Freedom of the Press – A Component of Freedom of Expression

Daniela Valeria IANCU, PhD in progress
Caraş-Severin Court
danaiancu69@yahoo.com

Abstract: The democratic development of a specific society implies the pluralism of ideas and conceptions about the world and life, about social organization, about the relations between the members of the society. As social beings, people need to receive ideas and information and to express, in any form possible, their own ideas and conceptions. That is why the right to freedom of expression and implicitly the freedom of press is a component guaranteed by the international legal documents in the matters of human rights.

Keywords: human rights, freedom of expression, principles, discrimination

The freedom of expression or freedom of speech is considered to be the most powerful weapon for the defense of the persons' rights and liberties against the antidemocratic manifestations (I.R.D.O., 1994, p. 37).

As shown in the doctrine (Bârsan, 2001, p. 10), "*one cannot conceive progress in the scientific, cultural or artistic domains without the existence of freedom of expression beyond any state frontier*…"

Freedom of expression is settled both in the reference international legal documents in the matter of human rights, and in the Constitutions of the individual states. From the regulations comprised in the international legal instruments in the matter of human rights, and from the dispositions contained in the constitutions of certain countries, one remarks that freedom of expression is designated by means of different denominations.

In article 10 of the European Convention of Human Rights and art.11 of the European Union's Chart of Fundamental Rights they are entitled "freedom of expression", and the same denomination is used in the Constitutions of Romania (art. 30), Germany (art. 5), Japan (art. 21) or Denmark (art. 77). We must point out

that, although art. 10 of the European Convention of Human Rights and art. 11 of the European Union's Chart of Fundamental Rights use the name of freedom of expression, in the content of the regulation expressed by these articles one speaks about the "right to the freedom of expression / speech". The same term is used in the content of the regulations contained in: the Universal Declaration of Human Rights (art. 19), the International Pact regarding the Civil and Political Rights (art. 19), the American Convention of Human Rights of San Jose (art. 13), the Islamic Universal Declaration of Human Rights (chapter XII, letter a).

Other instruments refer neither to the freedom of expression nor the right to the freedom of expression, but define this right through its components, i.e. freedom of speech and freedom of the press (The Constitution of the USA – The First Amendment, the Bill of Rights – document with constitutional value of Great Britain).

From the content of the international and constitutional regulations it results thus that freedom of expression is consecrated either under this name, or under the name of right to freedom of expression, or under the names of some of its aspects: freedom of speech and freedom of the press. One uses both notions, the notion of right, as well as the notion of freedom, freedom of expression being a right and a liberty at the same time, as long as the majority opinion in the legal literature is in the sense of the equivalence of the two notions. As regards the content of freedom of expression comprised in the international and constitutional settlements, we remark that this is different too.

Consequently, in the Universal Declaration of Human Rights, the International Pact regarding Civil and Political Rights, in art. 10 of the European Convention of Human Rights, art. 11 in the European Union's Chart of Fundamental Rights, the American Convention of Human Rights of San Jose, the Declaration of Fundamental Duties of Asian Peoples and States, the Islamic Universal Declaration of Human Rights, freedom of expression expressly contains the freedom of opinion and the freedom of information. The same content of freedom of speech is found also in the regulation given to this right in the Constitution of Switzerland, for instance.

Certain regulations (the Bill of Rights expressly includes in the content of freedom of expression only freedom of speech or freedom of opinion, the freedom of information being settled as separate right, as well as the freedom of the press (Constitution of Romania). Other regulations expressly include in the content of freedom of expression, beside the freedom of opinion and information or the

freedom of speech, the freedom of the press (Constitution of the USA – The First Amendment, Constitution of Germany, of Japan, of Russia).

Part of the aforementioned international and constitutional legal documents, although they do not expressly stipulate in the content of their regulations the freedom of the press as component of freedom of expression, still refer to it. For instance, the Universal Declaration of Human Rights and the International Pact regarding Civil and Political Rights refer, in the content of the regulation regarding the freedom of expression, to the dissemination of information in printed form, whereas the European Unions' Chart of Fundamental Rights speak about the freedom and pluralism of the mass media information, and the situation is the same in the case of certain constitutional dispositions (for example: the Constitution of France, the Constitution of Romania).

From the regulations analyzed above we may draw the conclusion that freedom of expression is a right with a complex content. In our opinion, the freedom of expression comprises within its content three other freedoms: freedom of opinion, freedom of information and freedom of the press, these three liberties being interdependent and unable to manifest one in the absence of the other.

As we have already pointed out, we consider the freedom of the press is a component of freedom of expression, with the mention that, when we refer to the press, we refer to the media in general, i.e. both the written press and the spoken one.

The analysis of freedom of the press as component of freedom of expression, in our opinion., should be considered in relation with matters connected to the journalists' freedom of expression, to the liberty to create publications, to the broadcast liberties and the liberty to broadcast radio and TV shows, in the context in which this freedom is not clearly defined in the content of the international regulations in the matter of freedom of expression.

Nevertheless, from the international regulations in the matter and from certain constitutional dispositions, as well as from the jurisprudence of the European Court of Human Rights we may deduce that the freedom of the press, as component of the freedom of expression, refers to the above-listed aspects.

The press has a special role in the present-day societies characterized, in the words of the constitutionalist Louis Favoreau, by "the convergence of political liberalism, of democracy and of the lawful state" (Favoreau, 2000, p. 91). The position of the

press in a society is determined by the very fact that, naturally, at its foundation, it aims at promoting the general interests of the civil society. From this perspective the press has, first of all, a central political role (Dănişor, 1997, p. 101).

Beyond the political part it plays, the press occupies a central place in the functioning of a true pluralism of ideas at the social level (Răduleţu, 2002, p. 21). The progress of a society cannot be conceived without the manifestation of a real competition in all domains of activities, first of all within the debates of ideas. Or the press represents the appropriate place for such debates. A limitation of its freedom would affect the very development of the respective society.

In fact, the importance of the press in a democratic society has been constantly recognized by the European Court of Human Rights in its jurisprudence. The Court justly remarked that the freedom of the press offer the public opinion one of the best means of knowing and judging the ideas and attitudes of rulers, and more generally the free game of political debates, which lies at the very core of the notion of democratic society[1]. The Court stated that the press has the role of "watchdog" in a democratic society, the freedom of the press being one of the characteristic traits of the democratic health of a state [2]. The freedom of the press is so important that the Court recognizes that the journalistic liberty also includes the possible appeal to a certain dose of exaggeration or provocation [3].

The European Court of Human Rights, through its jurisprudence, has set also the landmarks to be considered when analyzing the freedom of the press, as component of the freedom of expression.

A first issue related to the freedom of expression through the press regards ***the protection of the journalists' sources***, an extremely thorny problem that investigation journalists often have to face.

For instance, in the case ***Goodwin vs. The United Kingdom***[4], the European Court of Human Rights stated that the protection of sources represents one of the foundation bricks of the press freedom, the absence of this protection risking to discourage "informers" to help the press inform the public about general interest matters; consequently, a judicial ordinance that would rule the revealing of the journalists'

[1] ECHR, decision of 8 July 1986, pronounced in the case Lingens vs. Austria.
[2] ECHR (the Great Chamber), decision of 26 November 1991 pronounced in the case Observer and Guardian vs. The United Kingdom.
[3] ECHR decision of 26 April 1995 pronounced in the case Praeger and Oberlischlick vs. Austria.
[4] ECHR decision of 27 March 1996 pronounced in the case Goodwin vs. The United Kingdom.

sources could be reconciled with art.10 of the Convention only if it is justified by an imperative of preponderantly public interest. Consequently the protection of journalists' sources is guaranteed, but not unlimited, the more so as anyone invoking the freedom of expression also assumes duties and liabilities related to the rights of others (Renucci, 2009, p. 190).

The issue of the protection of journalists' sources is settled at the international level through the legal instruments regarding the journalists' rights (The Resolution adopted at the 4th European Ministries' Conference on the mass media policy held in Prague on 7-8 December 1994, the Resolution of the European Parliament regarding the non-revealing of journalists' information sources adopted on 18 January 1998), but also in the national legislation, through the current ethics codes in numerous states. Moreover, keeping in mind the jurisprudence of the European Court reflected in the case Goodwin vs. the United Kingdom, at the European Community, the Ministries' Committee adopted on 8 March 2000, the Recommendation no. R (2000) 7 on the right of journalists not to disclose their sources of information.

The regulation contained in this last document was mostly taken over in the Romanian legislation in the matter, i.e. in Law no. 504/2002 regarding the audio-visual – the frame law in the matter.

Thus, art. 7 par.1 of Law no. 504/2002 is dedicated to the guarantee of the confidential character of the information sources used in conceiving or elaborating news, shows, programs or other elements of broadcasting service. The enumeration of the "data able to identify a source" (name and personal details, as well as the voice or image of a source; the concrete circumstances of obtaining the information from a source by the journalist; the unpublished part of the information supplied by a source; the personal details of the journalists and their employer in relation with their professional activity) is taken from the resolution of the above-mentioned Ministries' Resolution.

We remark from the regulation contained in par. 2 of art. 7 of Law no. 504/2002 that the journalist is exempted to reveal his or her information sources only if the information thus obtained is in direct connection with his or her professional activity, the text does not expressly stipulate that the protection of the sources might take place also if the information is obtained by the journalist indirectly or accidentally. On the other hand we may also see that, in the absence of express rules, the interpretation of the statement "direct connection with the professional activity" and the establishment of such a connection is left to the latitude of the court of law,

that, in accordance with the regulations of par. 6, art. 7 has to decide upon the necessity to reveal the sources, in the situations expressly and limitatively provided in the same regulation (the defence of public order, of national security, the necessity of solving a cause deduced to trial).

This regulation is debatable under the aspect of the requirements of clarity and predictability of the law, affirmed by the European Court and its jurisprudence.

In relation with the protection of sources, we should mention that in a case[1], the European Court appreciated as an infringement of art. 10 of the Convention the searches affected against certain journalists at their place of work. In that case, the Court rules that the searches against the claimants meant to discover the information sources used by the journalists – although remained without concrete results – represent an act more serious that a legal summation asking to divulge the source. In this context, the Court considered that the searches effected against the journalist claimant at his place of work "affect more the protection of the sources" than the judicial obligation to reveal them.

The protection of journalists' sources, as seen by the European Contentious Court of Human Rights, is quasi-absolute. For instance, in the case ***Damman vs. Switzerland***[2], the European judges found an infringement of art. 10 regarding a journalist convicted for instigation to the infringement of the secret of the office; the Court ruled that such a condemnation constitutes a censorship modality aiming at inciting the journalists to not perform research activities inherent to their job, which risks to discourage them to contribute to the public debate of the issues interesting the community. This, in the opinion of Strasbourg judges, risks hindering the press in the fulfilment of its mission of information and control. Consequently there is no freedom of the press without the protection of its sources.

Another problem raised in connection with the freedom of the press as component of the freedom of expression refers to its relation with *the limit of the admissible criticism when it comes to public personalities, people in public office or magistrates, or the protection of the reputation of rights of the other citizens* (Renucci, 2009, p. 200).

It is extremely important to identify the position of the Court of Strasbourg in the appreciation of these relations.

[1] ECHR decision of 5 February 2003 pronounced in the case Roemen and Schmit vs. Luxembourg.
[2] ECHR decision of 25 April 2006 pronounced in the case Damman vs. Switzerland.

As regards the political field, the European Court stated that the limits of admissible criticism within the freedom of expression are wider when they are focused upon certain actions of the government, as its actions are also under the control of public opinion[1]; similarly, the limits of admissible criticism are wider when applied to a political figure acting in his or her capacity of public persona, than in the case of a private person, nevertheless the former is not deprived of the right to the protection of his/her reputation and dignity within private life and outside it[2]. A relevant case in this respect is ***Lingens vs. Austria***, which referred to the penal condemnation of a journalist for slander, for his affirmations regarding the former Austrian federal chancellor Bruno Kreiski.

In this case the Court made an important distinction between "facts" and "value judgments". According to the Court ruling, "The existence of the facts can be proved, whereas the truth of value judgments is not susceptible to be proved"[3]. The Court appreciated that the fact the claimant was asked, in order to avoid being convicted, to prove the truth of his assertions (that the Court considered judgments of value) constitutes an infringement of art.10 of the Convention.

In the case of public clerks or persons in public office, the Court also appreciated that the limits of the admissible criticism against them are wider than those of the criticism against private persons. However, the Court considered that public clerks cannot be treated exactly like politicians, because, unlike the latter, who are aware they are exposed to a close scrutiny of all their assertions and acts, control performed especially by the press, the persons in public office need the trust of public opinion in order to adequately fulfil their tasks, and it is thus necessary to be protected from the verbal attacks against them (Decision of 29 March 2001 in the case ***Thoma vs. Luxembourg***, decision of 27 May 2004 pronounced in the case ***Rizos and Dastkos vs. Greece***) (Tudorică & Bogdan, 2005, p. 297).

[1] ECHR decision of 30 January 1998 pronounced in the case party of United Communists of Turkey et al., vs. Turkey.
[2] ECHR decision of 8 July 1986, pronounced in the case Lingens vs. Austria.
[3] The distinction was taken over in all the ulterior cases, for instance: ECHR, The Decision of the Great Chamber of 17 December 2004 pronounced in the case Cumpănă andi Mazăre vs. Romania; ECHR, decision of inadmissibility of 21 September 2004 pronounced in the case Abeberry vs. France; ECHR, decision of 24 February 1997 pronounced in the case De Haes and Gijsels vs. Belgium.

An assessment criterion utilized by the Court for the admissible criticism is that of inscribing the critical assertions within a debate of general interest carried out in the press[1].

As regards the administration of justice, the Strasbourg Court pointed out that the press must inform the public opinion about the functioning of justice – essential institution in a democratic society – as it is an issue of general interest. Nevertheless, as the European judges ruled, the action of the judicial power needs the confidence of citizens in order to prosper, and it is essential to assure it protection against devastating attacks, lacking serious grounds, the more so as the obligation of reserve of the magistrates prevents them from reacting[2]. However the Court appreciated that the freedom of the press in a democratic society is so important that this can justify to a certain extent the questioning of the authority and impartiality of justice in a polemic, even aggressive tone[3]. Two further aspects related to the freedom of the press as component of freedom of expression are linked to the founding of publications and the regime of authorization in the audio-visual domain.

In the international regulations in the matter there is no express provision of what the freedom of the press consists of, i.e. if this liberty supposes also the right to found publications. However, the constitutional regulations of different states comprise referrals to this right. For instance, art.30 of the Romanian Constitution settling the freedom of expression, in par.3 stipulating the freedom of the press implies also the freedom to found publications, thus consecrating the right to establish publications. Par.4 of the same article forbids the suppression of publications, without referring to the interdiction of suspending publications, sanction that, in the absence of contrary dispositions, is allowed.

We may remark that in Romania there is no law of the press yet that stipulates in detail the manner to found publications and the cases that make applicable the sanction of suspending a publication, which is questionable.

As for the regime of authorization in the audio-visual field, we mention that in this respect, art.10, part.1 final thesis of the European Convention of Human Rights stipulates that the dispositions of paragraph 1 first thesis of the same article, which settles the freedom of expression, does not prevent states from subjecting the radiobroadcast companies, cinemas and televisions to a regime of authorization. In

[1] ECHR decision of 25 June 1992, pronounced in the case Thorgeirson vs. Iceland.
[2] ECHR decision of 26 April 1995 pronounced in the case Oberschlick vs. Austria.
[3] ECHR decision of 24 February 1997 pronounced in the case De Haes and Gijels vs. Belgium.

our legislation, we find referrals regarding the authorization of the radio and television stations in par.5 of art.31 of the Romanian Constitution and in the Audio-visual Law no. 504/2002 with the ulterior alterations.

From the jurisdiction of the European Court of Human Rights with incidence in the matter we may extract several principles. A first principle established through the jurisdiction of the Court is that the national authorities have the competence to settle the system of authorisation in the audio-visual field without this competence hindering the freedom of expression. As the European Court stated in the case ***Groppera vs. Switzerland***[1], the authorization clause provided in the third sentence of part.1 of art.10 in the Convention, to the extent that it constitutes an exception from the principle of freedom of expression proclaimed by art.10, has a reduced application scope. It aims at allowing the subjecting the audio-visual broadcasting media to an authorisation regime, especially in relation with the technical aspects. However the respective authorisation measures should in their turn observe the guarantees instituted by the second paragraph of art.10.

Moreover, the Court stated also that the states have the right to adopt one legislation able to assure the observance of the authorisation regime; in this respect, in 1986, the Commission declared inadmissible a complaint of the representatives of a radio station that had broadcast without a prior authorisation required by the Flemish community of Belgium. In that case, the Commission considered that "as a state may adopt the legislation meant to subject the radio broadcasting companies to a regime of authorisation, it should also be legal for the state to adopt a legislation meant to assure the observance of the respective regime, especially through measures meant to prevent the avoidance of the authorisation terms[2].

The Court established also that art.10 of the Convention does not guarantee the radio broadcasters a right of licence, however the states do not have an unlimited range of appreciation as regards the authorisation regime. In the Decision of 16 October 1986 pronounced din the case ***Verein Alternatires Lokalradio and Verein Radio Dreyeckland Basel vs. Switzerland***, the former Commission ruled that the rejection by the state of an authorisation application should not be manifestly arbitrary or biased and thus contrary to the principles stipulated in the preamble of the convention and the rights it guarantees. For this reason, an authorisation regime not observing the requirements of pluralism, of tolerance and of a spirit without which

[1] ECHR decision of 28 March 1990 pronounced in the case Groppera Radio AG et al. vs. Switzerland.
[2] European Commission for Human Rights, decision of 5 March 1986 pronounced in the case X et al. vs. Belgium.

no democratic society can exist, breaches art.10 par.1 in the Convention (Nicolae, p. 78).

A last aspect clarified by the jurisprudence of the Court regarding the authorisation regime in the audio-visual domain refers to the public monopolies in the matter of audio-visual mass media. The public monopolies in this filed were considered by the Court as susceptible to infringe the provisions of art.10, especially as they do not assure the plurality of the sources of information. The Court appreciated that such a monopoly is not necessary in a democratic society and that, anyway, in modern societies, the multiplication of the methods of broadcasting and development of trans-national televisions makes it impossible to justify the existence of monopolies[1].

Finally, a last issue related to the freedom of the press is focused upon its relation to the *protection of reputation and rights of others*. In this respect the European Court does not hesitate, for instance, to grant pre-eminence to the freedom of the press in relation with the rights of citizens to be protected against racial discrimination[2] or in relation with the rights of their fellow citizens to benefit from the presumption of innocence[3].

As a conclusion of the above analysis, the freedom of the press, as component of the freedom of expression, is an essential freedom related to the very nature of a democratic society. It assures the free debate of information and ideas, grace to the pluralism of the sources of information it offers. The exercise of the freedom of the press also contains obligations and liabilities, which are circumscribed to the limits the freedom of expression bears in its exercise.

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[2] ECHR decision of 23 September 2004 pronounced in the case Jersild vs. Denmark.
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