



Research Article

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The right to freedom of expression and its limitations according to Albanian legislation

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Abstract

The right to freedom of expression, not without purpose provided for in the first amendment of the Constitution of the United States of America, is one of the main basic rights on which modern democratic states were founded. The enjoyment of this freedom is closely related to a series of other equally basic rights, such as freedom of belief, freedom of organization, the right not to be harassed for personal opinions, the freedom to be attached to a certain political party, etc (Salvatore, 2019). The right to freedom of expression is one of the oldest freedoms that arose as a result of freedom of religion, mentioned by the first Christian writers during the II-III century, and then during the conflicts between Catholics and Protestants in the centuries XVI-XVII.

On the other hand, it was encouraged and elaborated by the great theorists of the freedom of scientific research (just think of Descartes and Galileo) and of political freedom (such as Milton). Later, the right of Freedom of Expression was elaborated by philosophers of the XVIII-XIX centuries such as Voltaire, Fichte, Bentham. In this sense, John Stuart Mill said that freedom of expression protects us from corrupt power, tyranny, and this freedom is one of the basic guarantees for an open and pluralistic society (Mihajlova, Bacovaska and Shekerxhiev, 2013). Since the circulation of ideas is a prerequisite for the communication of thought, the freedom of expression or manifestation of thought has always been considered by Italian constitutional jurisprudence as the cornerstone of the democratic system (Bin and Pitruzzella, 2012). Main objective of this manuscript is the analysis of the Albanian legislation and jurisprudence about the freedom of expression.

Keywords: The right, freedom of expression, limitations, Albanian legislation.

1. Introduction

The Strasbourg Court has stated that freedom of expression is one of the cornerstones of a democratic state. Without the guarantee of this right, there can be no talk of pluralism, tolerance and the creation of free political will, so necessary for a

democratic society. Later it reiterated that the right to freedom of expression is basic for a democratic society, one of the basic conditions for its development and the self-fulfillment of each individual.¹ Meanwhile, the Constitutional Court of the Republic of Albania stated that freedom of expression is objectively related to the principle of building a democratic state, stated in the preamble of Albania's Constitution. The implementation of this important principle also means the guarantee of freedom of expression.² In a political regime where freedom of expression is absent, there can be no question of the existence of democracy, and the democratization of a legal order is directly proportional to the degree to which freedom of expression is recognized and implemented (Anastasi and Omari, 2010).

2. The concept and origin of freedom of expression

The freedom of expression provided by the Constitution of the Republic of Albania in the first paragraph of Article 22 should be understood not only as a right to freely express personal opinions but also as a right to remain silent, as a right to use any technical means to spread personal opinions as well as a right to inform and to be informed. In contrast to the Constitution of the Republic of Italy and the ECHR, the Constitution of the Republic of Albania guarantees freedom of expression in the narrow sense and the right to information in two separate provisions, respectively in its articles 22 and 23. The law with the highest power in our legal system has sanctioned that fundamental rights and freedoms in general, as well as freedom of expression in particular, are at the foundation of the entire legal order. Also, the Constitution obliges state bodies to respect freedom of expression and to contribute to the realization of this freedom, which is so important in a democratic regime (Art. 15 of the Albanian Constitution). It should be emphasized that the freedom of expression, so important for the formation of the democratic state and the development of society, has been implemented de facto in our social order only after the fall of the communist dictatorial regime.

During the communist regime of the years 1946-1990, in the Republic of Albania, the freedom of expression and the press were deeply compromised and limited. I say limited because these freedoms only served to spread totalitarian ideas and did not aim at the democratization of the Albanian society of that period. Both the 1946³ and 1976⁴ constitutions provided for freedom of expression and freedom of speech only

¹ Ahmed v. UK, Ap Nr.22954/93, p. 55.

² Decision No. 16, dated 11.11.2004 of the Constitutional Court of Albania.

³ The Constitution of the People's Republic of Albania, approved in 1946, in its article 20 expressly provides that: *All citizens are guaranteed freedom of speech, press, organization, assembly, assembly and public manifestation.*

⁴ The Constitution of the People's Socialist Republic, approved with law no. 5506 dated 28.12.1976, in article 53 provided that: *Citizens enjoy freedom of speech, press, organization, assembly, meeting and public manifestation. The state guarantees the realization of these freedoms, creates conditions for them and makes available the necessary material means.*

theoretically because practically this freedom so important for the democratic system based on ideological pluralism has started to be implemented not only *de jure* but also *de facto* after the fall of the communist regime in the early 90s. The recognition of freedom of expression allows each subject to express his thoughts, spread and propagate them. Through this mechanism, the dialectical confrontation between subjects in different positions is realized, which concretizes the democratic dimension of a society at a given time. The object of freedom of expression according to Article 22 of the Constitution does not have to do with the right to communicate freely with someone in a specific way, but it has to do with the right to communicate the personal thoughts of an undefined sphere of people. Freedom of expression consists in the freedom to spread personal ideas to an indefinite group of people (Caretti and Barbieri, 2017). Here it differs from the freedom of communication provided for in Article 36 of the Constitution.⁵ More specifically, our Constitution in its 36th article protects the freedom and privacy of any form of communication.

In contrast to the freedom of expression provided for in Article 22, the freedom of communication provided for in Article 36 protects the expression of opinion in secret. The constitutional provision of article 36 together with the constitutional provisions provided by articles 35⁶ and 37⁷ protect a very important right of the person such as the right to privacy⁸ and the protection of personal data.⁹ In other words, if someone writes an open letter in a newspaper or magazine, he does so to spread his thoughts as much as possible, but if he writes a letter in a closed envelope to his friend, he wants his thoughts only for the recipient of the letter specifically. In the first case we are dealing with the freedom of expression provided for in Article 22, while in the second case we are dealing with Article 36 of the Constitution.

⁵ The Constitution of the Republic of Albania, Article 36, provides that: *Freedom and secrecy of correspondence or any other means of communication are guaranteed.*

⁶ The Constitution of the Republic of Albania, Article 35, provides that: *1. No one can be forced, except when required by law, to make public data related to his person. 2. The collection, use and making public of data about the person is done with his consent, except for the cases provided by law. 3. Everyone has the right to know the data collected about him, except for the cases provided by law. 4. Anyone has the right to request the correction or deletion of false or incomplete data or collected in violation of the law.*

⁷ The Constitution of the Republic of Albania, Article 37, provides that: *1. The inviolability of the residence is guaranteed. 2. Controls of the apartment, as well as of the environments that are united with it, can be done only in the cases and in the ways provided by law. 3. No one can be subject to a personal search outside of the criminal process, except in cases of entering and leaving the territory of the state or to avoid a risk that threatens public security.*

⁸ It should be noted that the right to privacy refers to the right to confidentiality of one's personal information and private life. This principle, very important for the Constitution, is used as a tool to protect the intimate sphere of the individual and aims to prevent the disclosure of information in the absence of specific authorization and the intervention in the private sphere by third parties.

⁹ Personal data protection is related to data processing. In its definition, in addition to the principle of confidentiality, the principle of availability and integrity of personal data is provided. The right to the protection of personal data protects the individual beyond the sphere of private life and social relations, guaranteeing self-determination in decision-making and control over the circulation of his data.

3. Means and constitutional guarantees for realizing freedom of expression

As for the means to realize the right to freedom of expression, it should be underlined that the Constitution of Albania, unlike the Constitution of Italy,¹⁰ does not expressly provide for their ranking. However, it must be said that the means to exercise freedom of expression are different. Freedom of expression is exercised through speech, writing, press, cinema, videotapes, radio and television, electronic media, messages sent through the Internet, as well as any tool that helps spread the word (Anastasi and Omari, 2010).

One of the most important tools to achieve freedom of expression at the time of drafting and approval of the current Constitution was undoubtedly the press,¹¹ radio and television.¹² For this reason, the constitutionalist, in the second paragraph of Article 22, has sanctioned the freedom of press,¹³ radio and television.¹⁴ The guarantee of freedom of the press and radio and television by the Constitution was undoubtedly a very important step for the democratization of the country after the dictatorial period. Also, the freedom of the press and radio and television helps to realize the freedom of expression. Another very important guarantee for promoting or concretizing freedom of expression is provided in the third paragraph of the same constitutional provision object of research. This guarantee consists in the prohibition of reverse censorship of means of communication.¹⁵ The ban on censorship should be understood as a ban on subjecting the press production activity and its content to prior administrative control.

Based on the third paragraph of the constitutional provision number 22, we can come to the conclusion that anyone who wants to publish a book, an article, a newspaper, etc., does not need to have any kind of authorization or prior approval for publication as well as the content of this article is not subject to censorship in advance (Anastasi and Omari, 2010). The constitutionalist has delegated to the law the regulation of the authorization or registration of radio and television stations.¹⁶ It should be emphasized

¹⁰ The Constitution of the Republic of Italy, in the first paragraph of Article 21, provides that: *Everyone has the right to freely express their opinion in words, in writing and with any other means of dissemination.*

¹¹ With this word should be understood everything that is published through printed paper to spread news and different opinions, such as newspapers, magazines, books, etc.

¹² In this case, by radio and television, it must be understood any state or private organization that manages radio and television broadcasts.

¹³ The Constitution of the Republic of Albania, second paragraph, article 22, provides that: *Freedom of the press, radio and television is guaranteed.*

¹⁴ Media pluralism in Albania began after the fall of communism in the early 90s. Moreover, private media started their activity without having a law regulating their work. The years 1994-1995 mark the beginning of the activity of private media (radio and television) in the Republic of Albania. As is known, the activity of private radios and televisions started much earlier than what was defined by law 8410/1998.

¹⁵ The Constitution of the Republic of Albania, paragraph three, article 22, provides that: *Prior censorship of means of communication is prohibited.*

¹⁶ The Constitution of the Republic of Albania, paragraph 4, article 22 provides that: *The law may require the granting of authorization for the operation of radio or television stations.*

that the granting of authorization or registration of the media entity is an act which does not require any kind of evaluation but serves to formalize the legal personality of the applicant by the competent state body.¹⁷ Legislation cannot establish criteria that prevent the realization of freedom of the press and radio and television, which are guaranteed by the Constitution, the law with the highest legal power. At the time of writing, it should be noted that there is no obstacle to their registration. A major problem at the moment we are writing remains the transparency of the financing of private media, which can affect the freedom of expression and the realization of the protection of human rights.

4. Freedom of expression as a relative and not absolute right

The Constitution of the Republic of Albania in its article 22, unlike the Constitution of the Republic of Italy, does not expressly provide for any limit regarding freedom of expression. The Italian Constitution, in the last paragraph of Article 21,¹⁸ foresees social morality as the only limit for freedom of expression. Constitutional doctrine and constitutional jurisprudence have stated that this limit refers to the possible violation of the sphere of sexual modesty (Caretti and Barbieri, 2017). *Il buon costume*, represent the only express limit that the Italian constitutionalist has placed on freedom of expression. Most have connected social morality with the criminal notion identified with the common sense of decency and related to the sphere of sexual morality (Tresca, 2020). It is clear that, precisely as it refers to sexual morality, the limit of good habits is related to the evolution of habits (Bin and Pitruzzella, 2012). In addition to this limitation clearly expressed by the Constitution, it should be noted that the right to freedom of expression is limited in many other cases to guarantee some other rights found in the Constitution. More specifically, the right to freedom of expression is not an absolute right but a relative right-freedom which can be limited to protect the right to honor and reputation, the right to privacy, the security of the state, the right to children etc. It should be emphasized that it does not mean that the rights mentioned above prevail over the freedom of expression automatically in case of conflict, but the legislator and the Constitutional Court will establish a fair balance of these interests in the agreement.

4.1 Restriction of freedom of expression for the protection of honor and reputation

The right to honor and reputation is closely related to human dignity. With the development of constitutionalism, Constitutions have given a primary role to human

¹⁷ The competent authority for audiovisual media activity in Albania is AMA. The Audiovisual Media Authority (AMA) is an independent public legal entity and operates based on law no. 97/2013 "For audiovisual media". Based on the aforementioned law, AMA regulates the field of audio and audiovisual broadcasting services and other supporting services in the territory of the Republic of Albania.

¹⁸ The Constitution of the Republic of Italy, last paragraph, Article 21, provides that: Publications in the press, performances and all other manifestations contrary to social morality are prohibited. The law determines the appropriate measures for the prevention and punishment of violations.

dignity. The Constitution of the Republic of Albania in its basic principles¹⁹ provides²⁰ that human dignity is the basis of the state and it has the duty to respect and protect it.²¹ The criminal protection of honor and reputation is realized in the provision as a criminal offense of insult and defamation by the current Criminal Code. Insult means²² the violation of honor and personal dignity by defamatory words or gestures that are evaluated on a case-by-case basis (Elezi, 2009). While defamation has to do with the intentional dissemination of information that is known to be false, which violates the honor and dignity of a person, it is worth mentioning the fact that the criminal doctrine is based on the idea that defamation violates not only the honor and reputation of the physical person who is alive but also of the person who has died due to the fact that the entire social opinion towards his memory changes (Elezi, 2009).

4.2 Restriction of freedom of expression to protect privacy

Freedom of expression is limited to protect the person's right to privacy. As I have emphasized above, the right to privacy, has to do with the privacy and protection of the person's personal data, which in Albania have constitutional and legal protection. In Albania, there have been many cases where photos of politicians regarding their private lives have been made public. So the means of using the freedom of expression, by using this widely recognized and protected right, have narrowed another equally important right, such as the right to enjoy a quiet private life.

4.3 Restriction of freedom of expression for the protection of children's rights

Freedom of expression may be limited to protect children's rights. The Constitution of the Republic of Albania²³ provides that children have the right to a special protection from the State, taking into account the fact that they are the weakest strata of society. The legislation in force prohibits the publication of data or images of children that lead directly or indirectly to the identification of the child involved in a criminal process. Law on Audiovisual Media no. 97/2013 classifies minors as groups that

¹⁹ The basic principles of the Constitution are those general principles expressed in the Constitution that regulate the entire state legal system.

²⁰ These principles are provided by articles 1-14.

²¹ The Constitution of the Republic of Albania, Article 3, provides that: Independence of the state and the integrity of its territory, human dignity, rights and freedoms, social justice, constitutional order, pluralism, national identity and national heritage, religious coexistence, as well as the coexistence and understanding of Albanians with minorities are the basis of this state, which has the duty to respect and protect them.

²² The Criminal Code of the Republic of Albania, Article 120, provides that: *Intentional insulting a person constitutes a criminal misdemeanor and is punishable by a fine or imprisonment of up to six months. And this act, when committed universally, constitutes a criminal misdemeanor and is punishable by a fine or imprisonment of up to one year.*

²³ The Constitution of the Republic of Albania, Article 54, provides that: 1. Children, young people, pregnant women and new mothers have the right to special protection from the state. 2. Children born out of wedlock have equal rights with those born out of wedlock. 3. Every child has the right to be protected from violence, abuse, exploitation and use for work, and especially under the minimum age for child labor, which may harm health, morals or endanger his life or normal development.

must be protected from the harmful effects that may come from media content. More specifically, this law clearly provides that one of the most important obligations of audiovisual service providers is not to broadcast pornographic programs without ensuring the protection of minors through conditional access devices and parental control. This Law establishes rules for advertisements that may be considered harmful to minors, including the restriction or prohibition of advertisements for alcohol,²⁴ harmful foods or content that may be considered to negatively affect the well-being of children.

4.4 Restriction of freedom of expression in the interest of justice

The Constitution of the Republic of Albania in its article 7²⁵ provides for the principle of separation and balance between the legislative, executive and judicial powers. This principle is very important for the state organization and constitutes the cornerstone for a democratic state. Constitutional law theorists have stated that one of the powers that is not explicitly mentioned in the constitutional provision is undoubtedly the power of the media through which the freedom of expression is partially realized. The power of the media is considered as the fourth power for its capacity to influence decision-making centers and the formation of public opinion. Freedom of expression through the power of the media can compromise the institutions of justice in providing justice in an objective manner. Unfortunately, in Albania, the publication of information during the investigation phase has often made it difficult for the justice institutions to exercise their powers with objectivity and impartiality. In this case, a balance must be made between the need for information on court cases on the one hand and not to influence these cases from the flow of information. Criminal legislation condemns the publication of information and acts that should not be published during a criminal process.²⁶ Witnesses and co-workers of justice enjoy a

²⁴ The law on audiovisual media in the Republic of Albania no. 97/2013, in paragraphs 5 and 7 of article 42, provides that: *Communications of a commercial nature in audiovisual broadcasts about alcoholic beverages are not allowed to be addressed especially to children, they must avoid following them by minors and should not encourage their excessive use by adults; while in the fifth paragraph it is provided that: Communications of a commercial nature in audiovisual transmissions must prevent the infliction of moral and physical harm to minors, as well as not expose them in an abusive manner to dangerous situations for them. Therefore, they should not encourage or push minors to buy or receive products or services, directly encouraging them to ask their parents or other relatives to receive the advertised goods or services, or to take advantage of the position of children in relation to their parents, teachers or other persons close to them.*

²⁵ The Constitution of the Republic of Albania, Article 7, provides that: *The system of government in the Republic of Albania is based on the division and balance between the legislative, executive and judicial powers.*

²⁶ The Criminal Code of the Republic of Albania, paragraphs 3, 4, 5 of Article 295/a, provides that: *Disclosure of secret acts or data, containing secret acts, by the prosecutor or judicial police officer, as well as non-compliance with the obligations of defined in article 103 of the Code of Criminal Procedure, shall be punished by imprisonment from one to five years. The disclosure of secret acts or data contained in secret acts by other persons, who have knowledge of data for the criminal proceedings and who have been warned by the prosecutor or judicial police officer for their non-disclosure, is punishable by imprisonment for up to three years. The disclosure of secret data, related to the identity, the process of cooperation, protection or the location of witnesses and associates of justice, who benefit from special protection, according to the laws in force, is punishable by imprisonment from two to six years.*

special protection in the criminal legislation.²⁷

4.5 Restriction of freedom of expression for the protection of national security

Freedom of expression may be limited to the disclosure of some information as a state secret. State secrets are considered military, political, economic data defined by law, which are stored and kept by certain persons, to whom they have been entrusted based on established rules (Elezi, 2009). State secrecy is closely related to national security. According to the legislation in force, national security has to do with the protection of independence, territorial integrity, constitutional order and relations with foreign countries of the Albanian State, while state secret means classified information according to the relevant law, the exposure of which without authorization may expose national insurance.

The criminal legislation in force condemns the distribution or dissemination of information classified²⁸ as a state secret not only to the competent classification authority but also to other citizens who may be aware of the information.²⁹ State secrecy is necessary for the protection of the country's interests, but the issue that is raised all the time during this discussion is if governments use this instrument to hide things that society should know and if it is made known, it leads to a lack of trust in them. It is the duty of the state to use the state secret to guarantee national security, but at the same time it is the duty of the citizens to watch their governments not to abuse this instrument to hide scandals or illegal actions during governance.

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²⁷ The Criminal Code of the Republic of Albania, article 313/b, provides that: *1. Making public, even in media bodies, contrary to the law, classified and confidential information that endangers the life, physical integrity or freedom of persons protected, according to law no. 9205, dated 15.3.2004 "On the protection of witnesses and associates of justice", shall be punished with a fine or imprisonment of up to two years and, when the commission of this offense has resulted in serious health consequences theirs, with imprisonment from 6 months to three years. 2. When this offense is committed by one of the persons who have the responsibility to maintain the classified and confidential nature of the data, it is punishable by a fine or imprisonment of up to three years and, when the commission of this offense has serious health consequences theirs, with imprisonment from two to five years. 3. When the offense resulted in death, it is punished with imprisonment from three to ten years.*

²⁸ The Criminal Code of the Republic of Albania, article 294, provides that: *The telling, spreading and informing of facts, figures, content of documents or materials which, according to the publicly known law, constitute a state secret, by the person who has been trusted or who could become aware of them due to duty, shall be punished with a fine or imprisonment of up to five years. And this crime, committed universally, is punishable by a fine or imprisonment of up to ten years.*

²⁹ The Criminal Code of the Republic of Albania, article 295, provides that: *Telling, disseminating and informing of facts, figures, content of documents or materials that, according to the publicly known law, constitute a state secret, by anyone who may have become aware of they are punished with a fine or imprisonment of up to three years. And this crime, committed universally, is punishable by a fine or imprisonment of up to five years.*

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