FREEDOM OF SPEECH. CONSIDERATIONS ON CONSTITUTIONAL COURT'S DECISION NO. 649/2018

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Abstract

Pursuant to article 30 paragraph (1) of the Constitution, freedom of expression is inviolable, but according to article 30 paragraphs (6) and (7) of the same Constitution, it cannot prejudice the dignity, honour, private life of the person and nor the right to one's own image, being forbidden by the law the defamation of the country and the nation, the exhortation to war of aggression, national, racial, class or religious hatred, incitement to discrimination, territorial separatism or public violence, as well as obscene, contrary to good morals. The limits of freedom of expression fully accord with the notion of freedom, which is not and cannot be understood as an absolute right. The legal and philosophical concepts promoted by democratic societies admit that a person's freedom ends where the other person's freedom begins.

Keywords*: freedom of speech, freedom of expression, limits, Constitutional Court, decision.*

1. Introduction

In the autumn of 2018, some changes to the Chamber of Deputies' Regulations, which essentially concerned the following issues, were subjected to the Constitutional Court's analysis:

a) the imposition of a ban on MPs concerning the adoption of defamatory, racist or xenophobic behaviour and languages and the holding of placards or banners in parliamentary debates;
b) the imposition of a sanction for deviations from the Regulation, worded as follows: "without prejudice to the right to vote in the plenary sitting and subject to a strict compliance with the rules of conduct, temporary suspension of the MP's participation in all or part of the activities of the Parliament for a period of two to thirty working days".

The decision of the Constitutional Court in question[1], whose considerations will be given below, has brought to the attention of law specialists, as well as the general public, the complex content[2] of the freedom of expression, enshrined at constitutional level by the provisions of article 30 of the Basic Law[3], which is why

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[1] Judgment of the Constitutional Court no.649/2018, published in the Official Journal of Romania, Part I, no. 1045 of 10 December 2018.

[2] In this regard, see, widely, Muraru, Ioan and Tănăsescu, Elena Simina (coord.), 2008, p. 89 et seq.

[3] According to article 30 of the Romanian Constitution, with the marginal name "Freedom of expression": " (1) Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, whether by spoken words, in writing, in pictures, by sounds or any other means of communication in public, is inviolable. (2) Any kind of censorship is prohibited. (3) Freedom of the press also involves free founding of publications. (4) No publication may be suppressed. (5) The law may require that the mass media disclose their financing sources. (6) Freedom of

we believe that the legal community will find the use of a paper which addresses, in a systematic manner, the emphasis added in the case-law of the Constitutional Court of Romania.

2. The political dialogue and the freedom of expression

With regard to the above-mentioned prohibition, the Court held that by its Decision no.77/2017 regarding the Code of conduct for deputies and senators, the legislator has established in article 1 para. (3) that "Deputies and Senators have the duty to act with honour and discipline, taking into account the principles of separation and balance of powers in the state, transparency, moral probity, responsibility and obedience of the reputation of the Parliament". As to the conduct to follow, article 6 of the Code provides that "Deputies and senators must ensure, through attitude, language, conduct and carriage, the solemnity of the parliamentary meetings and good progress of the activities conducted into the parliamentary structures" [para.(1)] and "not to use offensive, indecent or calumnious expressions or words" [para. (2)].

Thus, through this decision of the Parliament of Romania, the reputation of the Parliament is recognized as a value protected through regulations and rules of conduct, alongside with the principles of separation and balance of state powers, transparency, moral probity and accountability. The reputation of the Parliament, as the sole legislative authority of the country is valued, according to the conditions in which the deputies and senators act with honour and discipline, adopting the attitude, language, conduct and the outfit that would ensure the solemnity of the parliamentary meetings and the good progress of activities into the parliamentary structures.

Also, according to article 232 of the Regulation of the Chamber of Deputies, as it was amended through the single article point 5 of the Decision of the Chamber of Deputies no.47/2018, "Deputies, as representatives of the people, exercise their rights and meet their duties throughout the whole time of the legislature for which they were elected. Deputies are obliged, through their behaviour, to keep the dignity of the Parliament, to follow the values and the principles defined in the Statute of the MPs, in the Code of Conduct of Deputies and Senators, as well as into internal regulations. The behaviour of the deputies is characterized by mutual respect and should not compromise the ongoing parliamentary works, the maintaining of the security and internal order" [para. (1)]; "In parliamentary debates, deputies are bound to obey the rules of conduct, of courtesy and parliamentary discipline, to refrain from committing deeds that prevent or hamper the activity of other MPs, from using or showing provocative, injurious, offensive, discriminatory or calumnious expressions" [para.(2)].

Based on the constitutional provisions of article 61 on the role and the structure of the Parliament and of article 64 on the internal organization of each Chamber of the Parliament, the Constitutional Court underlined, in its case-law, that "each Chamber is entitled to set, within the limits and with respect of the constitutional provisions, the rules of organization and

expression shall not be prejudicial to dignity, honour, privacy of person, nor to one's right for his own image. (7) Defamation of the Country and Nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morals are forbidden by law. (8) Civil liability for any information or creation released for the public falls upon the publisher or producer, author, producer of an artistic performance, owner of copying facilities, or radio or television stations, subject to the law. Indictable offences of the press shall be established by law".

operation, which, in their substance, make up the Regulation of each Chamber. As a result, the organization and functioning of each Chamber of the Parliament are established through its own regulations, adopted through the decision of each Chamber, with the vote of the majority members of that Chamber. Thus, in virtue of the principle of regulatory autonomy of the Chamber of Deputies, established in art.64 paragraph (1) first sentence of the Constitution, any regulation concerning the organization and the functioning of the Chamber of Deputies, who is not provided by the Constitution, may and must be established through its own Regulation. Consequently, the Chamber of Deputies is sovereign in adopting the measures considered needed and advisable for its good organization and operation"[4].

The Court also retained that, "in the field of parliamentary law, the main consequence of the elective nature of the representative mandate and of the political pluralism is the principle suggestively enshrined by the doctrine as *the majority decides, while the opposition expresses itself*. The majority rules whereas by virtue of the representative mandate received from the people, the majority opinion is allegedly presumed that reflects or meets the majority opinion of the society. The opposition expresses itself as a consequence of the same representative mandate, underlying the inalienable right of the minority to make known its political options and to oppose, in a constitutional manner, the majority in power. This principle assumes that through the organization and the functioning of the Chambers of the Parliament, it is ensured that the majority decides only after the opposition had a chance to express itself, and the decision which it adopts is not obstructed within the parliamentary procedures. The rule of the majority involves necessarily, in the parliamentary procedures, the avoidance of any means that would lead to an abusive manifestation on the part of the majority or of any means which would have as scope the prevention of normal conduct of the parliamentary procedure. The principle of *the majority decides, while the opposition expresses itself* necessarily implies a balance between the need to express the position of the political minority on a certain issue and the avoidance of use of means of obstruction for the purpose of ensuring, on the one hand, the political confrontation in Parliament, respectively the contradictory character of the debates, and, on the other hand, the fulfilment by the Parliament of its constitutional and legal powers.

In others words, parliamentarians, either from the majority or from the opposition, must refrain themselves from abuse in exercising their procedural rights and respect a rule of proportionality, that would ensure the adoption of decisions following a debate public beforehand. As regards the legislative process and the parliamentary control on the Government or the realization of the other constitutional powers, parliamentarians, in exercising of their mandate, are, according to the provisions of article 69 paragraph (1) of the Basic Law, «in the service of the people». The parliamentary debate of the important issues of the nation must ensure the compliance with the supreme values enshrined in the Basic Law, such as the rule of law, political pluralism and constitutional democracy". This is the reason for which the Constitutional Court found that "it is necessary the exercise in good faith of the constitutional rights and duties, both by the parliamentary majority and the minority, and

[4] Judgment of the Constitutional Court no. 667/2011, published in the Official Journal of Romania, Part I, no. 397 of 7 June 2011.

the cultivation of a conduct of the political dialogue, which does not exclude beforehand the consensus, even if the motivations are different, when the major interest of the nation is at stake"[5].

Just for realization of this wish of political dialogue, it is forbidden the use, in the parliamentary works, of offensive, indecent or slanderous expressions or words, as well as the adoption of a hostile behaviour that would remove any possibility of communication between political entities, having some politically different views, sometimes even to the contrary. So being, not only occurs as natural, but as needed the regulation brought into the Regulation of the Chamber of Deputies, according to whom 'it is prohibited the disruption of the parliamentary activity, the uttering of insults or slander both from the tribune of the Chamber and in the hall of the plenary, of the committees or of the others working bodies of the Parliament". Apart from the fact that it determines the violation of the duties regarding the compliance with the rules of honour and discipline incumbent to each deputy, the manifestation of an inappropriate or offensive behaviour may determine the prevention or the impairing of the activity of other parliamentarians, thus constituting the premise for the disruption of the activity of the entire legislative forum. In conditions in which the statement of reasons in support of a legislative initiative, the proposal of amendments, the presenting of pros and cons opinions, their debate, therefore the political dialogue at the tribune of the Parliament or in committees, or the activities through which the Parliament fulfils its constitutional functions, represent issues related to the essence of parliamentarism, the prohibition of the disruption of parliamentary activity by uttering insults or slander or through adoption of denigrating, racist or xenophobic behaviour and languages give phrase to the need to discipline this dialogue and to create the premises for the compliance with the principle *the majority decides, while the opposition expresses itself*.

On the other hand, the principle cited ensures the right of the opposition to freely express itself, to make known its opinions, to express criticism on the positions adopted by the parliamentary majority. In exercising their mandate, deputies and senators are in service of the people and, respecting in good faith the constitutional rules and the parliamentary procedures established through the Regulations of the two Chambers, are obliged to defend the interests of the citizens they represent, by adopting an active, advised and responsible behaviour, to comply with the general interest.

Moreover, such as any citizen of Romania, the parliamentarian has the freedom of expression, guaranteed by article 30 of the Constitution, and, according to article 72 paragraph (1) of the Basic Law, he does not respond legally for the vote or for the political views expressed into the exercising of the mandate. But he/she is called to find the best suitable means of expression, which, on the one hand, ensure the exercising of the mandate with objectivity and probity and which, on the other hand, do not hinder the progress of the activities of the legislator.

3. Limitation of the parliamentarian's freedom of expression and the sanction by suspending his/her activity

Regarding the newly introduced provisions, namely the thesis that, in

[5] Judgment of the Constitutional Court no. 209/2012, published in the Official Journal of Romania, Part I, no. 188 of 22 March 2012.

parliamentary debates, deputies "do not carry placards or banners", the Court has determined that they do not contradict the provisions of article 30 of the Constitution.

In order to determine as such, the Court has held that, given the definitions of the Explanatory dictionary for *placard* and *banner*, these are ways of expressing ideas in visual, written or drawn form, used in public areas, sometimes with the occasion of public demonstrations, for the purpose of transmitting a message, a slogan or a catchphrase.

It is true that under article 30 para. (1) of the Constitution, freedom of expression is inviolable, but it is not an absolute right. In this sense, article 57 of the Constitution provides for the express duty of the Romanian citizens, of foreign citizens and of stateless citizens to exercise their constitutional rights in good faith, without breaking the rights and freedoms of others. An identical limitation is also provided in article 10 paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which "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", as well as in article 19 paragraph 3, of the International Covenant on Civil and Political Rights, which sets that the exercise of the freedom of speech involves special duties and responsibilities and that may be subject to certain restrictions which are to be expressly provided by law, taking into account the rights or reputation of others. Being a norm with a restrictive character, to circumscribe the framework in which the freedom of expression can be exercised, the enumeration made by art. 30 para. (6) and (7) is strict and restrictive[6].

By regulating the duty of deputies that, in parliamentary debates, they do not adopt denigrating, racist or xenophobic behaviour and languages, and neither to carry out placards or banners, the Chamber of Deputies, in virtue of its autonomy of regulations, transposed at an infra-constitutional level the limits of the freedom of speech established by the constitutional norm. In other words, the statutory provision prohibits the denigrating, racist or xenophobic behaviour and language, regardless of the way in which they manifest themselves, including the written way by posts displayed on placards or banners. The ban does not target the wording of the political message itself through the placard or banner, but only the content of the message, that should not circumscribe to the 'denigrating language, racist or xenophobic". The use of different forms of expression of political opinions must circumscribe the framework, the purpose and the reputation of the legislator, must respect the solemnity of the plenary sittings of each Chamber and must not harm the image of the Parliament and, even less, its activity. Therefore, it is necessary for the freedom of expression, the limits of which are set only by the Constitution, to find appropriate forms of manifestation, that, on the one hand, answer the imperative of the parliamentary right of the opposition and of each deputy or senator, individually, to express themselves and to make known their

[6] Judgment of the Constitutional Court no. 629/2014, published in the Official Journal of Romania, Part I, no. 932 of 21 December 2014.

opinions , political positions and, on the other hand, are not just a declaration of rights, without being followed by a real debate on political opinions, legal arguments presented by MPs into the formal framework of the activity of the legislator.

As such, the Court found that the provisions of art.153 par. (3) of the Regulation of the Chamber of Deputies meet the requirements, on the one hand, of the freedom of expression of deputies, enshrined in article 30 paragraph (1) of the Constitution, and on the other hand, the constitutional limits of this freedom, provided by article 30 paragraphs (6) and (7) of the Basic Law.

Regarding the sanctioning of the deputy by prohibiting him/her from participating in the activities of the Parliament for a certain length of time, the Constitutional Court retained its unconstitutionality. Analysing the criticism of unconstitutionality, the Court held that, in principle, some legal obligations must be matched by legal sanctions, in case of failure of their observance. Otherwise, the legal obligations would be reduced to a simple goal, without any practical result into the social space relations, thus being cancelled the very reason for the legal regulation of some of these relationships. If the Regulation of the Chamber states the actions of deputies which constitute deviations from the parliamentary discipline, it imposes the establishment, in same framework, of sanctions applicable to the guilty person.

Thus, the new regulation provides as disciplinary sanction, applicable to MPs, the temporary suspension of his/her participation at a fraction of or at all activities of the Parliament, for a period contained between two and thirty working days. The rule provides, however, that the temporary suspension "Does not bring touch to the right to vote into the plenary session", being taken "subject to the strict compliance of the rules of conduct".

Upon the disciplinary penalties applicable to members of the Parliament, the Constitutional Court ruled, during the *a priori* constitutionality review exercised on a law for the amendment and supplementing of Law no.96/2006 on the Statute of MPs[7]. With that occasion, the Court found that the regulation of disciplinary sanctions of the MP found in conflict of interest, consisting of the "ban on the participation in the works of the Chamber he/she belonged to, for a period of no more than six months", affects the parliamentary mandate. The Court held that "the parliamentary mandate is a public dignity acquired by members of the Chambers of Parliament through election by voters, in view of exercising through representation their national sovereignty, a conclusion based primarily on the following constitutional provisions: article 2 paragraph (1) – "National sovereignty belongs to the Romanian people, who shall exercise it through their representative bodies established as a result of free, periodic and fair elections, as well as by means of a referendum", article 61 paragraph (1) first sentence – "Parliament is the supreme representative body of the Romanian people [...]" and article 69 paragraph (1) – "In the exercise of their authority, Deputies and Senators are in the service of the people". The Constitution also establishes, in article 63, the duration of the office of the Chamber of Deputies and of the Senate , and in article 70, the moment when deputies and senators enter on the exercise of their office, respectively "upon the lawful convention of the Chamber whose members they are, provided that credentials are validated and the oath is taken... ", as well the time/ cases of termination of the office, respectively

[7] Judgment of the Constitutional Court no. 81/2013, published in the Official Journal of Romania, Part I, no. 136 of 14 March 2013.

"when the newly elected Chambers have lawfully convened, or in case of resignation, disenfranchisement, incompatibility, or death".

Therefore, the Court found that the newly introduced provisions into the Law no.96/2006 contravene "the constitutional provisions on the rule of law and of those who configure the legal regime of the parliamentarian office". In this respect, the Court held that "the representativeness of the parliamentary office, as it is established by the provisions of the quoted provisions of the Basic Law, has important legal consequences. One of these refers to the duties of the MP, which are exercised continuously, from the moment when he/she enters into office until the date of the termination of office, the legislator having the duty not to hinder their fulfilment by means of the regulation it adopts. Participation in the sittings of the Chamber is a duty which relies on the essence of the parliamentary office, as it results from the whole set of constitutional provisions that enshrine the Parliament, included into the Title III, Chapter I of the Basic Law. This is regulated specifically by Law no.96/2006 on the Statute of MPs in article 29 paragraph (1) – a text that did not suffer any change through the law subject to the constitutional control, being characterized by the legislator as a legal and moral obligation. Consequently, preventing the MP to attend the sittings of the Chamber he/she is part of, for a period of time which represents half a year out of those four years of mandate of the Chamber constitutes a measure likely to prevent him/her to accomplish the office given by voters. Taking into consideration that every MP represents the nation in its entirety, the conditions for the effective exercise of the office must be provided for, conditions which must be considered when regulating disciplinary sanctions".

For these considerations, the Court found that the provisions of Law no.96/2006, as subsequently amended and supplemented, are unconstitutional.

Given the identical hypothesis that targets the matter of the disciplinary sanctions applicable to deputies, the Court appreciated that the arguments on which it based the admission solution pronounced beforehand by the Court are applicable in full to this situation. So, since the duties of the MP are exercised continuously, from the moment when he/she enters into office until the termination of the office, the legislator, through the regulations it adopts, whether laws or regulations, cannot prevent their fulfilment. Just as the Court held into the decision cited above, the participation in the sittings of the Chamber he/she belongs to is a duty of the essence of the parliamentary office, as it results from the whole set of constitutional provisions and rules that govern the Parliament, so that any norm or regulation that affects the way in which the MPs meet their legal and constitutional duties constitutes a violation of his/her constitutional statute.

The criticized norm provides for the thesis according to which the disciplinary sanction "does not touch the right to vote within the plenary". But this provision is not likely to remove the unconstitutional effect of the temporary suspension. The duties of the MP, inherent to the constitutional office are not limited to the exercise of the right to vote into the sittings of the Chamber, and since the sanction concerns the suspension of the participation of the deputy to a part or to all activities of the Parliament for a period contained between two and thirty working days, it is obvious that this would prevent him/her to exercise the office in fullness of his/her rights and duties.

4. Conclusions

As stated above, the freedom of expression cannot be understood as an absolute right. Moreover, the Romanian Constitution, in article 53, as well as the international documents on human rights, such as the Convention for the Protection of Human Rights and Fundamental Freedoms or the International Covenant on Civil and Political Rights, admit the possibility of reasonable lowering of the level of protection offered to certain rights in certain circumstances or moments, subject to certain conditions, as long as the substance of the rights is not attained[8].

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