits of the exercise.

The constitutive elements of this freedom, as regulated in Article 10, are: the freedom of thinking, the freedom to seek information, the freedom to communicate ideas and information, without being restricted by borders and without any interference by the public authorities, freedom to benefit from information and ideas internally and internationally. The jurisprudence also established that art.10 guarantees also the artistic expression, the activities of the broadcasting companies, cinema or television and, of course, press. In summary, the European Court has emphasized that the freedom of expression includes the right to have and to express its opinion, but also the right to information. A democratic society is characterized by pluralism, tolerance and openness. Therefore, by protecting the freedom of expression, are protected not only the opinions or information received "favorably or indifferently, but also those that may offend or shock the state authorities or a part of the population"<sup>2</sup>. It is stated in the doctrine that the ability of each one to have and express a minority opinion is an essential component of a democratic society. (Sudre, 2006: 417)

The freedom of expression has an autonomous character, in the sense that it has a value unsubordinated to the general interest or determined by the state at a certain moment. (Micu, 2007: 94).

The autonomy is a guarantee for respecting the principle of pluralism and at the same time excludes the arbitrary interference of the state in the act of creation, information and expression of the individual.

The state has several categories of obligations to exercise this right: the obligation to refrain from limiting the freedom of expression in all its forms; the positive obligation to ensure the exercise of this right by guaranteeing the existence of diversified means of information. In this regard, the state must oppose excessive media concentration and ensure the diversity of media, information and ideas.

The provisions of Article 10 paragraph 2 provide that exercise of the freedom of expression implies "duties and responsibilities". Also the freedom of expression may also be subjected to restrictions, but also to certain formalities or conditions. The European Court has held that Article 10 may be violated by a wide variety of measures ordered by the national authorities against persons who have exercised

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<sup>1</sup> The Dispositions of article 10 of the Convention are to be found in Romanian Constitution in the regulations of the two articles: article 30 – Liberty of expression and article 31 – The right to information.

<sup>2</sup> Case *Lingens versus Austria*, Decision on July 8<sup>th</sup>, 1986.

their freedom of expression. These measures, which constitute interference from public authorities, may consist of civil and criminal actions, confiscation of goods, refusal to authorize publications or television stations, prohibition of dissemination of information, etc. (Harris, Gomien & Zwook, 1997:382).

In order not to constitute a violation of Article 10, these interferences must comply with the conditions imposed by paragraph 2: the restriction must be prescribed by law, pursue a legitimate aim, be necessary in a democratic society for the achievement of the aim pursued, which implies the compliance with the proportionality criterion.

The basic philosophy expressed in ECHR jurisprudence on freedom of expression can be synthesized through the following idea: Freedom of expression is one of the essential foundations of the democratic society, one of the primordial conditions for progress and flourishing of each one. Under the reserve of paragraph 2 of Article 10, it is used not only for information or ideas collected by favors or considered harmless or indifferent, but also for those who strike, shock or disturb the state or a part of the population. Therefore, they prove it: pluralism, tolerance and the spirit of openness, without which there is no democratic society. It follows, in particular, that any formality, condition, restriction or penalty imposed in the matter must be proportionate to the legitimate aim pursued.<sup>3</sup>

The observance of the principle of proportionality is an important condition which ECHR is examining in order to ascertain whether the restrictive measures ordered by the national authorities are appropriate to the legitimate aim invoked. The jurisprudence of the international Court reveals particular aspects of the principle of proportionality applied in the case of conditioning or restricting the exercise of the freedom of expression, particularities determined by the sphere and content of the forms of freedom of expression, the modalities of realization, the nature of the legitimate aim pursued and the concrete interests of the subjects involved.

The exceptions from the rule of guaranteeing the exercise of freedom of expression are interpreted restrictively, and the necessity and proportionality of certain limits must be established convincingly. The contracting States are recognized a certain margin of appreciation, which differs according to the legitimate aim pursued and the means of expressing of the freedom of expression. In this regard, ECHR concluded that it is impossible for the jurisprudence and law of the Contracting States to develop a uniform notion of morality and that the domestic authorities are better placed than the international judge to decide on the precise content of the requirements imposed by the morals of a society. Therefore, in these situations, ECHR has left to the national authorities a wide margin of appreciation, which also has consequences on respecting the principle of proportionality.

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<sup>3</sup> See case *Handyside versus United Kingdom*, Decision on December 7<sup>th</sup>, 1976, par. 49.

In the opinion of Strasbourg Court, the freedom of the press is one of the most effective means by which the public learns or forms opinions about the ideas and attitudes of political leaders and, in general, about social realities. Therefore, the restrictions on press freedom, including sanctions imposed on journalists, must be “rigorously proportional and centered on statements that have in fact exceeded the limits of an acceptable criticism”. (Sudre, 2006: 425)

The analysis of the principle of proportionality respecting, in case of the restrictions on press freedom, also takes into account the fact that the press has the task to communicate information and ideas related to the issues debated in political life. To this obligation corresponds the right of the public to assume them. Consequently, the limits of admissible criticism are much broader toward a politician or government, rather than for a simple citizen. ECHR has set a high level of media protection, stating that the general interest is better served when providing the public with the most comprehensive information possible and therefore the proportionality ratio is strictly interpreted in the sense that there must be "an imperious social need" to justify a limitation of press freedom.

The Strasbourg Court also distinguished between facts and value judgments. If the materiality of the former ones can be proved, the value judgments are not capable of being demonstrated in terms of their accuracy. Therefore, it is not justified, including in terms of proportionality, a measure to condemn a journalist for expressing valuable judgments. However, even when it comes to a value judgment, the proportionality of the interference may depend on the existence of a sufficient factual basis, because a value judgment without any factual basis for its support may be excessive.<sup>4</sup>

A particular aspect of the freedom of expression refers to the activity of state officials in the performance of their professional duties. ECHR jurisprudence has determined that the State may restrict the right to freedom of expression of its officials to the extent that their views relate to their duties or professional duties. In this case too, the proportionality principle must be respected so that restrictive measures are not excessive.

In relation to these rules, the observance of proportionality, understood as an appropriate relationship between the restrictive measures adopted and the legitimate aim pursued, is analyzed in concrete terms by ECHR depending on the particularities of each case.

Thus, in *Sunday Times versus the United Kingdom*<sup>5</sup>, ECHR found that the prohibition on the publication of an article relating to a case pending before a court, a ban ordered by the High Court and supported by the House of Lords, was a violation of Article 10 of the Convention because the principle of proportionality

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<sup>4</sup> See case *Unabhängige Initiative Informationsvielfalt versus Austria*, Decision on May 26<sup>th</sup> 2002; *Dichand and others, versus Austria*, Decision on May 26<sup>th</sup> 2002; *Krane Verlag Con & Co. K.G. versus Austria*, Decisions on February 26<sup>th</sup>, 2002.

<sup>5</sup> Decision on April 26<sup>th</sup>, 1979. For the same meaning see case *Barthold versus Germania*, decision on March 25<sup>th</sup>, 1985.

has not been respected. In order to determine whether the prohibition on publication is in this case proportionate to the legitimate aim pursued, the Strasbourg Court emphasizes the importance in a democratic society of press freedom, including for rendering the issue on justice administration: “Not only has the media the mission to communicate information and ideas on the issues that the tribunals judge, but the public also has the right to receive them”. Consequently, satisfying the public's interest to be informed is essential to determine whether the interference by public authorities into the exercise of freedom of expression is justified. In relation to these premises, ECHR notes that the interest in maintaining the authority of the judiciary was not such a pressing social need to counteract the public's interest in receiving information. Consequently, the restriction imposed on the applicants is not justified and is not proportionate to the legitimate aim pursued.

The convictions imposed on journalists for the articles published in the press, are a restriction on the freedom of expression. In these cases, the Court examines very rigorously the compliance with the condition of proportionality, especially if the sanctions have been applied to criticisms made against political people or state authorities.

The assessment of the observance of the principle of proportionality is carried out in relation to the following coordinates: “In a democratic system, the actions or omissions of the government must be placed under careful control, not only of the legislative and judicial powers, but also of the public opinion. Indeed, the dominant position it occupies requires that it shows restraint in the use of the criminal path, especially if having other means to respond to the unjustified attacks and criticisms of opponents.”<sup>6</sup>

The competent authorities of the state have the possibility, as a guarantor of the public order, to apply criminal sanctions even in order to react appropriately and necessarily to such allegations. The national authorities have a broader margin of appreciation regarding the need to interfere in the exercise of freedom of expression, in situations where the discourse in litigation instigates to the use of violence against an individual, a representative of the State or a part of the population. In relation to those considerations, which are consistently settled in jurisprudence, ECHR ascertained the violation of the principle of proportionality in several cases where the national authorities have adopted criminal sanctions against some journalists<sup>7</sup>.

The freedom of the press is not absolute. The press should not exceed certain limits, particularly as regards the reputation and rights of others, as well as the need

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<sup>6</sup> Case Seker Karatos versus Turkey, Decision on July 9<sup>th</sup>, 2002. For the same meaning see case Ayse Öztürk versus Turkey, Decision on October 15<sup>th</sup>, 2002.

<sup>7</sup> See case Lingens versus Austria, Decision on July 8<sup>th</sup>, 1986; case Dalban versus Romania, Decision on September 28<sup>th</sup>, 1999; case Thargeirsan versus Ireland, Decision on 25 iunie 1992; case Jersild versus Denmark, Decision on September 23<sup>rd</sup>, 1994; case Castells versus Spain, Decision on April 23<sup>rd</sup>, 2002; case Lehideux and Isarni versus France, Decision on September 23<sup>rd</sup>, 1998; case Sabău and Pârcălab versus Romania, Decision on September 28<sup>th</sup>, 2004.

to prevent the disclosure of confidential information.<sup>8</sup> While it is accepted that journalistic freedom includes the possible use of a certain amount of exaggeration, even of provocation, the limits of admissible criticism are narrower for a simple individual rather than for a government or a political personality.

In such cases, in order to determine whether the principle of proportionality has been respected, the Court distinguishes between injurious expressions used by a journalist in the press and the criticisms that are acceptable. Thus, in the case *Tammes v. Estonia*, cited above<sup>9</sup>, the complainant was convicted for using in the press terms that are offensive to the wife of a former prime minister and minister. In assessing whether the sanction applied is proportionate to the legitimate aim pursued - the protection of the reputation or the rights of others - ECHR notes that the offensive terms used by the journalist are value judgments expressed in an offensive manner that were not necessary to be used to express a negative opinion. At the same time, the use of these terms to qualify a person's private life is not justified by the public interest pursued. The nature and severity of the sanction applied is another criterion for assessing the respecting of proportionality. In the present case, the claimant was convicted to a modest fine. In relation to these elements ECHR has established that the principle of proportionality has been respected and consequently there is no violation of Article 10 of the Convention.

Obliging a journalist to disclose his sources of information and the application of a fine for refusal to comply is an interference with the exercise of freedom of expression which, in order to be justified, must also respect the criterion of proportionality<sup>10</sup>. In order to verify compliance with the principle of proportionality, in the quoted case, ECHR has taken into account the importance of the protection of journalistic sources for the freedom of the press and the negative effect that a disclosure ordinance is likely to produce. In this respect, it was stated that: "It is necessary to give greater importance to the democratic society's interest in assuming and maintaining the freedom of the press when it comes to determining whether the restriction is proportionate to the legitimate aim pursued. The limits brought to the confidentiality of journalistic sources, demand the Court the most scrupulous exam" In the cause was considered that the ordinance for disclosure of the sources of information used by the journalist was not a reasonable means proportionate to the legitimate aim pursued.

In the most recent jurisprudence ECHR has established that the time is a criterion for assessing whether the principle of proportionality has been respected in the event of a restriction on the exercise of the freedom of expression by prohibiting the publication of a work which is likely to reveal confidential data on the evolution of a disease suffered by an important political person<sup>11</sup>. The passage

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<sup>8</sup> Case *Tammer versus Estonia*, Decision on February 6<sup>th</sup> 2001.

<sup>9</sup> See case *Constantinescu versus Romania*, Decision on July 27<sup>th</sup>, 2000; case *Chawy and others, versus France*, Decision on 29 iunie 2004.

<sup>10</sup> Case *Goodwin versus United Kingdom*, Decision on March 27<sup>th</sup> 1996.

<sup>11</sup> Case *Plan (Society) versus France*, Decision on May 18<sup>th</sup> 2004.

of time must necessarily be taken into account in order to examine the compatibility with the freedom of expression of such a grave measure as the absolute prohibition on the publication of a book.

The interdiction on the cable retransmission of broadcasts,<sup>12</sup> the refusal by the national authorities to authorize an electronic company to receive non-coded<sup>13</sup> television programs by help of a parabolic antenna or the impossibility of having and operating private radio or television stations due to the monopoly<sup>14</sup> of the State, constitute interference in the exercise of freedom of expression requiring consideration of compliance with the criterion of proportionality. The particularities of the freedom of expression, the necessity and pluralism in a democratic society, the margin of appreciation recognized by the national authorities, depending on the protected values, constitute in these cases criteria for assessing the observance of the principle of proportionality.

The principle of proportionality has particular features in ECHR jurisprudence when it is applied in order to establish whether the restriction of the freedom of expression of office clerk is justified.

The international Court in Strasbourg has consistently held that the State may restrict the right to the freedom of expression of its officials to the extent that their views relate to their professional duties or tasks. In such cases, ECHR jurisprudence also refers to other criteria for assessing whether the restrictive measure is proportionate to the legitimate aim pursued. Thus, in case of persons having military status, the Court examines the concept of "order". The idea of order refers not only to public order, but also covers the order that must prevail within the limits of a specific social group. In case of the armed forces, the "order" imposed by the regulations has a particularly important aspect and may require the military not to undermine military discipline, including throughout written materials. Consequently, the States have a broader margin of appreciation and the measures imposed on soldiers on the freedom of expression are appropriate to the legitimate aim pursued.<sup>15</sup>

The duty of political loyalty imposed on an official is of a particular importance for the constitutional order of a state. However, the dismissal of a teaching staff, due to lack of loyalty to the Constitution, was appreciated by ECHR for being disproportionate to the legitimate aim pursued, especially as the national authorities had other alternatives for lighter sanctions.<sup>16</sup>

The freedom of the political debate is a particular aspect of the freedom of expression. Maintaining and strengthening the pluralistic democracy requires constitutional safeguards restricting the freedom of exercise for some professional

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<sup>12</sup> Case Groppero Radio A.G. and others, versus Switzerland, Decision on March 28<sup>th</sup> 1990.

<sup>13</sup> Case Autronic A.G. versus Switzerland, Decision on May 22<sup>nd</sup> 1990.

<sup>14</sup> Case Informationsverein Lentia and others, versus Austria, Decision on November 24<sup>th</sup> 1993.

<sup>15</sup> Case Engeland and others, versus The Nederlands, Decision on June 8<sup>th</sup> 1976.

<sup>16</sup> Case Vogt, versus Germany, Decision on June 8<sup>th</sup> 1976.

categories. Therefore, the interdiction by the Constitution for police officers to conduct political activities respects the principle of proportionality.<sup>17</sup>

In its jurisprudence, ECHR has determined that in cases where the freedom of expression of the high-ranking magistrates is at stake, the rights and responsibilities referred to in Article 10 paragraph 2 are of particular importance. “Thus, it is justified to expect the judicial clerks to use their freedom of speech with restraint, whenever it is susceptible to question the authority and impartiality of the judiciary power”.<sup>18</sup> Any breach of the freedom of expression of a magistrate requires careful consideration of the observance of the principle of proportionality. The premise of this analysis is the existence of a fair balance between the fundamental rights of the individual to the freedom of expression and, on the other hand, the legitimate interest of a democratic state to ensure that the public office acts for the purposes stated in Article 10, paragraph 2.

In the above-mentioned case, the Court found that there had been a violation of the right of the claimant, a high magistrate, to exercise his freedom of expression, because the national authorities criticized the content of his speech and announced its intention to sanction him for expressing his opinion freely. ECHR considers that the reasoning of the national authorities, in order to justify the infringement of the claimant's right to the freedom of expression, is not sufficient to show that the interference was necessary in a democratic society, since the disputed litigation concerned constitutional law issues. Even if there is a certain margin of appreciation, the reaction of the national authorities, namely the removal from office of the magistrate, was not proportionate to the aim pursued and therefore Article 10 of the Convention was violated.

The freedom of expression also includes artistic expression. The Strasbourg Court found that Article 10 of the Convention “includes the freedom of artistic expression that allows the participation in the public of the exchange of cultural, political, and social information and ideas of all kind”<sup>19</sup>.

In most cases, the restrictive measures adopted by the national authorities on the freedom of artistic expression have legitimately aimed at protecting the morals or protecting the rights of others. Applying the principle of proportionality in such cases implies also the characterization of the concept of morality and, implicitly, of the possibility for the States to adopt restrictive measures. In this regard, ECHR has constantly stated that contracting states have a greater margin of appreciation when regulating issues likely to offend intimate beliefs in morals and religion. “In terms of morality, European countries do not have a uniform conception on the protection requirements against attacks on religious beliefs.”<sup>20</sup>

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<sup>17</sup> Case *Rekveny versus Hungary*, Decision on May 20<sup>th</sup> 1999.

<sup>18</sup> Case *Wille versus Lichtenstein*, Decision on October 28<sup>th</sup> 1999.

<sup>19</sup> Case *Müller and others, versus Switzerland*, Decision on May 24<sup>th</sup> 1988.

<sup>20</sup> Case *Wingrove versus United Kingdom*, quoted previously. For the analysis of the observance of the criterion of proportionality, in cases of restriction of the freedom of artistic

The Romanian legal doctrine and the jurisprudence of the Constitutional Court have also contributed to the understanding and guarantee of the freedom of expression.

The doctrine states that, according to their more authoritarian or more liberal tendencies, the legal regulations on press can be grouped in the light of comparative law into two main systems: the preventive and repressive systems (Drăganu, 1998: 176). The legal regime applied in this area must comply with the principle of proportionality, in that the limits and conditions imposed on the exercise of that freedom must be appropriate to the aim pursued by the constituent legislator, namely the protection of the freedom of expression, but at the same time to prevent the abusive exercise of this right.

The Constitutional Court refers to the jurisprudence of ECHR and to the provisions of the Convention involving the principle of proportionality. In this respect, it has been stated that the freedom of expression is not absolute and, consequently, has certain legal limits. Thus, the establishing by law of the restrictions or sanctions are measures compatible with freedom of expression if they comply with the conditions imposed by Article 10, paragraph 2, of the Convention. “It is of principle that to a legal obligation, regarding the limiting of the freedom of expression, and even more so to a constitutional obligation must correspond a legal sanction in the event of its non-compliance”.<sup>21</sup>

This interpretation is also confirmed by the recent jurisprudence of the Constitutional Court. By Decision no. 183/2004<sup>22</sup> was established the constitutionality of the provisions of article 205 Criminal Code who incriminates the insult. In the recitals it was stated that the insult is an offense against dignity, and the dignity of man is a supreme value according to art. 1, paragraph (3) of the Constitution. The limits of the exercise of freedom of expression are determined by the need to respect the dignity, honor, private life of the person and the right to their own image. The violation of these limits is sanctioned by incriminating the sanction of insult. The Court states that the determination of the limits of the exercise of a right or freedom can be made by the legislator in compliance with the provisions of Article 53 of the Constitution, implicitly respecting the proportionality criterion,

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expression, see the case *Handyside versus United Kingdom* previously quoted and case *Müller and others, versus Switzerland*, previously quoted.

<sup>21</sup> Decision no. 51/1999, published in the Official Gazette no. 262/1999; See Decision no. 205/2000, published in the Official Gazette no. 702/2000.

<sup>22</sup> Published in Official Gazette no. 431/2004. See in the same meaning the Decision no. 268/2004, published in the Official Gazette no. 640/2004, by which the objection of unconstitutionality of the provisions was rejected art. 206 Criminal Code. In consideration of the decision it was stated that all the provisions of the Constitution and the international legal instruments by which is consecrated the freedom of expression, allowing the possibility of restricting this freedom, if the restrictive measures are necessary and appropriate for the defense of the rights and liberties of others. Incriminating of the defamation is such a measure appropriate to the legitimate purpose pursued, especially as the law allows the person who proves to have a legitimate interest, in whose defense he made the slanderous statement or imputation, to make the test of verity.

although, as happened in other cases, the Constitutional Court does not analyze it. However, the cited judgment makes extensive references to ECHR jurisprudence to argue that the restriction of the freedom of expression, by incriminating by the lawmakers the insulting offence, is a necessary measure in a democratic society, appropriate to the legitimate aim pursued, namely “the protection of the reputation or the rights of others”.

In the older jurisprudence, the Constitutional Court found, in our opinion on good grounds, the constitutionality of the provisions of Article 238, paragraph 1 of the Criminal Code, which incriminates the offense committed against authorities.<sup>23</sup> Although the principle of proportionality is not explicitly invoked, out of the constitutional judge's reasoning and from extensive references to ECHR jurisprudence it follows that the restrictive measure on the freedom of expression is necessary and appropriate to the legitimate aim pursued, namely the protection of the dignity and honor of a citizen who performs a public office. “Precisely the investing of a citizen with a public office attracts not only increased demands on the part of the official, but also the need for special legal protection, since the reputation of such a person indirectly affects the prestige of the authority in whose name he acts within the legal framework of the duties invested”.

The freedom of expression implies “the right to reply”, which in turn is considered to be a fundamental right. The Constitutional Court has applied the principle of proportionality to determine the limits of each of these rights. In this regard, the Court found that the statutory regulation of the right to reply “meets the constitutional requirements contained in the Constitution”. By analyzing the limits of the right to reply, the Constitutional Court applies the principle of proportionality, expressed as a fair relationship between the allegedly defamatory information and the replica given to this information: “Even in case of pertinence of the right of reply, the question on its limits is questionable because it is natural that between the dimensions of the information allegedly defamatory and those of the injured person's reply, there is no *apparent disproportion* (s.n) in favor of the latter one, keeping the limits of a reasonable reply, focused on the defamatory aspects, fought by the replica whose publicity is required”.<sup>24</sup> The limits of exercising the freedom of expression imply the principle of proportionality when determined by other values protected by the constitutional norms. The Court ruled that “the provisions of paragraph (6) of Article 30 of the Constitution have into regard *the limits* of the exercise of the freedom of expression, which cannot, through other supreme values of the lawful State, prejudice the right of the person to his own image”.<sup>25</sup> In the same meaning is ECHR jurisprudence that refers to the

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<sup>23</sup> Decision no. 140 /1996 published in the Official Gazette no. 324/1996.

<sup>24</sup> Decision no. 8/1996, published in the Official Gazette no. 129/1996.

<sup>25</sup> Decision no. 54/2000, published in the Official Gazette no. 310/2000.

principle of proportionality in situations where the exercise of the freedom of expression may be limited<sup>26</sup>.

The protection of public morality is one of the legitimate purposes justifying the restriction of the freedom of speech. Having into consideration this legitimate purpose, the Constitutional Court has found the constitutionality of the provisions of Article 325 of the Criminal Code which incriminates the crime of spreading obscene material.<sup>27</sup> The restrictive measure is necessary in a democratic society, although the concepts of “public morality” and “good morals” have varying content according to collectivity and epoch. However, in all these cases, there is a limit to the tolerance of manifestations, the violation of which must be sanctioned by criminal law, since the constitutionally guaranteed fundamental rights and freedoms can not be exercised in a manner contrary to good morals or that would harm public morality. The principle of proportionality is a jurisprudential criterion for determining these limits.

### **Instead of conclusions**

The spiritual being of man in the depth and interiority of self-consciousness has something characteristically opposed to the expressiveness of the social dimension of the being, which also denotes the primacy of the spirit, as in essence the self-consciousness is spirit, against externality, against everything that is deeds and doing. It's about *silence*. The authenticity of expressing the self-consciousness is the silence, which in principle cannot be subjected to the legal status or normative regulation, representing, by excellence, an area of the non-right. There are however exceptions.

The philosophers and theologians spoke about “the knowledge through silence”. We will discuss in detail on this in another material with more reflections on the philosophical and theological conception of silence. Here we highlight some aphorisms that we consider important to appreciate silence as the self-discovery of man in the authentic of his being.

Saint Isaac Sirius said that “*Silence is the mystery of the future century, and the words are the instruments of this world*”. The same wise man said, “*It is good to be friends with all, but alone in your conscience*”. The loneliness of conscience is actually a silence that does not imply immutability or inactivity, but the immersion into the indefinite and infinite depth of being through continuous spiritual progress. Father Arsenie Boca identifies the ten commandments of wisdom: “*For nine times to shut up and once to talk and then only for a little*”. And the Holy Saints Calist and Ignatius said: “*The prayer of the pure is the silence*”.

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<sup>26</sup> Case Handyside versus United Kingdom - 1976; Case Sunday Times versus United Kingdom - 1979; Case Lingens versus Austria - 1986; Case Dalban versus Romania - 1999, in decisions of the European Court of Human Rights, vol. I.

<sup>27</sup> Decision no. 19/2005 published in the Official Gazette no.153/2005. Nevertheless, this is our Constitutional Court constant jurisprudence on this matter. See the Decision no. 108/1995, published in the Official Gazette no. 8/1996.

Almost paradoxically, the phenomenality of the juridical status of man recognizes and even consecrates the “right to silence” - the right of the defendant not to make any statement. Moreover, “silence” can produce legal effects. For example, the adoption of a legal act through consensus by a collegiate body, or in some cases is recognized the value of consent to the conclusion of contracts or the acquiescence of a third party's claims. The legal meanings of “silence”, however, require a separate study. In the context of the above, we limit ourselves to the emphasizing that by exception the human will in the legal plane can also be expressed by silence, therefore silence is also a phenomenal social reality, legally quantifiable, not only a dimension of self-consciousness, of interiority of the human being.

Let us therefore acquire the power of silence in order to express ourselves in the authenticity of our being, in the freedom that it assumes, in all that is the social nature of our being.

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