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The Protection of the Freedom of Expression in Europe: Analysis of Article 10 of the ECHR

Abstract

The current article deals with the issues regarding freedom of expression, which has been thoroughly manifested in the European Convention on Human Rights and other international documents. The article takes a look at different sides of the freedom of expression in European legal system - the area of protection, the legitimate grounds for restrictions and relevant case law, briefly analysing those elements.

Annotasiya

Diqqətinizə çatdırılan bu məqalə Avropa İnsan Hüquqları Konvensiyası və digər beynəlxalq sənədlərdə geniş şəkildə əks olunan ifadə azadlığı ilə bağlı məsələləri əhatə edir. Məqalə Avropa hüquq sistemində ifadə azadlığının qorunma sahəsi, məhdudiyyətlər üçün qanuni əsaslar və bununla bağlı məhkəmə təcrübəsini analiz edərək, ifadə azadlığının qeyd olunan müxtəlif elementlərinə qısaca nəzər salır.

Introduction

Freedom of speech or expression is considered as one of the key elements of the modern civil societies. Throughout the history the speech has been the main tool for transmitting ideas, thoughts, and information among the people. Despite the fact that the expression of the new ideas, which mostly had shocking effects in the societies, were exposed to the attacks and threats by the authorities, the defenders of it never gave up and continued to fight that freedom. It goes without saying that the freedom of expression has been the “accelerator” of the human development and prosperity for ages.

This right has been embodied in several international documents related to human rights and freedoms. For example, Article 19 of the Universal Declaration of Human Rights (“UNHR”), which was adopted in 1948, states that: *“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”*. That provision was followed by Article 19 of the International Covenant on Civil and Political Rights (ICCPR), adopted in 1966. Article 19 of ICCPR states that: *“1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of*

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frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals."

As it is obvious, article 19 of ICCPR defines the freedom of expression in a comprehensive way and reveals the restrictions to that right as well.

The freedom of expression was also enshrined in the article 10 of the European Convention on Human Rights ("Convention"). This has a central part to play in the protection of other rights under the Convention. Besides this, freedom of expression may frequently conflict with other interests, indeed with other rights protected by the Convention, for instance the right to a fair trial, the right to respect for private life, and the right to freedom of thought, conscience and religion. Where there is a conflict between freedom of expression and some other interests, the European Court of Human Rights ("ECHR") is engaged in some sort of weighing exercise to determine the priority of one over the other.¹

In *Handyside v. UK*², the Court stated:

'Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".'

I. The Area of Protection

The characteristic feature of the freedom of expression is that it preserves activities which carry a risk of harming or actually damage the interests of others of public interest. Publication of some information which damages the reputation of an individual or harms certain group of people or their beliefs is tolerated and this should be considered as one the essential values of a democratic political system. Recent tragic events in France arising from the publication of caricatures by "Charlie Hebdo" revealed the conflict between freedom of expression and religious beliefs of a certain group of people, but the importance of the former makes authorities take measures in order to protect that right.

¹ D J Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights*, pp. 372-373 (2nd ed. 2009).

² *Case of Handyside v. The United Kingdom*, A/24 para 49 (1976).

Freedom of expression includes the right to communicate and to express oneself in any medium, including through words, pictures, images and actions (including through public protest and demonstrations).

The type of expression protected includes:³

- political expression (including comment on matters of general public interest);
- artistic expression; and
- commercial expression, particularly when it also raises matters of legitimate public debate and concern.

As it is seen from the list aforementioned, “expression” does not merely mean words, still less spoken words, but extends to pictures, images and actions intended to express an idea or to present information. Equally, the means of protected expression go beyond speech to print, radio and television broadcasting, artistic creations, film, and probably electronic information system.

The political expression is given a special attention and perseverance. Equally, the Court is of the view that artistic expression, which is vital for fostering individual fulfilment and the development of ideas, are also robustly protected by Article 10. In *Markt Intern Verlag v. FRG*⁴, the government objected the allegations stating that information in a trade magazine fell outside Article 10, being directed to the promotion of the economic interests of a group of traders, and thus an aspect of the right to carry on business. The Court, conversely, described the item as “information of a commercial nature” but held that it was protected by Article 10 as that Article did not apply “solely to certain types of information or ideas or forms of expression”.

It should also be mentioned that as all kinds (political, artistic, commercial), forms (words, pictures, sounds) and media (speech, print, film, television etc.) of expression may fall within Article 10, it does not follow that they must all be treated equally by states. The margin of appreciation which Article 10 permits may be applied differentially (but not discriminatorily).

Meanwhile, the issue about the protection of the access to information and its extent is not completely backed by the Court. In *Leander v. Sweden*⁵, the applicant sought confidential information in government files, on the basis of which he believed he had been denied a job, in order that Article 10 gave him no protection. Rather, the general duty on the state is not to block access to information which is available.⁶

³ The European Convention on Human Rights, Article 10, Freedom of expression.

⁴ Case of *Markt Intern Verlag v. FRG*, A/165 para 25-26 (1989).

⁵ Case of *Leander v. Sweden*, A/116 para 74 (1987).

⁶ Case of *Z v. Austria* No 10392/83, 56 DR 13 (1988).

Besides this, Article 10 distinguishes between “information” and “ideas” and makes it clear that the freedom of expression is not restricted to verifiable, factual data. It also covers opinions, criticism, value judgements, speculation: for these latter instances, in particular, there is no room in general for the argument that Article 10 extends only to “true” information.

The final sentence of Article 10 (1) is also interesting and can be regarded unique in the Convention. It defines the wide power for states to continue to regulate the licensing issues for broadcasting and television. In a word, this sentence gives an entitlement to the states to make technical or financial licensing decisions.

II. Limitations to Freedom of Expression

Freedom of expression is not an absolute right and Article 10(2) defines basis for restrictions and limitations to this freedom. One of those criteria is “prescribed by law” and the term “law” has been extensively construed so as to include not only statutory laws, but also unwritten laws in order to reflect the legal cultures of common law countries.⁷ The Court has identified two sub-tests that must be satisfied for a norm to be a “law”: those of accessibility and of foreseeability (or clarity). The sub-test of accessibility can be fulfilled if the citizen is able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. A more rigorous assessment is required for the sub-test of foreseeability. The foreseeability is one of the requirements included in the phrase “prescribed by law” in Article 10(2). A norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen-if need be, with appropriate advice-to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁸

The second paragraph of Article 10 lists nine legitimate purposes for which restrictions on the freedom of expression can be justified. These are: a) the protection of national security; b) the protection of territorial integrity; c) the protection of public safety; d) the prevention of disorder or crime; e) the protection of health; f) the protection of morals; g) the protection of reputation or rights of others; h) the prevention of the disclosure of information received in confidence; and i) the maintenance of the authority and impartiality of the judiciary.⁹

When considering the issue on “limitations”, it should also be mentioned that there exists a big difference between communication addressed to an audience consisting of an ordinary individual, a few individuals, or even the general populace, and communication addressed to those who hold power as rulers, elected or unelected, representatives and officials. There is also an

⁷ Case of *Sunday Times v. UK* (No 1), A 30 (1979).

⁸ Case of *Müller and others v. Switzerland*, A/133 (1988).

⁹ D. J. Harris and O'Boyle and Warbrick, p. 474.

appreciable difference between messages put out by individuals on their own responsibility, and messages that originate from officialdom or are circulated by some media organization.¹⁰ Currently, it is generally accepted that the communication addressed to state officials, government authorities should be tolerated and State Parties to the Convention should abolish the provisions on application of criminal liability for defamation, especially in the cases related to the media.

Article 10(2) reveals “duties and responsibilities” of persons exercising their freedom of expression. The notion of “duties and responsibilities” has been invoked in relation to different bearers of expression rights, including politicians, civil servants, lawyers, the press, journalists, editors, authors and publishers, and even artists such as novelists. This notion puts a significant importance with respect to special categories of civil servants, such as diplomats, judges, intelligence agents, and police officers. The Court has found that the obligations imposed on special categories of public officials, including police officers, to refrain from political activities to ensure that their balanced or political neutral views were compatible with the duties and responsibilities under Article 10(2).¹¹ With respect to journalists, the Court has consistently stressed their duties and responsibilities to act in good faith to provide accurate and reliable information in accordance with ethics of journalism. For example, journalists accused of defamation are required to provide *prima facie* reliable evidence for supporting their claim, failing which the Court may demand the proof of the veracity of allegations. As said in *Steel and Morris v. UK*, it is not in principle incompatible with Article 10 to place on a defendant in libel proceedings the onus of proving to the civil standard the truth of defamatory statements, namely that the statement is substantially true on the balance of probabilities. Nevertheless, they are not required to establish the truth of all aspects of information they report in the press. In relation to statements considered false assertions of facts, the Court may take into account whether the applicants were responsible for the production or publication of such statements, and whether they intended to deceive other persons through such information.

Conclusion

Freedom of expression, enshrined in Article 10 of the Convention, can be considered as one of the main elements of the civil society and democratic political system. Informed discussion of matters of public concern is of high value because of its role in the working of a democratic society. “Expression”

¹⁰ Paul Sturges, *Limits to Freedom of Expression? Considerations arising from the Danish cartoons affair*, IFLA Journal 32, 181-188, p. 185 (2006).

¹¹ Case of *Rekvenyi v. Hungary* 1999-III para 46 GC; and Case of *Otto v Germany* No 27574/02 Hudoc (2005).

has been interpreted widely and all the means for engaging in expression have been brought within the scope of Article 10(1). However, this wide right is not an absolute right and Article 10(2) allows some limitations to it. The Court always struggles with the conflict between the individual right and the public interest. The rhetoric of its judgements in support of freedom of expression is strong and it has been through Article 10 cases that the requirements of “law” as the basis for interference was first set down. In order to justify limitations, relevant authorities need to show the basis embodied in Article 10(2). The margins of appreciation in this Article can be considered very wide but the jurisprudence of the Court reminds states that their powers are unlimited. Because many of these issues are both multinational and economic, for those Convention states which are members of the European Union it is encouraging that the development of European Community law has paid attention to the standards of the Convention. Besides this, recent events happening in Europe and other parts of the world shows that the freedom of expression should be protected and the attacks to free speech and expression need to be prevented by relevant authorities, otherwise, the democratic values, such as the pluralism and diversity of opinions can be under threat of terror and despotism.