



## ORIGINAL PAPER

# State interference in the right to free speech. A legal perspective related to the ECHR jurisprudence

Maria-Nicoleta Morar\*

### Abstract

The purpose of this paper is to show that in many cases, the State abusively restricts individuals' freedom of expression, amid confusion between exercising their right to free expression and the issue of value judgments. The State sanction applied to individuals for exercising their right to free speech is not always aimed at a legitimate purpose (the protection of rights and freedom of others) and conviction does not correspond to a pressing social need, as it should happen. ECHR jurisprudence reveals that a State interference in the right to free speech is not necessary in a democratic society more so when there is no proportionality between the sanction of state or conviction and the aim sought by the Authority. The way a person exercises his right to say what he thinks, makes it almost impossible to separate a value judgment of its abusive exercise of freedom of expression to it. In such a context, it remains to be seen whether the value judgment is an exception to the limits of free speech or if freedom of expression is the sum of value judgments.

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\* Ph.Dc., University of Craiova, Faculty of Law, Phone: 0040736059279, Email: nyko\_173@yahoo.com

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### **Introduction**

Suppose that freedom of expression must be exercised without limits and that this right is granted to any individual. In exercising this fundamental right it is impossible to ignore the consequences which may be expected on another individual or private communities and even on a nation. Of course, the right to free speech takes a liberal and democratic form in the legal regulations of international, European and national states, legislative texts even leaving the impression that by exercising this right, individuals can materialize another right, the right to liberty of conscience. If the exercise of a fundamental right through another fundamental law, represents a normal legal situation, it is necessary to analyze to what extent the restriction of rights reflects on the other right. In this case, when there is an interference of the state in the right to free speech, the question is whether, indirectly, the interference did not affect the right to liberty of conscience.

In many cases the state may abusively restrict individuals' freedom of expression, amid confusion between exercising their right to free expression and the issue of value. Therefore, analyzing case law of European Court of Human Rights, it can be seen that in many situations, state interference in freedom of expression is not necessary in a democratic society and it does not correspond to a pressing social need, which is why it creates a disproportion between state sanction and the legitimate aim pursued by state when it comes to convict individuals who exercise this fundamental right.

### **State interference in freedom to free speech relative to the condition of "necessity in a democratic society"**

In the main, although freedom of expression should not assume the public authorities, the right to free speech is not absolute, for exercising this right by an individual may be restricted in the name of "values" that the state deems necessary and assigns them a democratic society where prevails a type of social order. Beyond the myriad reasons invoked by a State or another to justify the interference in freedom of free speech, interesting is the way in which the States relate to the exercise of this right by individuals. Not the individual prevails, not the limit exeding of this right, but the quality of the individual which, according to the State, exercises his right in an abusive manner. Not the way a statement was made is important in restricting the right to free speech, but the type of allegation, the circumstances in which this claim was submitted, the social impact that it could have, and of course, professional or social status of the transmitter of the information, for all these elements are essential in establishing that *"pressing social need"*~ that supposedly the State would take into account when resorting to the interference with freedom of expression.

An example of this is *the cause Perna v. Italy* (European Court of Human Rights, judgement by the July, 25, 2001), Giancarlo Perna notified the European Court of Human Rights, claiming that his freedom of expression provided in the Convention was violated. He is convicted of defamation because, as a journalist, he published in 1993 in the newspaper "Il Giornale" an article about the Judge G. Caselli, entitled "Caselli, white tuft of justice", with the subtitle "School priests, communist militancy as a friend Violante", *the* magistrate being presented as a follower of the Communist Party ideology, standing out in the article in which G. Caselli made a *"vow of obedience"* to this party. In the same article, the magistrate was accused of trying to gain control of the Prosecutor in several cities in Italy, It was used an informant to invict the former Italian Prime Minister Giulio Andreotti.

By judgment of 2001, the Judges of the Court held that the complainant's allegations regarding the political militancy of Caselli are simple values of judgments, it did not require any sanction for his critics, stressing that journalistic freedom covers a certain degree of exaggeration. As a result, according to the ECHR, the conviction of Perna, to pay material and moral damages by the national courts of Italy was not necessary, being violated Article 10 of the European Convention. (European Convention of Human Right, 2015 : " Article 10 – Freedom of expression: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. 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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary").

Regarding the speculative assertions of the journalist about the Caselli magistrate's alleged strategy to control activities in the Prosecutors', The Court found that it did not contain an ambiguous expression, being injured the magistrate's reputation by the content published. As a result, by reporting that the journalist did not seek to prove abuse of authority of Caselli, claiming only that in the content are expressed critical judgments, the judges decided that *State interference in freedom of expression is necessary in a democratic society when it aims to protect the reputation of others*. As a result, because the journalist's speculative assertions were serious allegations that could not be proved by him and exceeded the limits of acceptable criticism, it was found that the penalty imposed on it was justified, in this case is no infringement of the right to free speech.

### **The discrepancy between the "pressing social need" and state interference in the freedom of expression of the individual**

Returning to the idea that in the case of the state interference in free speech, it matters more how the state relates to circumstances in which this fundamental right is exercised, and the quality of the person who exercises it, we could deduce that the state rather seeks the individual not to breach the limits of freedom of expression, only positive obligation of a public authority to protect this right. Let's take as an example the cause Fuentes Bobo v. Spain (European Court of Human Rights -Fourth Section- judgement by the February, 29, 2000). The applicant requested the Court to rule on the infringement by the Spanish government to free speech, showing in his application to the Court that as the Spanish television TVE employee, published critical acclaim concerning mismanagement of trust, which is why, after being moved to another workstation, it was sanctioned with suspension of the employment contract and salary rights for a period of several weeks. As a result of the sanctions that have been applied, Fuentes Bobo discussed at several radio stations measures that have been applied, action which resulted in his dismissal.

Spanish national courts, although noted that F. Bobo value judgments issued during the broadcast of programs on radio that he was invited, have held that his right to free speech, guaranteed by the fundamental law of Spain, do not cover the right to insult or slander, and as such, the sanction was required to be applied.

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ECHR judges stressed, however, that the applicant was imposed on the most serious sanction prescribed in the Statute of Workers, ie termination of employment without payment of any allowances, saying that his journalist could be applied other lighter disciplinary sanctions. As such, taking into account the facts set forth in the application, The Court found a violation of Article 10 of the European Convention on Human Rights, considering that the interference did not correspond to a *"pressing social need"* and that *"there is no proportionality between the sanction imposed on the applicant and the legitimate aim pursued"*.

This case is just one example of how the state tries to justify the interference in the right to free speech, by putting the sign of equality between value of judgment and insult, not reporting to the circumstances in which an individual makes critical statements on another individual, group of individuals or a given situation. In this case, the journalist Fuentes Bobo criticized many people from Spanish television executives, but, as it is clear from the complaint filed by the Court, statements were made in some of the direct emission of radio stations, in a spontaneous exchange of words between him and journalists. The circumstances in which they were expressed, the values of judgments are very important in determining restrict the right to free speech, It is necessary to take into account whether or not the individual can correct or even withdraw those stated.

This constitutes a notable example of how a state may mistakenly interpret and apply the restriction of free speech having been reported to the quality of the individual exercising his right. From the judgment of the ECHR it appears that national courts considered that the Spanish state interference in the applicant's freedom of expression is necessary in a democratic society and that the solution would have been totally different if it had a journalist on that date.

So, not the information content matter, nor that the value of judgment it was labeled as insult, but as that "insult" came from a person who was not at that time employed and not exercise the profession of journalism. So, what is the essence of value judgment? It is democratic and it is for the competence of the rule of law to apply differentiated protection of free speech admitting that a statement can be considered value of judgment only in case of an employment relationship and only if it comes from a person who has a certain quality?! ECHR jurisprudence shows that issue of value judgments whose authenticity cannot be proven, such as expressing ideas about a person's character, It should not be followed by a penalty, for this would be a violation of free speech, aspect emphasized in the case *Grinberg v. Russia* (European Court of Human Rights, judgement by July, 21, 2005). Isaak Grinberg Pavlovitch asked the Court to rule on violation, by the Russian Federation, of Article 10 of the Convention, him showing in complaint that following publication of an article in the newspaper in which it characterized the General Chamanov as having *"no shame, no scruples"*, he was sentenced to pay damages of 2,500 rubles (about 100 euros), and the foundation to edit newspaper it was forced by court order, to pay the sum of 5,000 rubles in damages and to publish the judgment.

ECHR judges found that the decision by Grinberg was sentenced it represents an interference of the state in the freedom of expression of there, arguing that, the veracity of information regarding the characterization of General Chamanov cannot be calculated and that national courts have imposed such evidence is proof that the authorities did distinguish between value judgments and statements of fact: "The Court considers that the statement is a perfect example of value judgment. The applicant was held responsible for the alleged damage caused to the reputation of Mr. Chamanov, simply because it failed to prove that was not actually prove that «no shame, no scruples», which it was impossible

to prove” (ECHR, 2005).

In continuation, The Court emphasized that the article has had minimal impact on the general's career, enrolling within a reasonable criticism, which is why the measure taken by the authorities it was not necessary in a democratic society, the Article regarding freedom of expression was violated.

### **The necessity of state interference in the freedom to free speech relative to the origin of acceptable criticism**

Although, at least in principle, freedom of expression is guaranteed for every individual, without privileges and discrimination, from the European Court of Human Rights appears that the protection of exercising the right to free speech, by issuing critics, it is applied differently in relation to the quality of the person making the allegations. For example, the Court held that limits of acceptable criticism in people who have a political career are broader than of ordinary people, as it originates from the case *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft v. Austria*. (European Court of Human Rights, judgement by November, 14, 2002). In the application to the Court, the applicant, company responsible for publishing a monthly magazine, he showed that he was convicted for publishing an article in the contents of which had criticized the expression "*punitive camp*", used by the politician Jörg Heider, criticizing it that by using that term it distorts the significance of the Nazi extermination camps which would constitute a crime. As a result, by court order, the defendant was ordered to pay damages, disposing the confiscation of the magazine number in which the article was published and publication of the judgment. Austrian Court emphasized in the sentence that restricting this right was necessary, arguing that the terms used by Haider were taken out of context to give the impression that it intentionally would minimize the atrocities committed in the extermination camps, which contravenes to the law.

Analyzing the exposed request, ECHR judges concluded that the article published by the applicant is, essentially, a value judgment, is not justified State interference in the freedom of expression. More than that, The Court emphasized that they were notoriously Nazism ambiguous statements concerning the politician, not denied by anyone that it consistently uses the phrase "*punitive camp*". In continuation, they said that for politicians the limits of acceptable criticism have a different dimension to other people.

Finally, the judges of the Court found that Article 10 of the Convention was violated, Austrian courts did not expose relevant and sufficient reasons to justify the interference with the right to free speech of the applicant's. Regarding the limits of acceptable criticism, not infrequently the Court relates to the quality of person and type of allegation, not taking into account the impact that could have the assertion that, any circumstances in which a person has used expressions that could harm the interests of another person or a particular group. An example of this is the judgment of the ECHR in the *Cause Jerusalem v. Austria* (European Court of Human Rights, the Third Section, judgement by February, 21, 2001) in which it was found the violation of Article 10 of the Convention.

In his complaint to the Court, the applicant Susanne Jerusalem, showed that, as member of the municipal council of Vienna she attended the council debates, giving a speech about granting subsidies to the associates to help parents whose children joined the sect. In her speech, she made several assertions to sects which she called "*psycho-sect*" (ECHR, 2001: "*Like everyone, I know that today a sect no longer a small group that dissociates from a recognized church (...),but a psycho-sect*". ) and characterized it as

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having in common a "totalitarian character" and "fascist tendencies" adding that the involvement of a person in a sect results in loss of identity. Further, commenting on the work of an association, IPM, which the applicant considers sect, she emphasized that it would have an influence on the Austrian People's Party regarding the drugs: ( ECHR, 2001: "... The sect IPM [the Institut zur Förderung der psychologischen Menschenkenntnis – The Institute of a better understanding of human psychology], recently established in Austria, but already has several years of activity in Switzerland, where called VPM [Verein zur Förderung der psychologischen Menschenkenntnis – The Association for a better understanding of human psychology], exerts an influence on the Austrian People's Party policy on drugs."). Consequently, IPM has filed a civil action against Jerusalem, the latter being forced by Court not to make statements regarding the totalitarian character of the association. Considering that in this way was violated her right to free speech, the applicant requested the European Court of Human Rights to find a violation of Article 10 of the Convention.

Analyzing the reasons in fact and in law put forward by the applicant, ECHR judges ruled that there was an interference in the right to free speech, whereas, in their view, activity of the association IPM target a general interest and it ought to have a greater degree of tolerance for criticism made against her. (ECHR, 2001: "In the present case, the Court finds that the IPM and VPM are associations active in a field that interests the public, namely policy in relation to drugs. They took part in public debates on this issue and, as the Government recognizes, cooperated with a political party. Because they were active in the public domain, they should demonstrate a greater degree of tolerance for the criticisms of opponents regarding their goals and means used in the debate.")

Moreover, the Court opines in a hallucinant manner the fact that although the applicant's allegations are not covered by immunity, they were not formulated in a parliamentary session, they were submitted at the meeting of a forum that can be compared to a legislative forum due to the structure and activity. As a result, there would have been important considerations to justify state interference in freedom of expression, The Court held that the applicant's claims are value of judgments which in reality were contradicted by the bylaws.

It can be considered that the Court's reasoning is unfair whereas the judges fail to take into account the protection of the interests of association, mentioning in the judgment that she targeted a general interest.

Further, the Court's argument becomes confusing, whereas although she stressed that complainant's allegations are value judgments, she qualified terms used by it ("*fascist tendencies*" and "*totalitarian character*" ) *statements of fact* requiring the burden of proof.

The Court had to consider that the applicant's speech was meant to highlight the need to provide subsidized associations fighting against sects, not to award a special character or a name to sects, giving as an example a certain association and criticizing its links to a particular political party.

ECHR judges did not take into account the negative social impact that Jerusalem's speech had over the association's members and supporters, nor that the debate was one of general interest, neither protected the interests of the association which pursued a general interest, nor the circumstances in which the statements were made, she be content to appreciate the fact that the association should have a greater degree of tolerance.

Although sustainable, the Court's assertion that freedom of expression is extremely important for elected people. The Court had to consider the fact that Jerusalem's

speech was not of ambiguous nature, affected not only the interests of the association in question, but also the reputation of the association members, which Jerusalem described as *deprived of identity*.

Given all these considerations, given that the applicant did not seek to demonstrate "fascist tendencies" and "totalitarian character" of the association, exceeding the limits of acceptable criticism, it can be accepted that the interference with freedom of expression was necessary because it was intended not only to protect a general interest targeted by association, but also protect the reputation of its members and supporters.

Doing a brief comparative analysis of the causes *Perna v. Italy* and *Jerusalem v. Austria*, it can be inferred that the ECHR applied differently the protection of free speech, in relation to the origin of acceptable criticism. Although the judges of the Court consider that freedom of expression in elected officials is another dimension compared to the ordinary people, it is clear that Perna was not just an individual, he has the quality of a journalist. And yet, in his case, judges of the Court delineated statements of fact from value judgments, admitting that in case of some statements interference in freedom of expression she was justified, necessary in a democratic society outweighs the protection of the rights of others.

**The report of proportionality between state interference in the right to free speech and the legitimate aim pursued**

As evident from the above, State intervention in the individual's freedom of expression must match the condition of necessity in a democratic society and a pressing social need, the state should take into account the origin of acceptable criticism. But for the interference with the right to freedom of expression not to be contrary to the provisions regulated in the European Convention on Human Rights, to conditions listed above are added to a major factor, namely to exist a *proportionality* between the state sanction and the legitimate aim pursued, this proportionality being examined by the potential impact that a person exercising his right to free speech can have.

*Regarding the existence of a proportionality report* between state interference in freedom of expression and the legitimate aim pursued by it, European Court of Human Rights reveals that the solution convicting a person must be proportionate to a legitimate aim envisioned by the authorities, otherwise the interference suffered by that person is not "necessary in a democratic society". An example of disproportionate it is revealed in the *Cause Barb v. Romania* ((European Court of Human Rights, judgement by the February, 21, 2005). The application to the Court, the applicant John Barb, a journalist, shows that he was sentenced to pay a criminal fine for the offense of insult, following the publication of an article which referred to that the German Forum President, P. D., promised employment of approximately 700 people, without a legal basis, even supporting training courses in German through his association, for which he received payment, although it did not have a certificate of teaching this language. In the content of the article, the journalist also said that although P. D. can not be held responsible for organizing courses, he "exploited the credibility of those who wanted to work". (ECHR, 2005). Considering that in the judgment of conviction has been infringed his right to freedom of expression, Barb asked the Court to declare the violation of Article 10 of the Convention.

Noting the reasons stated in the application, judges of the Court found a violation of the article, stating that the action taken by national authorities was disproportionate to the legitimate aim pursued and that they "have not provided relevant and sufficient reasons to justify it" (ECHR, 2005). Consequently, the Court concludes that the interference

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suffered by the applicant does not correspond to *the condition of necessity in a democratic society*.

*Regarding the examination of proportionate punishment through the potential impact generated*, ECHR judges have determined that, compared to print, audiovisual environments can produce immediate and strong effects by statements made, enjoying a considerable audience. For example, in *the Case Baadsgaard and Pedersen v. Denmark* ((European Court of Human Rights, judgement by December, 17, 2004) although the applicants requested to note that it was infringed his right to free speech by their conviction by the authorities to pay a criminal fine and damages, for transmitting a television station interview questioning the investigation of a crime, the Court found that the penalty imposed on them was proportionate to the legitimate aim pursued.

As shown in the documents in the case file, the applicants have expressed criticism about the murder investigation of a crime whose author was sentenced in 1982, disseminating within some programs at prime time, a person's interview stating that at the time of the crime he saw the convicted in another place. During the show it was displayed on the screen a photo of a policeman and his name, it was affirmed that in the case which was the subject of discussion samples were removed from the file.

ECHR judges qualified the journalists assessments regarding the investigation and the statements to the police as value judgments, but the accusation of stealing police evidence from the file it is a very serious one, requiring proof of veracity. Given this context, the Court considered, in this case there is no violation of Article 10 of the Convention.

The Court's reasoning reinforces the fact that, the report of proportionality between state interference in freedom of expression and the legitimate aim pursued must be examined in the light of the potential impact.

The issues presented in this article reflect that yet, delineation statements of fact from value judgments is clouded by confusion, the states disregarding, most often, the conditions of admissibility of interference in the right to free speech: the interference "to be necessary in a democratic society", it is conditioned by the existence of a "pressing social need", it should be reported to the origin of admissible criticism, it should be "proportionate to the aim pursued" and this proportionality to be examined by the potential impact.

In light of all these considerations, it can be said that the expression of value judgments and statements made that need to be probed are the essence of freedom of expression. It can be said, in this context, that freedom of expression could be redefined as "*sum of all value judgments and statements of fact susceptible of proof that a person has the right to express them, within their admissibility in a democratic society*".

This definition is based on the consideration that limiting the freedom of expression should be represented by admissibility in a democratic society of all value judgments and statements of fact susceptible of proof that a person claims and that all he must assume. Reporting to the limit of acceptable criticism in a democratic society is essential, since, in such a society outweighs individual freedom, freedom that can only be restricted to protect the freedom of another.

When there is interference of a state in the fundamental right to free speech, it should be taken into account all the points made in the European Court of Human Rights, described in this article. In contrast, compliance by a state individual's right to free speech should be a mere formality that affects individuals externalization of consciousness, no longer able to exercise conscience rights, this right is materialized by exercising the right



to free speech. This is how the restriction of a right can prevent the exercise of another right, between the two fundamental freedoms in question settling some interdependence. No right to free speech can be exercised without first having a free conscience, nor freedom of conscience can not be manifested in other way than exercising the right of free speech.

### **Conclusions**

Freedom of expression is not an absolute right and there's no need to generalize it, for no exercise of this right can be irresponsible and infinite, nor the restriction of this right can be unreasonable or without limits. To justify, however, rightly restricting the right to free speech, a state must provide sufficient arguments to prove the application of such measures in a democratic society, not merely be limited only to the invocation of the term "pressing social need" , which it uses when trying to prove that the interference with freedom of expression of an individual was proportionate to the aim pursued.

In fact, beyond all these issues highlighted which would justify restricting freedom of expression, the question of what point to what point can operate this restriction. If for factual statements likely proof of truth restricting freedom of expression is justified by the evidence itself, aiming to protect the interests of another, when issuing a value judgment, which means the expression of ideas that belong to the perfectionist values of a person, does not justify restricting freedom of expression.

The public authority must take into account that a value judgment is essentially a perfectionist value, and this perfectionist value takes the moral individual and does not require proof of truth, for it is impossible to prove an opinion related to a person's character, for example. For this reason, as author Dan Claudiu Dănișor emphasizes, "the liberal state, the exercise of freedoms and rights cannot be restricted to defend self perfectionist values" (Dănișor, 2014: 14). Restriction of basic freedoms is therefore only required to enable the protection of other fundamental freedoms. In this case, the interference with the right of a state to free expression is justified only when it is designed to protect the dignity, reputation or interests of another person, the State should take into account that the applied sanction is proportionate to the aim pursued. The necessity in a democratic society to restrict freedom of expression could not be justified by a state by ignoring the origin of acceptable criticism and proportionality of restricting this freedom to the legitimate aim pursued. Moreover, a state cannot justify the pertinent report of proportionality between restricting freedom of expression and the legitimate aim pursued if this proportionality is not examined in terms of the potential impact generated from exercising this right.

It is quite obvious that the right to free speech can be exercised without limits, which is why freedom of speech can be summed up in the idea of freedom, understanding by this term that a person would be entitled to do and say everything he/she wants without incurring any consequence. After all, freedom of expression must not allow an individual to harm the interests or reputation of another, even as restricting freedom of expression cannot operate on the basis that a person does not like the criticisms made against them by another person, for a restriction that would be based on such a consideration would be absurd. After all, as George Orwell said, "If liberty means anything at all it means the right to tell people what they do not want to hear" (Orwell, 1945: 17).

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