

TEATRO DO MUNDO |

DIREITO E REPRESENTAÇÃO

LAW AND PERFORMANCE



## **Ficha Técnica**

Título: Direto e representação | Law and Performance

Coleção : Teatro do Mundo

Volume: 10

ISBN: 978-989-95312-7-7

Depósito Legal: 401279/15

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Capa Foto: ©Rogov Bundenko - 2014 | Kristina Shapran (Russian ballerina)

Projeto gráfico: Cristina Marinho e Tiago Daniel Lamolinarie de Campos

cruz

1ª edição

Tiragem: 150

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# **The conflict between freedom of expression and reputation rights in Portuguese case law**

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## **Introduction**

In Portugal we have two jurisprudential currents: one favours the reputation rights, and the other follows European standards. As far as I can see, in the published case law, it seems that the second one is growing.

Portuguese Law has a special mechanism to uniform the jurisprudence but it has not been used in the context of freedom of expression. We never had a standardization of the interpretation of the law as these matters involve open standards that depend mainly on the evaluation of facts, and the evaluation of facts depends on the sensibility and on the vision of the world of the judge.

The Constitutional Court has not been of great help in contributing for the protection of the freedom of expression, deciding sometimes that it has no competence for the case, and other times accepting the factual evaluation of the civil or criminal courts.

These rights – freedom of expression, freedom of the press, and reputation rights – are stipulated in the Portuguese Constitution, as fundamental rights.

The European Convention of Human Rights and the interpretation of fundamental rights done by the European Court of Human Rights are national legislation due to the principle of automatic reception of international law.

To analyze the balance between freedom of expression and reputation rights, courts who adopt the traditional position start by accentuating the principle of freedom of expression and its value as a fundamental right in a democratic society. But then they consider that freedom of expression is not an absolute right, and it has to be conciliated with the rights of others, specially, in what concerns defamation and civil liability of journalists, the honor and reputation right. And when applying the proportionality test, they consider that although it is important that journalists denounce illegalities committed by public figures, they should do a complete investigation towards the imputation of facts and the selection of the evidences and of the sources. These standards are like the European standards, but the traditional position fails in considering the good faith of the journalists and the fact that they have to do their work in a very accelerated way due to the concurrence, what attenuates their fault if some information is not exact. The amount of the compensation of damages in civil liability is also too high considering the low wages paid in Portugal, although the newspapers have solidary liability with the journalists and usually pay the compensation.

### ***1. The balance problem in opinion articles about public persons***

It is in the opinion articles that the traditional current penalizes more the freedom of expression with judges recommending that the authors of the articles speak or write in a moderate way, without the use of aggressive words because it offends the rights of others. It means that freedom of expression is not being protected in its dimension of freedom to choose the ways or the forms of expression, including the possibility of using provocative, exaggerated and polemical words.

In what concerns the balance between freedom of expression and the good name of a political or a person occupying a public function we have the Supreme Court decision of 13 January 2005, as paradigmatic in adopting the European standards.

Here it has been stated that freedom of expression is a fundamental principle of a democratic society and one of the most important conditions for the progress and for the individual self-fulfillment. In consequence, interferences or exceptions to the freedom of expression should be subjected to a restrictive interpretation and based on a convincing foundation. The right of honor is not an absolute limit to the freedom of expression in what concerns matters of general interest. When performing the duty and the right of information, journalists should behave in good faith, providing credible and exact information, according with the deontological principles that regulate their professional activity. In face of the facts of the case – unjustified enrichment of a mayor – the freedom of information includes the possibility of exaggeration, provocation, and aggressiveness in the words

used. The ECHR protects not only the substance of ideas but the forms and the words chosen to transmit an idea. As what concerns value judgments it is not necessary to prove its veracity, being only demandable some kind of factual basis. The value judgments are subjected to an appreciation through the test of proportionality. The criticism has wider limits when it concerns public figures acting in this quality.

Representing the traditional current, the Portuguese Supreme Court, in the decision of the 14th of February 2012, convicted the author of an opinion article to pay compensation for offending the good name of the Prime Minister.

In 2004, a newspaper published an opinion article criticizing the Prime Minister of Portugal, saying, in the context of critics to his political decisions, that he did so bad things because he had consumed drugs when he was young.

The Supreme Court, although accepting the ECHR rules about the freedom of expression to criticize political figures even with expressions that hurt or shock, considered that personal injuries that have no relationship with the public debate about politics can be an offence to the honor of a public person, and condemned the author of the opinion article to pay compensation: «On the pretext of doing an institutional critique, the author of the article attacked personally the target person, what was beyond the evaluative judgment about his political work (...) doing unnecessary considerations about the personality of the injured, likely to degrade him as a person». The Supreme Court did not accept the

argument of the applicant that the reference to «drugs consume» was a metaphor used in the article and not a factual reality.

But the strongest limitations to freedom of expression are those applied in the context of workers that criticize their employer or to journalists or experts in children rights that criticize judicial decisions.

## ***2. Conflict between freedom of expression of the workers and the employers' reputation rights***

In the first case, a female worker who was a legal adviser of a cooperative society was fired because interviewed in a radio program she has criticized the cooperative and denounced the high salaries of the new directors and of the President, saying that «the President never dreamed to earn in a year what he is earning in a month»; «the persons who are directing the society do not have technical capacity for that and did not choose persons enough capable»; «the Society is alone... drifting».

The Supreme Court decided that the dismissal of the worker was legal because of the violation of labor duties (loyalty and respect) and because of the violation of the good name of the society.

The Supreme Court said that the workers have freedom of expression in the workplace and the right to denounce illegal and unfair decisions of the employer, but the employee reaction was inadequate because it exceeded the limit of what could be seen as a reaction against unfair situations and the worker did not base her statements on facts.

The freedom of expression is not an absolute right but it has to be conciliated with other fundamental rights, and the conflict should be solved in accordance with criteria of reciprocity and proportionality.

In the second case, the worker of a security company, that was a syndical delegate, wrote in *facebook* texts against the employer, denouncing that the employer silenced and humiliated him, lied and ordered persecutions and that some colleagues were «illiterate» and «stupid» and published images of clowns to describe his superiors. The Court did not consider the freedom of expression of the worker and legitimate his dismissal in basis of violation of labor duties (loyalty and respect). *Facebook* with 140 friends was considered, by the Court, to be a public space and not a private one. The Court of Appeal confirmed this decision.

Confronting these cases with the ECHR case-law, we have the reference of *Fuentes Bobo v. Spain* (*Judgments by the European Court of Human Rights, application n.º 00039293/98, of 29 February 2000*).

In this case, an employee of the public broadcasting organization TVE was interviewed in two Radio programs and made critical remarks about some TVE-managers using aggressive language, as calling them «thief» and «leech». These sentences led to disciplinary proceedings that resulted in the applicant's dismissal.

The worker applied to the Spanish Supreme Court which considered the dismissal to be legal.

But the European Court decided that the dismissal of the applicant due to certain offensive statements was to be considered



interference by the Spanish authorities with the applicant's freedom of expression.

The European Court pointed out that article 10 of the Convention is also applicable to relations between employer and employee and that the State has positive obligations in certain cases to protect the right of freedom of expression against interference by private persons.

The European Court of Human Rights could not agree that the severe penalty imposed on the applicant met a "pressing social need" and underlined that the criticism by the applicant had been formulated in the context of a labor dispute within TVE and was to be included in a public discussion on the failings of public broadcasting in Spain at the material time. The Court also took into consideration that the offensive remarks attributed to the applicant appeared more or less to have been provoked during lively and spontaneous radio shows in which he participated. The European Court admits that, in a context of conflict and tension, the use of strong expressions, that cause shock, is not a ground to restrict freedom of expression, which can only be limited due to a social necessity, if it is proportional to the need of protecting other rights and for a legitimate purpose.

The two cases cited above did not value enough the freedom of expression of workers, which must be specially protected considering that workers are a subordinate group, especially vulnerable to suffer oppression and injustice at the workplace. Workers' economic dependency and their need for protection against abuse of power by employers should be balanced when analysing the conflict between

rights. The effect of punishing with dismissal the workers who criticize the employer can have the evil effect of silencing the workers what is a not an admissible result in a democratic society.

Freedom of expression has been a collective value to workers as a group that had historically depended on the vindication of rights.

### ***3. Freedom of expression to criticize judicial decisions about the best interest of the child***

The problem of commenting judicial decisions on pending litigation, especially on adoption and child custody proceedings, has created judicial conflicts between freedom of expression and reputation rights.

In a case decided by the Supreme Court, at the 27<sup>th</sup> May 2008, the Court released a father who has criticized a judge who has decided the custody case of his son. In its decision, the Supreme Court took in consideration the context of the articles, the public interest of the matter discussed (child custody case), the principle that judicial decisions are submitted to the public critique and the difference between the decisions and the person that had adjudicated the decision.

But in another case, the Lisbon Civil Court has convicted a public attorney - a children's rights expert, of the female sex, who commented some of his decisions - to compensate a judge for damages.

The criticized judge, in his judicial decisions, refused to decree adoption of children who were already in custody (pre-adoption) of the adopting parents.

The speech of the public attorney that was considered a violation of the right of honor of the judge was the following one: «This judge has the mentality that children belong to their biological parents, who, like in roman law, have the power to sell children, to neglect them and even to sexually abuse them». The Court of Appeal revoked this decision, releasing the public attorney, but the case is still on appeal.

The words of the public attorney were integrated in an interview published in a periodical about the decisions of this judge who refused, as a matter of personal conviction and principle, to decree adoptions on the basis of biological parents' rights, considering that adoption is a legal artificial tie that is not comparable to the beauty of blood ties.

The Court of Lisbon and the Court of Appeal condemned the periodical to pay compensation to the offended judge. But the Supreme Court (Supreme Court, 8<sup>th</sup> May 2013) considered that the reporting was covered by the freedom of the press. The journal was not condemned to compensate the judge for damages because the Supreme Court considered that the magazine observed the rules of an objective and complete investigation, and that the reporting was of public and social interest. The restraint claimed by the judge was not justified in the need of a democratic society for maintaining the authority of the judiciary. The Supreme Court considered that in this case the freedom of the press prevailed over the personality rights of the judge, on the basis of three criteria: the truth of the information; the public interest of the reporting; proportionality and adaptation of the limitation of the personality rights of the offended person.

In another case, a journalist, in an opinion article about a child custody case, reproduced words of a seven years' old child, saying that her father sexually abused her. These words were taken from a psychological report that integrated the child custody proceeding. The Family Court has decided to put the child in foster care, accusing the mother of having alienated the child from the father and of having built false allegations of child sexual abuse. The criminal proceeding was filed.

Portuguese Courts, when analysing the conflict between freedom of expression and the reputation rights of the father, considered that the article was a violation of the father's honor and good name, and condemned the author to pay compensation for damages.

This case raises an important issue: Is an unproven accusation of child sexual abuse a private life matter of the accused or is there a public interest in discussing child sexual abuse and the value of the words of a young child in a child custody proceeding?

I think that due to the characteristic of child sexual abuse crimes defined by the distrust towards the child testimony, there is a collective and public interest in promoting a free debate about a matter that had been silenced and neglected by society and by the State.

## **Conclusion**

I think we live in a society that overvalues the reputation rights of employers compared with workers' rights, as well as the adults' personality rights compared with children rights.

It means that Portugal is a paternalistic society based on obedience to authority and, if subordinated groups criticize the authority to which they are subjected, they can easily be punished for that.

Of course children do not rebel against the system by their own words and means but through adult people who adopt their perspective, as in the cases described did the journalist and the public attorney.

So, I think that in the judgment of proportionality about the balance between freedom of expression and reputations rights, a wider space and strength should be given to freedom of expression in order to compensate the position of subordination of the discriminated groups, as workers and children, and the unequal relationship between workers and employers, and between children and adults.

Only in this way can society become an egalitarian one and can democracy grow.

