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I. Freedom of expression – the concept

It is not possible to talk about democracy without a free flow of information; therefore, freedom of expression represents a key element in modern society.

We can retrieve the notion of freedom of expression from article 19 of the Universal Declaration of Human Rights:

“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.”

It is important to retrieve the following: freedom of expression includes freedom to disseminate thought and opinion by every means possible, regardless of frontiers. It also includes freedom to seek and receive information which can be translated into freedom to be informed, freedom of press and freedom to receive and send information. Nowadays, the internet is a crucial instrument to exercise these freedoms.

Analysing the regional instruments, we will retrieve these elements and add others.

In the Council of Europe

The Council of Europe is an international organisation founded in 1949 aiming to uphold Human Rights, Democracy and the Rule of Law. At the moment, it is composed of 47 members. The decisions that emerge from the Council of Europe are not binding. The most important accomplishment of this institution is the creation of the European Convention for Human Rights in 1950 and its control mechanism. Up to 1998, the respect for the Convention was upheld by the European Commission on Human Rights. This changed with the entry into force of Protocol n.º 11 that determined the new functioning of the European Court of Human Rights as the protector and controller of the European Convention.

1. The European Convention on Human Rights

The European Convention on Human Rights was the first regional convention on this subject. It bounds every State Party to guarantee the rights and freedoms established in its text and provide internal mechanisms to protect them, to every individual in their jurisdiction, without discrimination and regardless of nationality.²

Regarding freedom of expression, we ought to analyse article 10 of this Convention:

*“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

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² MACHADO, Jónatas, “Direito Internacional – do paradigma clássico ao pós-11 de setembro”, 4th edition, Coimbra, Coimbra Editora, 2013, 419

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.”

In the European Convention, we can find limitations (perceived as a consequence of the duties and responsibilities the right implies) to freedom of expression. Freedom to hold opinions cannot be restricted in any way.

We can confront these limitations with those enshrined in the International Covenant of Political and Civil Rights (that we will analyse on Thursday)– there are more limitations in the European Convention, but more clarified.³

2. The European Court of Human Rights

The European Court of Human Rights was created, with permanent characteristic, with Protocol 11 to the European Convention of Human Rights in 1998. It has the competence to judge every question related to the interpretation and application of the European Convention and its Protocols.

States are entitled to present to the Strasbourg Court possible violations of the Convention against other States.

The Court will also receive cases from any individual, non-governmental organisation or individuals' groups who have been victims of violations of the Convention by any State Party.

Applications directed to the European Court of Human Rights will only be admissible if they fulfil the following criteria:

1. Victim of violation – the applicant should be a victim of a violation of a right enshrined into the European Convention by any Contracting Party (article 34)
2. Exhaustion of domestic remedies – when addressing a complaint to the Court the applicant must have exhausted all the remedies (article 35)
3. Six-month time-limit – the application directed to the Court should be addressed within 6 months after the final decision (article 35)
4. If it was never considered by the Court or other international court or similar (article 35)
5. Well-founded – to be admissible, the application has to be well-founded. (article 35)

The Court's case law has contributed to densify the interpretation of freedom of expression. Regarding the limitations imposed by the Convention, the Court created a 3- stage test to evaluate the conflicts between fundamental rights that emerge from the exercise of freedom of expression.

1st stage - the interference must be prescribed by law.

2nd stage – the interference must pursue a legitimate aim (*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*)

³ MOREIRA, Vital, GOMES, Carla Marcelino, “Compreender os Direitos Humanos – Manual de Educação para os Direitos Humanos”, 1st edition, 2013, p. 420

3rd stage – the interference must be necessary in a democratic society, which implies verifying whether the national intervention corresponds to a “pressing social need” – the, it must pass the proportionality test:

- 1) Appropriateness of the measure to achieve the aim
- 2) Possibility of adopting less intrusive measures by a State

Analysing the Court’s case-law, we will understand there is not a perfect consistency in the assessment of proportionality – it will also attend the country in question and the current situation.

Another notion produced by the ECtHR is the “margin of appreciation” – national authorities are allowed some margin of appreciation in certain cases because of the understanding and interpretation of the limitations fundamentals in the Convention can be understood differently regarding culture and living experiences in the different States. Although this is true, the ECtHR “reserves itself the position of final arbiter”.

The ECtHR also substantiates some decisions in article 17 in the cases of freedom of expression. Article 17 establishes the prohibition of abuse of rights – which reveals itself important when there is a violation of freedom of expression that is based on the exercise of another fundamental right.

II. In the European Union

1. The treaties

Although there is no mention of freedom of expression in the Treaties, we can find the mention of pluralism and defence of democratic values within.

Article 2 of the European Union Treaty states that

*“The Union is founded on the values of **respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.**”*

We can acknowledge in this article the values in which the EU is based upon. Therefore, it includes the essential values which also include freedom of expression, but it is also important to consider pluralism as a value that all Member States should respect – there is room for the realization of freedom of expression as an element that allows the exercise of this pluralism.

Article 6 conferred legal status to the EU Charter.

“1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.”

Freedom of Expression, as enshrined in the Charter, is then observed as a fundamental right that is to be respected by institutions, bodies, offices and agencies of the Union and also by the Member States when implementing EU Law.

It is also interesting to refer that number 2 of article 6, establishes that the European Union should accede to the European Convention on Human Rights (that we will analyse further). Although this was enshrined in the Treaty, the Court of Justice of the European Union rejected, in 2013 (Opinion 2/13), the negotiated accession agreement.⁴

Number 3 of article 6 of the Treaty of the European Union introduces the fundamental rights included on the European Convention on Human Rights as general principles of EU Law.

“3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.”

2. The Charter of Fundamental Rights of the European Union

Although it is not inserted in the European Union Treaties, the Charter is the most important text on fundamental rights of the European Union Law. It is the fundamental rights standard for the Member States when they are applying EU Law, and for the institutions, bodies, offices and agencies of the Union. In 2009, in Lisbon's Treaty, article 6 confers its legal status.

Being an integral part of the European Union Law, the application of the Charter is monitored by the Court of Justice of the European Union.

The only way to reach the Court of Justice is through prejudicial questions sent to the Court by the national Courts on the application and interpretation of European Law. There is no direct path to propose a case to the Luxembourg Court.

Freedom of Expression is configured in the Charter mirroring the European Convention on Human Rights. Article 52 of the Charter determines that the interpretation of every right and freedom described it is done in conformity with the “meaning and scope of those rights”⁵.

In article 11 of the Charter, we can testify the presence of various elements aggregated with freedom of expression, including freedom of opinion and freedom to receive and convey information and ideas. There is also comprehended the prohibition of interference by public authority and of limitations by borders.

Number 2 concerns itself with freedom of the press and establishes its need to pluralism.

“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.

2. The freedom and pluralism of the media shall be respected.”

In a synthesised way, article 11 contains all of the essential elements of article 10 of the European Convention and considering article 52 and the annotations of the Charter made by the *Praesidium*⁶; it also understands article 10's limitations to freedom of expression.

⁴ “The EU Accession to the ECHR after Opinion 2/13: Reflections, Solutions and the Way Forward”; <http://www.europarl.europa.eu/cmsdata/104503/EP%20Hearing%20Contribution%20MoranoFoadi%20Andre%20adakis%20April%202016.pdf>

⁵ Article 52 (3) of European Union Charter on Fundamental Rights

⁶ Explanations related to the Charter on Fundamental Rights, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214%2801%29>

The limitations of freedom of expression acceptable in the Charter are obtained from article 52 – a general clause of limitations applicable to every right considered within the text of the document.

The limitations should:

- 1) Have a legitimate aim – general interest recognised by the Union; aimed at protecting the rights and freedoms of others
- 2) Be necessary to the objective
- 3) Be proportional to the objective

Also here, the Court of Justice allows a broad margin of appreciation to national authorities to define what are “pressing social needs”.

The acceptable limitations for freedom of expression are those which are prescribed by law, needed 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”⁷.

III. Emblematic cases dealing with freedom of expression

*Garaudy v. France (2003)*⁸

The Facts: Mr Garaudy is the author of a book entitled *The Founding Myths of Modern Israel*, which was distributed through non-commercial outlets in 1995 and then republished at the author’s own expense in 1996 with another title.

Five separate sets of criminal proceedings were brought against the author under the Freedom of the Press Act of 1881. In spite of the author’s efforts to join the proceedings, they were decided separately. The Paris Court of Appeal found Mr Garaudy guilty of disputing the existence of crimes against humanity, public defamation of a group of people- namely the Jewish Community - and incitement to discrimination and racial hatred. The convictions were upheld by the Court of Cassation in five judgments in 2000. The prison sentences (suspended) were to be served concurrently, and the fines totalled 25.900€ and the compensation of more than 33.500 € awarded to civil parties.

Complaint: The applicant complained under article 10 of the Convention of Human Rights (ECHR) that his right to freedom of expression had been infringed. He argued that his book was a political work written with a view to combating Zionism⁹ and criticising Israeli policy and had no racism or anti-Semitic content. He also argued that, since he could not be regarded as a revisionist, he should have been afforded unlimited freedom of expression.

Court’s decision related to article 10: With regard to Mr Garaudy’s convictions for disputing the existence of crimes against humanity, the Court referred to Article 17 (prohibition of abuse of rights), which was intended to prevent people from inferring from the Convention any right to engage in activities or perform acts aimed at the destruction of any of the rights and freedoms set forth in the Convention. The ECtHR considered the argumentation made by the domestic court – as the real purpose of the work was to rehabilitate the National-

⁷ Article 10 (2) of the European Convention on Human Rights

⁸ <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-788339-805233&filename=003-788339-805233.pdf>

⁹ Nationalist movement of the Jewish people that supports the re-establishment of a Jewish homeland in the territory defined as the historic Land of Israel (roughly corresponding to Canaan, the Holy Land, or the region of Palestine)

Socialist regime and, as a consequence, to accuse the victims of the Holocaust of falsifying history. This denial or rewriting of historic facts constituted a serious threat to the public order, and it was incompatible with democracy and Human Rights, and therefore, it was inadmissible under article 17 of the Convention.

Regarding Mr Garaudy's convictions for racial defamation and incitement to racial hatred, the Court found that they could constitute an interference with his right to freedom of expression. The interference was prescribed by the Act of 29 July 1881 and had at least two legitimate aims: "the prevention of disorder or crime" and "the protection of the reputation or rights of others". However, for the same reasons as those set out above and in view of the overall revisionist tone of the work, the Court had serious doubts as to whether the passages on which his convictions were based could qualify for protection under Article 10. Mr Garaudy did not confine himself to criticism to State policy, that would be protected by Article 10 – the writing had a clear racist objective. But, the Court considered that it would not be necessary to decide on the issue as the domestic court's argumentation for the conviction was enough,

In sum: The Court considered that the book, as a whole, had a marked tendency for revisionism and therefore its statements were contrary to the fundamental values of the Convention – it should not be analysed upon article 10, as the limitation was founded by law and necessary to a democratic society. The complaint on the violation of Article 10 related to the conviction of racial defamation and incitement to racial hatred was considered ill-founded.

Erbakan v. Turkey (2006)¹⁰

Facts: Necmettin Erbakan is a Turkish national. He is a politician and was Prime Minister of Turkey from June 1996 to June 1997. He was chairman of Refah Partisi (the Welfare Party), which was dissolved in 1998 for engaging in activities contrary to the principles of secularism.

On 25 February 1994, during the local election campaign, the applicant gave a public speech in south-east Turkey. No official recording of the speech was made. In July 1998, criminal proceedings were brought against Mr Erbakan for having incited the people to hatred or hostility through comments made in his 1994 speech about the distinction between religions, races and regions. In March 2000, the State Security Court convicted Mr Erbakan and sentenced him to one year's imprisonment and a fine.¹¹ In July 2000 the Court of Cassation dismissed an appeal and upheld the conviction.

Complaint: Mr Erbakan complained that his conviction had infringed his right to freedom of expression and submitted that his case had not been heard by an independent and impartial tribunal on account of the presence of a military judge among the members of the State Security Court. He argued a violation of article 10 and article 6, §1 of the Convention.

Court's decision related to article 10: With regard to the comments attributed to the applicant, the Court considered that by using religious terminology in his speech, he had, among other things, reduced diversity – a factor inherent in any society – to a simple division between "believers" and "non-believers" and had called for a political line to be formed on the basis of religious affiliation. The Court further noted that at the material time the region's inhabitants had been victims of a number of tragic acts perpetrated by fundamentalist movements. Although the Court pointed out that combating all forms of intolerance was an

¹⁰ <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-1728198-1812055&filename=003-1728198-1812055.pdf>

¹¹ Taking into account the situation at the material time in the city of Bingöl, where the inhabitants had been victims of terrorist acts perpetrated by an extremist organisation, the State Security Court concluded that the applicant, in particular by making a distinction between "believers" and "non-believers", had overstepped the acceptable limits of freedom of political debate.

integral part of human rights protection and that it was crucially important that in their speeches politicians should avoid making comments likely to foster such intolerance; it had to ascertain whether there were compelling reasons that could justify a severe penalty in relation to political speech.¹²

The Court noted in particular that the authorities had not sought to establish the content of the speech in question until five years after the rally and had done so purely on the basis of a video recording whose authenticity was disputed. The ECtHR also considered that it was particularly difficult to hold the applicant responsible for all the comments cited in the indictment. Furthermore, it had not been established that at the time of his prosecution the speech in question had given rise to, or been likely to give rise to, a “present risk” and an “imminent danger”. Lastly, the Court took into account the extremely severe sentence imposed on such a well-known politician.

In sum: The Court considered that the criminal proceedings instituted against a politician four years and five months after the alleged comments had been made had not been *reasonably proportionate to the legitimate aims pursued*, regarding the interest of a democratic society the importance of ensuring and maintaining freedom of political debate was prevalent.

IV. The Court’s techniques – practical exercise

Case-study

Relevant facts:

- The applicant, Mr A, is a chairman of a political party “National Front” and the editor in chief of the party’s publication and website owner.
- He is also a member of the House of Representatives.
- During the electoral campaign leaflets from Mr A’s party were distributed. Those leaflets claimed to “oppose to the Islamization of the country”, “return non-European unemployed”, “stop the pseudo-integration policy”, “reserve for country’s citizens and Europeans priority in Social Security”.
- Criminal proceedings were held against Mr A. His parliamentary immunity was waived, and Mr A was convicted to 250 hours of community service related to the integration of immigrants and to a 10-year suspended prison sentence. The Court also declared him ineligible for 10 years. He also was ordered to pay one euro to each of the civil parties.
- The domestic court found that the offending conduct of Mr A had not fallen within his parliamentary activity and the leaflets contained passages that represented a clear and deliberate incitation of discrimination, segregation or hatred and violence based on race, colour or national or ethnic origin.
- The subsequent appeal was dismissed on points of law.

Complaint:

Mr A complaint to the European Court of Human Rights relying on article 10, alleging that his conviction for the content of his political party’s leaflets represented an excessive restriction on his right to freedom of expression.

Analyse:

- **The Admissibility criteria** – Was the application admissible considering the ECtHR’s admissibility criteria?

¹² In cases of political discourse, the Court usually applies a wider margin of appreciation, considering the importance of freedom of political debate in a democratic society.

- Alleged violation of a right enshrined in the European Convention of Human Rights
 - Victim status
 - Exhaustion of domestic remedies
 - Well-founded
 - The complaint has not been examined by the Court
- Applying the 3-stage test to evaluate
 - Article 10 – a violation of freedom of expression
 - Article 17 – abuse of the right
 - Non-violation
 - Non-admissible to Court

Conclusion:

Facts – Mr Ferét is a Belgian national and a chairman of the political party “Front National” and the editor in chief of the party’s publications and owner of its website. He was a member of the Belgian House of Representatives at the relevant time. During the electoral campaign leaflets from Mr Ferét’s party were distributed. Those leaflets claimed to “oppose to the Islamization of the country”, “return non-European unemployed”, “stop the pseudo-integration policy”, “reserve for country’s citizens and Europeans priority in Social Security”. The Court found that the offending conduct on the part of Mr Ferét had not fallen within his parliamentary activity and that the leaflets contained passages that represented a clear and deliberate incitation to discrimination, segregation or hatred, and even violence, for reasons of race, colour or national or ethnic origin.

Decision: The interference with Mr Féret’s right to freedom of expression had been provided for by law (law of 30 July 1981 on racism and xenophobia) and had the legitimate aims of preventing disorder and of protecting the rights of others. The Court observed that the leaflets presented the communities in question as criminally minded and keen to exploit the benefits they derived from living in Belgium, and that they also sought to make fun of the immigrants concerned, with the inevitable risk of arousing, particularly among less knowledgeable members of the public, feelings of distrust, rejection or even hatred towards foreigners.

While freedom of expression was important for everybody, it was especially so for an elected representative of the people: he or she represented the electorate and defended their interests. However, the Court reiterated that it was crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. The impact of racist and xenophobic discourse was magnified in an electoral context, in which arguments naturally became more forceful. To recommend solutions to immigration related problems by advocating racial discrimination was likely to cause social tension and undermine trust in democratic institutions. In the present case there had been a compelling social need to protect the rights of the immigrant community, as the Belgian courts had done. With regard to the penalty imposed on Mr Féret, the Court noted that the authorities had preferred a 10-year period of ineligibility rather than a penal option, in accordance with the Court’s principle of restraint in criminal proceedings. The Court thus found that there had been no violation of Article 10. The Court added that the remainder of the application was inadmissible.

Final remarks:

- Freedom of expression is essential for the existence of a plural, free democracy.

- It is important to maintain contrary ideas in discussion – respecting the others point of view.