

# RIGHT TO FREEDOM OF EXPRESSION ANALYSIS OF THE ANGLE OF PRACTICE EUROPEAN COURT OF HUMAN RIGHTS

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## Abstract

*European Court affirms the idea that democracy is not about majority rule opinion, but also implies a respect for minorities, tolerance of isolated events or eccentric approach requiring individual-community relationship from a liberal perspective. Meanwhile, the European Court's view, freedom of expression serves a dual goal: that of the fulfilment of each individual, thus representing an aspect of the general principle of individual autonomy in relation to society, at the same time, freedom of expression has a significant function instrumental, providing an extremely useful tool to ensure proper functioning of an open and pluralistic societies, and particularly a representative democracy. As will be seen in the paper, this second explanation seems to weigh heavier, causing it increased protection that the Strasbourg court to release a discussion of issues that are of public interest.*

*Objectives approach refers to the extremely wide range of manifestations of law, including material and technical means used for its exercise, analysis of forms of limitations on freedom of expression, whether measures which restrict freedom of expression, margins of discretion available national authorities to restrict freedom of expression that has a variable extent depending on the message content of the right holder and the value of the state a legitimate claim to justify the need for interference.*

**Keywords:** *freedom of expression, forms of expression, restricting freedom of expression.*

## Introduction

Freedom of expression is one of the oldest and most important freedoms, is known under this name or under the names of its aspects: freedom of speech and press freedom. Freedom exists only if it is not limited, but the lack of restrictions is not sufficient, freedom must also have a positive content to be supported by the values embodied in action. If freedom of expression necessary for someone to listen, to have dialogue and consequences of dialogue: normal and moderate consequences, but both necessary and predictable. Otherwise, freedom of expression can lead to no dialogue, but to chaos. The link between words and reality can be seen, for example, well into the civil society, nongovernmental organizations.

Developed in the Council of Europe signed in Rome on 4 November 1950, Convention on Human Rights and Fundamental Freedoms (known as simplified by the European Convention on Human Rights) has gradually become one of the most effective instruments of defence human rights worldwide.

She is such a tool for two main reasons: on the one hand, place the law of the Member States which have ratified the Convention (currently forty-five, forty-six soon), a place that explains the profound influence exerted the Convention on legislation, jurisprudence and practice of these states, and, on the other hand, the fact that unlike other international instruments of human rights, European Convention on Human Rights has its own supranational judicial mechanism, which requires Parties High contracting and ensures an effective, compliance with the proclaimed rights.

Of course, this system of human rights is not universal, but European. It is also true that it only covers the rights and freedoms which are essentially oriented individual rights, civil and political rights of man, excluding a few exceptions, economic and social rights (which are guaranteed by other tools such as the European Social Charter). However, the two limits mentioned above, the

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geographical and material does not diminish the special legal and political importance of the European Convention on Human Rights.

This is why the Convention is vital to know at present: it may be invoked before the national courts must apply the ultimate control of the European Court of Human Rights, which occurs not as a judge of the third or the fourth court, but a European supervisory body. The Convention is therefore founded on the principle of subsidiary, better known in general public international law.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, national security, territorial integrity or public safety, prevention of disorder or crime protection of health or morals, protection of the reputation or rights of others to disclosure of confidential information contravenes or for maintaining the authority and impartiality of the judiciary".

### Content

Freedom of expression, Article 10 devices, has a special place among the Convention rights. Indeed, it sits right at the notion of "democratic" system of values that summarizes the Convention is built. The particular importance of Article 10 was highlighted by the Court for the first time because *Handyside v. United Kingdom* (1979), the idea being constant in all cases and then resumed later. Thus, "freedom of expression constitutes one of the essential foundations of a democratic society, one of the essential conditions of progress and individual fulfilment and its members. Subject to paragraph 2 of Article 10, it covers not only" information "or" ideas " that are received favourably or considered inoffensive or indifferent, but also those that offend, shock or disturb the State or a segment of the population.

These are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". European Court affirms the proposition that democracy is not confined to rule the majority, but also implies a respect for minorities, tolerance of isolated events or eccentric approach requiring individual-community relationship from a liberal perspective. Meanwhile, the European Court's view, freedom of expression serves a dual goal: that of the fulfilment of each individual, thus representing an aspect of the general principle of individual autonomy in relation to society, at the same time, freedom of expression has a significant function instrumental, providing an extremely useful tool to ensure proper functioning of an open and pluralistic societies, and particularly a representative democracy.

As we will see below, this second explanation seems to weigh heavier, causing it increased protection that the Strasbourg court to release a discussion of issues that present a public right guaranteed by Article 10 but not absolute. Paragraph 2 allows restricting its exercise if the use of freedom of speech is directed against certain values, which the state can legitimately defend, or even against democracy itself. Restrictions on freedom of expression will be controlled by the European Court but by applying a series of principles of interpretation of Article 10 of the Convention in the jurisprudence crystallized on them. Although the Strasbourg bodies (Commission and Court) have not always followed in the present case solutions approach announced in favour of freedom of expression because *Handyside*, is sometimes criticized the doctrine of specialty for this prominent role of freedom of speech was constantly said at least in principle, he must guide any analysis of any restraint of that freedom.

The main feature of the way defined by the Commission and Court on freedom of expression, in terms of Article 10, is their tendency to include within the scope of paragraph 1 an area of extremely large expressions of law, including means and technical materials used for its exercise. Basically, the Strasbourg organs very easily accept framing the scope of paragraph 1 and will differentiate the legitimate forms of expression that the state is able to suppress on the basis of the restrictions mentioned in paragraph 2 (restrictions must be provided by law internal, pursue a

legitimate aim exhaustively listed in paragraph 2 and to be necessary in a democratic society to achieve those goals).

Right protected by Article 10 includes, in the words of the ECHR, "freedom of opinion and freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers".

It should be noted that were considered interference in exercising that freedom very different situations such as punishment of journalists for various statements published in newspapers or television shows made during the refusal of the authorities to distribute a certain magazine in military barracks, detention of persons protesters handing out leaflets during a parade or a conference on military topics, a person denied access to confidential information concerning them held by authorities, confiscation by the authorities of the paintings of an artist shown at an exhibition, a film broadcast ban the dismissal of a teacher because of his political activities in the German Communist Party, unable to create investor-owned radio or television because of state-owned monopoly in this area, denying access to the country of a foreign political leader to prevent to attend a meeting that had been invited, and others.

In the case *Groppera Radio AG v Switzerland* (1990), that the decision by Swiss authorities to prohibit the broadcasting company applicant to resubmit cable broadcasts issued in Italy, the government argued that Article 10 does not cover broadcasting of programs whose content, especially popular music and advertising, does not fit the notion of "information and ideas".

The Court rejected this argument and stated that Article 10 (1) is applicable and should not make any distinction based on the content of programs.

Freedom of expression occur all categories of objective, pluralist and all original creations and ideas, in any form, media or their purpose. Since she has not only mass media but also all citizens and creators of scientific, literary or artistic. Included within the scope of protection of Article 10 so words, images, sounds transmitted through printed media, the radio, television, film, etc.. Although there is still no jurisprudence in this respect, it is clear that electronic information broadcast over the Internet will be covered by Article 10.

As shown, the scope of the liberty protected by the Convention is very broad, including all forms of artistic discourse, shopping or on public issues. Of course, given the effective protection of Article 10 varies in the sense that the legitimacy of state interferences in exercising freedom of expression will be evaluated according to different value which the Court granted different messages sent by the right holders. For example, as we shall see below, forms of advertising included in the commercial speech will have a much lower protection to political speech. Important to note however that these differences are made on the land of paragraph 2 of Article 10, which obliges the state to comply in all cases rather strict conditions imposed by it.

Paragraph 2 of Article 10 allows the state to provide limitations of forms of freedom of expression provided it complies with the requirements of the Convention impose for their validity. Once established the applicability of Article 10, after it was found that there was a applicant's right to freedom of expression, the Court said that state limitations on this right is contracting Convention if fulfils the three cumulative conditions listed in paragraphed 2: to be provided by law, to at least one of the legitimate aims specified in the Convention and be necessary in a democratic society to achieve that goal. When there is failure of one of these conditions, the Court will find no violation of the Convention to pursue his other.

Interference with freedom of expression must be based on existing legislative provision in law. Of the Strasbourg jurisprudence has established that must be understood by the term "law" will be one of the so-called "autonomous concepts" whose content differs from that which could be the law of different States Parties to Convention.

Thus, the "law" means the legislative act of general normative value emanating from legislative power and a lower norm with legal force of law in the formal sense. It covered the concept

of "law" under the Convention including case law, and this applies not only to countries that have a legal system of "common law".

Especially in the latter case, the Strasbourg organs have held that the "law" under the Convention can understand both the written and unwritten law. Also, because *Autronic v. Switzerland* (1990) were considered as "law" under the Convention and rules chair belonging to international law.

Important is that the law which provides an interference with freedom of expression must meet two basic conditions: the availability and predictability. In their absence, found by the Strasbourg Court, Article 10 will be violated even if the interference is provided by law in force in the domestic legal order, emanating from Parliament.

European Court had the opportunity, if the *Sunday Times v. the United Kingdom* (1979), to affirm the basic principles which define notions of accessibility and foresee ability of the law. Thus, "it is mainly the" law "to be sufficiently accessible; citizens must have sufficient information, considering the circumstances, in connection with legal rules applicable in a given case. Second, there can be considered "law" than the norm formulated with sufficient precision to enable citizens to adjust their conduct to legal requirements, using competent advice if necessary, he must be able to provide a reasonable degree of accuracy taking into account the circumstances, the consequences that may result from an act committed by him caused.

These consequences need not be foreseeable with absolute certainty, this experience proves impossible. In fact, although certainty is desirable, sometimes it causes excessive rigidity, or the law should not be able to adapt to changes in situation. Thus, inevitably many laws using formulas more or less vague, the interpretation and application depend on practice.

The ambiguity of existing laws can be compensated by the law of the state in a consistent judicial practice, allowing achievement of the desired condition that affects freedom of expression as are prescribed by law, and thus remove the arbitrary and avoid granting a discretionary state authorities. There are areas which by nature does not allow a perfectly rigorous regulations, so that is inherent in the existence of texts with a more general law. Court accepted that in terms of, for example, defends moral or legal rules governing the field of unfair competition, the situation in which repression by these plaintiffs could be provided due to existing case law in that area.

If *Steel and Others v. R.U.* (1998), the European Court suggested that the mere provision in domestic law is not a sufficient, is necessary and compliance with the Convention.

After finding that interference with the freedom of expression was prescribed by law, the European Court check it following a legitimate exhaustively listed in paragraph 2 of Article 10. In this regard, it should be noted that European courts are not satisfied to accept the existence of alleged legitimate state purpose, but done themselves an assessment will be identified after which one of the objectives listed in paragraph 2 that is most relevant in the circumstances.

When you check the condition of the pursuit of a legitimate purpose is fulfilled, the European Court to take into account that inspired interference emanating from authorities at the time of its establishment, and not to the respondent State could reconstruct it later to justify As the proceedings in Strasbourg.

Possible and be retained in the same case several legitimate reasons to justify state action. For example, if *Barfod v. Denmark* (1989) in which a journalist was sentenced for two judges accused of lack of impartiality in the way they solved a tax dispute, the court held as legitimate in terms of paragraph 2 "the reputation of judges" and indirectly "safeguard the authority of the judiciary".

This is the most important requirement that the state must meet when they restrict freedom of expression of individuals. Strasbourg bodies have established a number of principles concerning the interpretation of this notion, because it is often decisive for establishing conclusions or violation of the Convention. Analysis need measures that affect freedom of expression, to bring to conclusion Convention compatibility with the need to highlight that it answered a "pressing social need" that caused its adoption. Also, the measure must be proportionate to the legitimate aim pursued and the reasons given to justify national authorities must be relevant and sufficient.

## Conclusions

European Court rejected the argument states that have held that the requirement of necessity in a democratic society is satisfied when the state demonstrates that it acted reasonably, carefully and in good faith. Stressing the critical importance of which should enjoy freedom of expression, the Court insisted that aspire need for restrictions must be convincingly established.

It is true that a national authority is primarily the task of implementing the Convention. They are actually placed in a more favourable position than the European courts to assess the appropriateness of certain measures that restrict freedom of expression. Accordingly the European Court has recognized discretion in this area. However important to note is that this discretion is limited. It is subject to European control and named on the final state in need of law and its enforcement decisions. Therefore, the European Court is competent to ultimately determine whether a certain extent the guarantees established by art. 10 of the Convention.

Is important to note that concrete appreciation of the necessity of the restriction is made on a case by case basis, taking into account all the circumstances of the case. Therefore, the Court concludes often determined by specific issues that case, although it is possible to extract some general principles to allow anticipation attitude Court in subsequent cases, leading to the establishment of European standards that states party to the Convention must accept as minimum obligations on freedom of expression.

Margin of discretion available to national authorities to restrict freedom of expression is variable but a stretch, according to the owner of the message content, and legitimate value that the state invoke to justify the need for interference. In consequence, the protection of the convention also varies accordingly.

As we have already stated, the Court need to protect freedom of expression based primarily on the value which it represents as a means to ensure proper functioning of a democratic society. Hence the privileged position given to the free discussion of matters of general interest, and in particular press freedom when it conflicts with other values that the state can legitimately defend. Therefore, when the objective is formed infringement complaint in Strasbourg freedom speech "political" understood in its broadest sense, the discretion of national authorities is very low.

Conversely, if the right claimed by claiming concerns a speech whose content had a predominantly commercial, so transmission of information and ideas of general interest, but purely economic interests of individual discretion is much broader. In this case the Strasbourg Court is in a lesser extent willing to substitute its own assessment on the need for restriction of the state authorities. It can also argue that discretion exists for distinct artistic discourse. Once qualified as a speech that bears on issues of general interest, the discretion given to states to restrict also vary according to the legitimate aim pursued and the extent to which we can speak of an "objective definition" of it to European scale. The Court recognized that the notion of "moral" is not seen uniformly in Europe, it vary greatly from country to country depending on the specific realities of each. Therefore, national authorities decide how to protect will be subject to less stringent than the European courts, for example, the notion of "authority of the judiciary", which can be observed if more consistent in concerning Justice and states party to the Convention.

Also, because *Süreç v. Turkey* (1999), the Court held that when the claims in dispute, even if they concern a matter of public interest, encourage the use of violence against an individual, a representative of the State or part of population (thus affecting national security or public order), the discretion is larger than, for example, if critical discourse directed against a politician.

It must however be stated that the idea that a certain measure was considered by the Court not to violate the Convention because authorities had acted within their margin of appreciation does not necessarily mean that is basically foreign speech protection area established by Article 10, but only that, given the circumstances prevailing at that time in that State authorities have been able to legitimately use discretion to determine whether the ban. However, it should be remembered that

Article 10 of the Convention requires Member States accepted minimum standards on freedom of expression, not prevent them, according to Article 53 of the Convention, to grant individual rights law toward the increased protection provided by law of the Strasbourg jurisprudence. Thus in *Handy side v. United Kingdom* (1979), the Court has agreed not to violate the Convention by the British authorities ban a book on sex education to school-age children, ban motivated by moral considerations, though the same book circulating freely in other European countries.

We discussed until now how is established in the abstract extent of the discretion, depending on the nature and value of protected speech by suppressing it. To resolve the issue but a concrete, consider the European Court and other elements related to the specific example of a quality that can discourse author (journalist, member of the opposition politician, soldier, civil servant, etc.) Or injured person (politician, civil servant, judge, private person, etc.) and the means by which the broadcast message (print, television, public exhibitions, film projections, etc.) also plays an important role and specific circumstances dissemination of the disputed speech, such as, for example, that children's access was restricted material considered pornographic or not.

Last but not least, the nature and severity of the penalty for playing a key role in determining the proportionality of the legitimate aim pursued. The penalty is more serious effects on the plaintiff, the more the state will have to prove the existence of proportionality between the bond and the legitimate aim pursued.

If the sanction imposed has the effect of restricting freedom of speech more than necessary, and forms of expression affecting not threaten legitimate values apparatus, the Strasbourg organs will find a violation. Thus, the general prohibition and perpetual right to publish a person as a result of criminal conviction for collaboration with the Nazis was considered by the European Commission of Human Rights as violating Article 10 as rigid and permanently affect the individual's right to express other than political issues (causes of *Becker v. Belgium*, 1962).

Also, where information on the state claims it is entitled to suppress public opinion is already available from other sources, they ban can be justified in terms of the Strasbourg Court. This happened, for example, because the *Observer & Guardiani v United Kingdom* (1991), which concerned the publication ban by the authorities by the applicant newspapers published extracts from the book by a former British Intelligence officer that contained information that was considered that, could affect national security. Since the book was published in the United States and could be readily made in the UK, the Court held that the rationale of the prohibition has ceased to exist.

Although criminal sanctions, especially those involving deprivation of liberty, are those that draw their need for strict control by the Strasbourg court because of special severity, and civil penalties can sometimes lead to exorbitant duties to plaintiffs, as happened in *Because Tolstoy Miloslavsky v. the United Kingdom* 1995, the applicant was convicted of libel to pay huge sums of money (1.5 million pounds).

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