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**LIMITATIONS OF THE RIGHT TO FREEDOM OF EXPRESSION**

**“An Evaluative Study of the European Approach”**

PhD Dissertation

Thesis Booklet

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# 1. Research Objectives, Importance, and Hypotheses

## 1.1. Problem statement

Despite the great importance of freedom of expression, which is embodied in philosophical and legal discussions, legal and social logic necessitates regulating the exercise of freedom of expression by setting limits or restrictions based on certain justifications. However, these justifications have been the subject of discussion and disagreement. On one side are those who defend the right to freedom of expression as an absolute right that may not be restricted in any way. On the other side are those who view the matter from the perspective of public interests and the rights of others that may be affected by treating freedom of expression as an absolute right.

What is known as the “proportionality test” has emerged as a method of justification adopted in many judicial systems, including the *European Court of Human Rights (ECtHR)*. However, the application of this test was not without controversy in light of the European Court’s recognition of a set of principles and standards, including the margin of appreciation granted to member states of the *European Convention on Human Rights (ECHR)*. Some consider this as a way to frame the state’s burden in justifying the imposition of restrictions on freedom of expression, thus being far from the path of justice.

The research’s main focus on the objective considerations for determining the scope of the right to freedom of expression and the problematic nature of some forms of expression. Additionally, it delves into the foundations and justifications upon which the restrictions imposed on freedom of expression are based, and the method of evaluating the legitimacy of these restrictions, primarily based on the approach of the ECtHR.

## 1.2. Justifications and Objectives

Europe has always been considered the cradle of democracy and the source of many ideas and theories that defended human rights and freedoms and later became a source of international and regional charters and covenants on human rights. But the reality today shows a clear discrepancy within Europe in considering freedom of expression, and this is what makes research into the causes of this discrepancy very important, especially since this research deals at the same time with the theoretical framework of the right to freedom of expression and the regulation of its practice.

The objective of this research is to conduct an evaluative study of Europe's current approach to addressing restrictions on freedom of expression, with a specific focus on the ECtHR's perspective. This study will delve into the tools and standards developed by the Strasbourg Court over the past decades, which have been utilized to strike a balance and assess the legitimacy of authorities' interventions in various forms of expression. Additionally, this research aims to shed light on the gaps and deficiencies inherent in the legal and procedural aspects of imposing these restrictions, providing a comprehensive evaluation of the justifications employed to curtail freedom of expression, particularly the proportionality test.

By achieving these goals, this study will contribute as a complementary assessment to previous studies on the same subject matter.

### 1.3. Importance

In light of major shifts in global politics and the military landscape, as well as the rapid advancement of the digital world and the increasing impact of health and natural disasters, there is a growing need for research on the boundaries of freedom of expression.

Legal, philosophical and political studies related to human rights are of great importance as they often deal with sensitive topics and issues that have a direct impact on individuals and governments alike. This applies to a large extent to studies and research related to freedom of expression. The importance of this study comes in that it discusses the procedural and substantive aspects related to the restrictions imposed on freedom of expression and examines the foundations and criteria that are adopted in imposing these restrictions. One of the important aspects of this research is linking the theoretical framework for freedom of expression in Europe, in particular the ECHR, with the jurisprudence of the ECtHR, to create a clear conception of the reality of freedom of expression in Europe between theory and practice.

### 1.4. Hypotheses

Through this dissertation, my primary objective is to comprehensively address and examine four hypotheses that are integral to the understanding of the right to freedom of expression and its limitations.

In the first hypothesis, I assume that the current concept of the right to freedom of expression and the idea of restrictions associated with it are the joint product of a group of historical, philosophical and political influences that emerged from the early beginnings of the Enlightenment in Europe and then the establishment of the doctrine of the First Amendment in

the United States of America until the end of the World War and the adoption of the *Universal Declaration of Human Rights (UDHR)*. These influences also played a significant role in the establishment of freedom of the press and the development of censorship systems, influenced by the prevailing political and military climate.

In the second hypothesis, I assume that analysing the legal framework surrounding the right to freedom of expression in Europe and examining the delineated categories of protected expression—largely shaped by the ECtHR's interpretations of the ECHR—proves instrumental in delineating the boundaries of this fundamental right. This classification of protected expression is based predominantly on criteria intertwined with the content, objectives, and forms of the expression.

The third hypothesis focuses on the external restrictions included in the second paragraph of Article 10 of the ECHR as legitimate justifications for restricting the right to freedom of expression. I assume that these restrictions are not based primarily on the nature of expression or its goals, but rather on considerations related to protecting public or individual interests. These restrictions may constitute exceptions to freedom of expression, regardless of the content, form, or purpose of the expression. In this context, I aim to explore the approach of the ECtHR in assessing the legitimacy of these restrictions and the preference underlying the interests that are preserved. By examining the interplay between these restrictions and potential harm to the right to freedom of expression, I seek to analyse the delicate balance between protecting public interests and preserving the values associated with the exercise of this fundamental right.

The fourth hypothesis, through which I seek to show that the approach of the ECtHR in dealing with issues related to the right to freedom of expression has developed greatly, especially during the past two decades, by adopting criteria to evaluate the legitimacy of the authorities' interference in exercising the right to freedom of expression, which have significantly reduced Restrictions. At the same time, I discuss how cultural and legal diversity among member states, in addition to the existence of the principle of margin of appreciation, constitute the most important and greatest challenges to the ECtHR in deciding cases that may involve a violation of the right to freedom of expression.

## 2. Structure and Methodology of the research

The first chapter of the thesis delves into the theoretical framework of the right to freedom of expression, divided into two main sections. The first section explores the development of the

modern concept of this right, analysing historical and legal factors, events, and contexts. It emphasises the impact of the Enlightenment and the establishment of the First Amendment doctrine in the United States on crystallising the concept of freedom of expression. Additionally, it examines how the First and Second World Wars led to stringent censorship systems and addresses the developments and challenges that emerged following the adoption of the UDHR.

The second part of the first chapter focuses on the significant theories and philosophical arguments that justify protecting the right to freedom of expression from various perspectives. The researcher examines key theories, including the pursuit of truth, autonomy, democracy, and human dignity, demonstrating that despite their different foundations, these arguments collectively provide a robust basis for defending the right to freedom of expression.

In the second chapter, the researcher investigates the foundations and scope of the right to freedom of expression in European jurisprudence, divided into two sections. The first section outlines the legal framework for this right, primarily based on international, European, and national instruments and legislation, with a particular focus on the importance of Article 10 of the ECHR as a cornerstone in protecting and regulating the exercise of this right.

The second section examines the scope of the right to freedom of expression according to the standards and methodology of the ECtHR. This has led to a classification of expression categories that fall under the established protection of this right. The researcher shows how, despite its limitations as a fundamental criterion, this classification helps delineate the boundaries of the right to freedom of expression.

In the third chapter, the researcher discusses the justifications provided by the second paragraph of Article 10 of the ECHR for legitimate state interference and restrictions on the right to freedom of expression. This chapter carefully analyses the ECtHR approach to assessing the legitimacy of state intervention and the application of the proportionality test to balance individual expression rights with public and private interests that may be affected under certain forms or circumstances. The researcher evaluates the Court's standards, jurisprudence, and recent trends in applying and assessing the justifications in Article 10, illustrating how these justifications serve as external restrictions on the right to freedom of expression, based primarily on interests and rights rather than the form, content, or goals of the expression itself.

Accordingly, historical and analytical approaches were used to present the effects of the Enlightenment and some historical events that affected the formation and development of the modern concept of the right to freedom of expression in Europe. This included tracking the

movement of charters, laws, and documents, accompanied by the development of the right to freedom of expression and the establishment of censorship systems in Europe.

The philosophical approach was employed to examine the theories and ideas proposed by philosophers, jurists, and politicians that had a significant impact on the formation of the general theory of freedom of expression. This included presenting arguments for and against the human right to freedom of expression and addressing objections that denied this right or argued for its limitations. Additionally, the philosophical approach investigated the arguments and justifications for restricting the right to freedom of expression, emphasizing the prevention of harm and respect for others' rights.

The research also scrutinized legal texts from selected national legislation and international and regional charters that addressed the protection and regulation of the right to freedom of expression. This included analysing the foundations for imposing restrictions on freedom of expression and examining case law related to this right in cases presented before the ECtHR. The doctrinal approach was followed to achieve the desired outcomes in this segment.

To evaluate the legitimacy and feasibility of restrictions on freedom of expression, the justification approach based on the proportionality test was discussed. Given the differing perspectives between supporters and opponents of this approach and considering its adoption by the ECtHR and various European national courts in resolving freedom of expression issues, a critical evaluation of its advantages and disadvantages was necessary. This was conducted through the critical approach.

Finally, after considering all the previous aspects, the comparative analytical approach was employed to discern the reasons for discrepancies in the actual implementation and respect for the right to freedom of expression. This involved analysing these discrepancies by comparing the legal methods of addressing freedom of expression in different national legal systems across Europe.

## 3. Conclusion and Results

### 3.1. Factors and circumstances for establishing the current concept of the right to freedom of expression and censorship in Europe

The right to freedom of expression has deep historical roots that date back to ancient times. However, this thesis demonstrates that the modern understanding of this right, including the idea of limitations and the emergence of censorship systems, resulted from intellectual and political influences that spanned from the Age of Enlightenment in Europe until the adoption of the UDHR in 1948.

During the Enlightenment period, which took place in the 17<sup>th</sup> and 18<sup>th</sup> centuries, there was a significant impact on the recognition of freedom of expression. The fight against censorship played a crucial role in establishing freedom of the press as a prominent aspect of this right. Thinkers and philosophers of that time, such as *John Milton* and *John Stuart Mill*, made compelling arguments in favour of allowing individuals to express their thoughts and opinions without undue censorship. They challenged traditional authority and advocated for individual rights and liberties.

Furthermore, revolutionary and liberation movements also played a vital role in solidifying the defence of the right to freedom of expression. The ideas and circumstances that coincided with the American and French revolutions led to the creation of legal and political frameworks that reflected evolving societal values, emphasising the importance of open dialogue and the unrestricted exchange of ideas. The First Amendment to the United States Constitution and the French Declaration of the Rights of Man and of the Citizen (1789) were instrumental in presenting a strong concept of the right to freedom of expression, which later influenced international instruments like the 1948 UDHR.

Additionally, the thesis highlights how wars, conflicts of ideologies, and influences contributed to the establishment of strict control systems, particularly during the twentieth century. All these circumstances and factors worked together to solidify Europe's current concept of the right to freedom of expression. This was further reinforced by important instruments like Article 10 of the ECHR, which became a fundamental reference for protecting and regulating this right.



### 3.2. Analysing legal frameworks contributes to revealing objective limitations to the right to freedom of expression

The right to freedom of expression in Europe finds its basis in various texts of international human rights law and European law, in addition to the national laws of European countries. While Article 10 of the ECHR constitutes the primary reference for protecting and restricting the right to freedom of expression in Europe, it does not provide a precise detail of the scope of protection, or the categories and forms of expression protected. Although defining the scope of protection does not necessarily mean defining the limits of the right to freedom of expression, it contributes significantly to discovering those limits. Especially since the standard formula in all international and regional instruments that protect freedom of expression is built on general phrases that emphasise the rights of individuals to hold opinions and receive and transmit information. Therefore, correctly interpreting these texts would reveal the forms and types of protected expression in a manner commensurate with the nature of the right to freedom of expression and the importance of its individual and social function. Moreover, clarifying the limits of the right to freedom of expression based on the nature or form of the act or speech would contribute to drawing boundaries between the right to freedom of expression and other rights, which may overlap or be linked in a way that may be confusing to the judiciary and individuals alike. Hence, it can be said that drawing these boundaries is based primarily on the nature of the act, its goals, and its method, and this is what contributed to the creation of multiple classifications of protected expression.

All of the above shows the importance of the role played by the ECtHR in interpreting the text of Article 10, which led to the production of classifications of categories of protected expression based on criteria developed by the Court over the past decades. These classifications are effective not only in determining the scope of protected expression but also in determining the degree of protection based on the same criteria. For example, political expression receives a greater degree of protection compared to some other forms of expression. Hence, it can be said that these limits are of an internal nature imposed by objective considerations.

On the other hand, based on the legal analysis of the text of Article 10 and in response to the challenges created by the significant progress in digital means of communication and the complexities imposed by the massive spread of social media and platforms, the researcher suggests updating Article 10 with a protocol that sets clear definitions and standards for digital expression. This protocol would clarify the accountability of service providers, website owners,

and public page administrators for content inciting violence or hatred, define digital expression related to terrorism and hate speech, and ensure any restrictions are necessary, proportionate, and subject to judicial oversight. Additionally, it would explicitly extend academic freedom to digital platforms and apply freedom of expression protections to digital media, including the internet and social media. These updates would create a comprehensive framework to address digital communication challenges while safeguarding human rights and the rule of law.

### 3.3. External limitations

The dissertation has discussed how the theoretical justifications for protecting the right to freedom of expression vary, based on individual and collective considerations. The same logic can be used to justify restrictions on freedom of expression. If the exercise of freedom of expression confers a value that cannot be easily denied or infringed, the same practice may involve a violation of another individual or collective right. If this matter were left unchecked, the result would be a state of mutual violation, resulting in a war based on theoretical justifications. This ultimately led to the clear legal recognition of a set of justifications that allow states to intervene in the exercise of the right to freedom of expression. This intervention is necessary to maintain a balance between the value and benefit represented by the right to freedom of expression and the potential violations or threats that may arise from its exercise in certain ways, tools, or content. In other words, the criterion for determining these restrictions is based on considerations and external factors that are related to protecting vital interests when the exercise of the right to freedom of expression poses harm or poses a threat to those interests. Therefore, understanding and analysing the social, political, and cultural contexts play a significant role in evaluating these restrictions and determining their legitimacy.

The dissertation has explored how the ECHR allows for restrictions on freedom of expression to protect public interests such as national security and public safety, the prevention of disorder and crime, and the protection of health and morals. This is when freedom of expression constitutes a violation or threat to any of the aforementioned interests.

The ECHR also approved justifications based on protecting public and private interests, such as preventing the disclosure of confidential information whose disclosure might harm the interests of state agencies or public bodies of a sensitive nature, such as the army and intelligence, as well as harm the individual interests of specific people. Among the justifications that combine the protection of public and private interests are those that aim to preserve the

authority and impartiality of the judiciary when expression would affect the conduct of the judiciary and affect the right of individuals to a fair trial.

The last type of justification is based on preserving individual interests, namely the rights or reputations of others. This includes defamation, slander, or making false statements that harm someone's reputation or violate someone's rights. The agreement allowed contracting states to intervene in such cases.

It is important to note that these justifications are not absolute and must be applied in a manner that is necessary and proportionate in a democratic society. The ECtHR considers the specific circumstances of each case and applies a balancing test to determine whether restrictions on freedom of expression are justified considering the competing rights and interests at stake.

### 3.4. ECtHR approach in evaluating the breach of the right to freedom of expression

Through its approach, the ECtHR has developed a body of case law that provides guidance and clarity on interpretations relating to the scope of the right to freedom of expression and the restrictions that may be imposed on its exercise. This appears to have significantly helped to enhance consistency and predictability in addressing violations across diverse legal systems.

The "three-step approach" followed by the ECtHR in assessing the legitimacy of the intervention by authorities on the right to freedom of expression involves three stages of analysis. These steps are commonly used by the Court to determine whether the interference with freedom of expression is justified. The three-step approach consists of the following:

The first step involves examining whether the interference with freedom of expression is prescribed by law. The Court assesses whether the restriction is based on a clear and accessible legal provision that meets the requirements of foreseeability and accessibility. It ensures that individuals are aware of the rules governing their expression and that restrictions are not arbitrary or based on subjective or ad hoc decisions.

The second step focuses on determining whether the interference serves a legitimate aim. The Court examines whether the restriction pursues one or more of the aims explicitly mentioned in Article 10(2) of the ECHR, such as protecting national security, public safety, preventing disorder or crime, protecting health or morals, or protecting the reputation or rights of others. The Court considers whether the interference is genuinely aimed at achieving a legitimate goal, as opposed to being implemented for improper purposes.

The third step involves evaluating whether the interference is necessary in a democratic society. This step is crucial and requires a thorough examination of several factors. The Court assesses whether the interference is proportionate to the legitimate aim pursued, considering the severity of the restriction imposed and the impact on the right to freedom of expression. It examines whether there were less restrictive measures available to achieve the same objective. The Court also considers the specific context, including the nature of the expression, the identity of the person making the expression, and the potential impact on public debate and democratic discourse.

The margin of appreciation granted to member states is considered one of the most problematic points addressed in the thesis. The ECtHR recognises the principle of margin of appreciation, which allows Member States some discretion to restrict the right to freedom of expression within their legal systems based on specific considerations. Although this approach carries a recognition of the diversity of legal traditions and cultural contexts within Europe, at the same time, it may constitute a tool of tyranny that may be difficult to control, even with the authority of supervision by the ECtHR. This is what made some criticise this margin of appreciation on the grounds that it frames the state's burden of proving harm to the right to freedom of expression. Especially since the state's situation with the tools, powers, and database it possesses may make the task of the court, as well as the applicant, more difficult to evaluate the validity of the assessment of the state's behaviour and the extent of its proportionality with the margin of appreciation and its necessities, which may differ from one state to another.

Internal circumstances play a normative role in applying the principle of margin of appreciation and evaluating considerations in the second paragraph of Article 10. In most cases, the court concludes violations of Article 10 even when such justifications are invoked. Although the ECtHR often seeks to set limits to ensure that member states do not disproportionately restrict freedom of expression or abuse their discretion, it seems that the court remains unable to reduce these violations due to the principle of margin of appreciation and the absence of clear definitions and criteria for justifications related to national security and public order.

Through this thesis, the researcher has explained in detail the mechanism for examining requests related to the right to freedom of expression by the ECtHR. The ECtHR uses the proportionality test followed by a large portion of national and international judicial systems, which is based on achieving balance, as a basis for evaluating cases involving violations of the right to freedom of expression. The proportionality sought by the ECtHR is based on the extent to which member states take into account considerations related to the value of free expression

and the loftiness of their goals in comparison to the results that may affect some other rights or interests, taking into account the circumstances and context of each case.

However, while the test considers the circumstances and context of each case, there may be challenges in accurately assessing these factors. Contextual nuances and complexities may not always be fully understood or appreciated, resulting in decisions being made that fail to adequately address the underlying issues.

On the other hand, and in contrast to the concerns related to the margin of appreciation and what may result from the ECtHR being influenced by the decisions of national courts, there are fears that the ECtHR, in its attempt to achieve a balance between competing rights and interests, may exceed its authority by replacing its ruling with that of the national courts. This would undermine the principle of subsidiarity, which suggests that decisions should be made as locally as possible.

Additionally, there is a worry that the proportionality test may not always effectively protect minority views or unpopular speech. In some cases, the test may prioritise majority interests or societal norms, which can suppress dissent and limit the diversity of opinions.

The ECtHR has the authority to provide remedies for violations of freedom of expression. These remedies may include monetary compensation, declaratory rulings, and measures aimed at preventing similar violations from happening again. By holding Member States accountable for violations and providing remedies, the Court contributes to the overall effectiveness of addressing violations of freedom of expression. However, the successful implementation of its decisions relies on the cooperation of member states. Some countries may face difficulties in fully complying with the Court's rulings, which could affect the enforcement and effectiveness of freedom of expression protections. This point was highlighted by Judge Julia Laffranque, president of the Organizing Committee of the seminar traditionally held to mark the opening of the judicial year of the ECtHR, in her speech, where she emphasised that the European Court of Human Rights cannot be solely responsible for enforcing human rights standards across Europe. She pointed out that upholding human rights and the rule of law is a national task involving the legislature, executive, and courts, not just the ECtHR.

This dissertation highlighted the pivotal role played by the ECtHR in interpreting and applying Article 10 of the ECHR. Over the past decades, the Court has sought to fill the gaps in the legal text by adopting clear criteria to evaluate restrictions on freedom of expression, such as the "quality of law" criterion. In addition to the court's adoption of some interpretive tools and

principles that ensure the continued effectiveness and appropriateness of the provisions of the ECHR, such as on precedent-based adjudication, margin of appreciation, evolutive interpretation. Nevertheless, the Court has faced challenges arising from extreme differences in legal and political systems among member states and variations in the democratic climate. This is evident in the number of cases related to Article 10 violations, where Eastern and Central European countries show a higher frequency compared to Western European and Scandinavian countries.

The researcher believes that although the court has largely succeeded in developing a method to evaluate the legitimacy of authorities' interference in exercising the right to freedom of expression, it lacks effectiveness in influencing member states. The court's role is limited to approving or disapproving violations and ruling on material or moral compensation, which may not act as a sufficient deterrent. Additionally, reaching the ECtHR is challenging due to financial costs, procedural complexity, and stringent standards related to proving interest and exhausting remedies. Therefore, the Court and the Council of Europe face the challenge of increasing the court's effectiveness in reducing violations related to freedom of expression. This requires finding legal means that enable the court to intervene effectively and bindingly in changing state policies and seeking a general European legal approach with clear standards preventing violations of the right to freedom of expression.

One possible solution to this issue is implementing a comprehensive monitoring system that actively oversees member states' compliance. Additionally, it would be beneficial to establish a sanctioning mechanism that imposes greater consequences for violations. This could involve financial penalties and political repercussions, such as the suspension of certain privileges within the Council of Europe. Furthermore, it is crucial to enhance the capacity of national institutions to uphold human rights. This can be achieved by ensuring they are adequately resourced and independent, which would further strengthen the efforts of the ECtHR.

## 4. Researcher Publications Related to the Topic

Ghanem R. (2020). Constitutional Development of the Human Rights in Europe. Doctoral Students Forum, University of Miskolc.

Ghanem R. (2021). Human Rights Between the Philosophy of Natural Law and Legal Positivism. *Studia Iurisprudentiae Doctorandorum Miskolciensium*. Tomus 23. 2022/1. <https://doi.org/10.46942/SIDM.2022.1.283-298>.

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