# FREEDOM OF SPEECH IN RELATION WITH THE RIGHT TO PRIVATE LIFE IN THE DIGITAL ERA

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**ABSTRACT:** *The Human Rights Council of the United Nations Organisation, remarking the „vast technological leaps" taking place in the digital era, as well as their impact on human rights nationally and worldwide, is considering the promotion of certain measures within a recent resolution..*
*The Council reminds „the universality, indivisibility, interdependence and interrelationing of all human rights and fundamental freedoms"; it acknowledges the need for promoting and protecting these rights in the context of the fight against terrorism, but affirms especially the protection of the right to the freedom of opinion and freedom of speech, the right to privacy respect – domicile and correspondence, the protection of honour, reputation and the right to one's own image – for all persons. Thus, it establishes and promotes a special procedure to this respect, based on the international law, but also of guarantees of efficient internal liability (stipulation of attack ways, non-arbitrary examination of basic principles related to legality, evaluation of proportionality in relation with the surveillance practices etc.). For this purpose it identifies principles, clarifies standards and good practices of the protection of the right to private and family life.*

**KEY WORDS**: *right to privacy in digital era, right to one's image, special reporting expert, „just balance" between freedom of speech and the public's need for information*
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**1.** The Council for Human Rights, by a recent decision (no. 25/117 /2015), reaffirms the right to privacy (as stipulated in art.12 of the Universal Declaration and art.17 of the International Pact on civil and political rights), according to which „no one will be subjected to arbitrary or illegal intrusions in their intimate life". The exercise of the right to private life is important for the very fulfilment of the right to free speech, i.e. the right to have and express opinions without external interferences. Freedom of speech is necessary also for the affirmation of other freedoms (such as freedom of reunions), but at the same time it also constitutes a limitation or a threat for other rights (for instance the respect for private and family life). But this very fact gives the specificity of the two rights; they support one another, but also limit one another. More precisely, they may occur in their very exercise, as concurrent individual rights as well.

The Council also finds that the prevention and elimination of terrorism is a public interest necessity of great importance. It reminds that the states must make sure that any

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measure taken for the fight against terrorism is compliant with the obligations they have based on the international law (especially with the rights of refugees and with those resulting from humanitarian law). Any interference in the right to private life, founded on the justified preoccupations related to public safety, also requires the protection of certain sensitive information, and the state must assure as such the full respect of these obligations. The Council for Human Rights stresses thus the following objectives:

1. reaffirmation of the legal protection of the right to private life (no one will be subjected to the arbitrary or illegal interference in private and family life, of his domicile or correspondence;

2. acknowledgment of the global , open character of the Internet and the quick advance of information technology – the driving force of progress having transformed the environment of the exercise of freedom of speech in the world – generating significant advantages, but also serious reasons for worry;

3. the warning that the same rights people have *offline* must also be protected *online*; the condemnation of all the restrictions imposed to digital communication which refers to the stakeholders of civil society; the reiteration of the necessity to grant special attention to the rights of journalists and Internet expression, with the full observance , surely, of the right to privacy;

4. the firm condemnation of the use of religion and terrorism (including the actions of cyber terrorism) by extremists and Jihad groups who aim at destroying the freedom of speech and the religious freedom; the discovery of the causes underlying these forms of terrorism, political inequality, non-respect of human rights and of the rule of law;

5. the need for adopting a decision to appoint a *special reporting expert* in the right to private life for a three-year period, given the concern related to the restriction of rights and liberties in general (by excessive requirements regarding the their exercice, by the aggressive use of dispositions and other restrictive laws etc.) and definitely assuring the mechanism to enforce liability to the country guilty of the non-observance or abuse in the matter of all human rights (EU Resolution of 10.3.2015).

The tasks of the special reporting expert will usually include the following tasks:

collecting information in relation with the international evolutions in the matter of the right to private life, including the provocations resulting from the use of the new technologies; transmission of recommendations to the Council regarding the promotion of a better protection of private life before the growth of challenges in the digital era; the reporting of any breach of the right to private life in the international instruments in the field, the reception of information and answers to the information gathers by the UN and all its agencies; the participation and contribution to any relevant international conference; transmission of an annual report of the Council and General Assembly of the UN (Țucă Zbârcea & Associates, 2015 a).

To conclude, it is for the first time in the history of the UN (two yeas after the „*Snowden revelations"* related to the mass surveillance programmes) when an independent reporting expert is charged to monitor and investigate the issue of the alleged violations of this right by the states of the world. The increased UN preoccupation is obvious in the domain of privacy. The establishment of this new position (of reporting expert) comes after the UN published the report *The Right to Privacy in the Digital Age*, where it underlined the negative impact of mass surveillance on the right to privacy. The resolution was promoted by Germany and Brazil, countries whose leaders were involved

in surveillance conducted by the NSA (*National Security Agency*), being then supported by more than other 60 countries and over 90 NGOs. It is sure that the activity of the Special *Reporting Expert* will be an important one, the UN auspices assuring it a true quality of global leader in the *privacy* domain with a much wider visibility than other organisms with similar attributions (Țucă Zbârcea & Associates b).

Although there are numerous international treaties signalling the existing risks, and the effort of states to adapt their legislation to the evolution of the process of *online* interaction is permanently supported, nevertheless, the regulations imposed are not compliant, keeps many a time a too wide a scope to regulate the specific issues or are simply several steps behind the new technologies and tolls to be controlled (Andreea Lisievici, 2015 a). To assure an interaction protecting the right to private life, the basic concept in any initiative is *responsibilization* – the fundamental component of any strategy anchored in the digital reality. In such a connected world, where the information arrives to circulate freely, the so-called „democratisation of information" brought about by „free" internet, it is very easy to do wrong or to profit, to play unfairly (Vali Bîrzoi, 2012). There are several preoccupations for the rethinking and preoccupation for the matching of legislation and technology; the awareness of the limits of technologies and the legal limits in the surveillance of their use of these technologies and proportionality. The European Union is regulating in this field, makes great efforts for harmonising the 28 legislations, which is not an easy task. National institutions also intervene, those with a role in the transposition of the directive, but also the control of constitutionality (Daniel Mihail Șandru, 2015). The ability to use the digital media, but also to triage the accessible continent, becomes at the same time a quality, a right and an essential obligation for each user. In the virtual environment, any person (even non-users) may become a „vector of image" and the unprecedented capacity of information to *„become viral"* generates the obligation of „media education" – concept belonging to an interdisciplinary field (Nicoleta Foriade, 2015).

**2.** *The right to image in the context of assuring a „just balance" between freedom of speech and the need of the public to be informed.* The breach of the right to private life and mass surveillance are two dangers in the global digital era. In the conception of the specialists in the matter – computer experts and jurists – they become perils, not by the existence *per se* of the digital environment, but the will and controlling desire of decision-making political factors or stakeholders of other nature (either in the process of the collection of personal data, or the cyber attacks etc. (Nicoleta Foriade, 2015).

The right to image in relation with the right to free speech is not a simple exercise. The courts of law are entitled to carefully set the limits of these rights, when they have to decide if the use or distribution of the image of a person complies or not with legal requirements (Bogdan Halcu, Andreea Lisievici, 2014). In shaping the relation between the freedom of speech and the right to image, the Court frequently rules in mattes such as: publication of a person's image, the use of defamatory expressions against honour and reputation. As for the right to image, the jurisprudence in the matter admitted (as far back as 2002 by the decision given in the case *Schüssel vs. Austria*) that it falls within the sphere of privacy. The ECHR signatory states must guarantee any person the protection in this respect. According to art.10, par. 1, any person has the right to freedom of speech. This right contains: freedom of opinion; freedom to receive or communicate information

or ideas; freedom of the press. Consequently, its content requires interpretations related to the notions: *opinion, information, press, duties and responsibilities specific to journalists*, etc. The protected right must be considered in a very wide sense and includes the political discourse, the commercial discourse and the artistic expression.

The right to private and family live, in its turn, is made of another four rights, more precisely: the right to private life, the right to family life; the right to domicile and the right to correspondence. One of the four rights constituting the elements of the content of the right to private and family life protects multiple values, some of them being in turn individual rights. For instance, the right to private life: right to image , sexual freedom, right to identity, right to physical and psychic integrity, right to social life, personal data, right to a healthy environment. The right to family life protects the values related to: 1. The relations that may constitute family life: a) relations among family partners; b) relations between parents and children; c) other relations of the family life type; 2. relations resulting from family life in special situations: a) special situations of protection of the right to family life in the relation between parents and children (custody, visitation right, placement, restrictions imposed to parental rights etc.); b) foreigners' family life; c) detainees' family life.

The protection of domicile is understood in the extensive interpretation of this notion, and the protection of correspondence also refers to the modern one in the digital era. Jurisprudence also balances the secret of correspondence and the domicile with the interest of the defence of public order and prevention of crime – estimated as necessary measures in a democratic society.

The rule set in jurisprudence as regards the publication of the image of a person distinguishes among public and private persons. The national and European courts frequently ruled also about the publication of the image of a deceased person – if this would have harmed the right to private life; also about the publication of the image of a person accused or condemned for the commission of a crime. In all cases, jurisprudence established that in the search for the balance between the freedom of speech and the right to private life one must take into account two criteria. The consent of the person for publishing the image and the existence of a purpose of the social utility of information for the satisfaction of public interest. The grounding of intrusions in the private life of public persons according to the theory of the *„tacit consent"* cannot be accepted, as such a person lacks the legal faculty to oppose the revelations related to his or her public activities. The right of the public to be informed or the „legitimate interest" of the public exist only in the case of public activities, not in the case of the curiosity related to the personal and family aspects thereof. Consequently, we consider that the right of the public to information must be invoked with great caution in the analysis of the consent condition. It never legitimates the violation of the right to image on the ground of a consent presumption. Certain attitudes may however implicitly express the will or the consent of the subject (Călina Jugastru, 2009).

We may conclude that the private life of private persons enjoys more protection and respect than that of public persons, as the public interest in relation with them is lower. The prevalence of public person' right to image versus the freedom of speech is made in accordance with the „satisfaction of the public interest, which is also the cause of complexity in the appreciation by the course of the „just balance" between the freedom of speech and the right to private life. „The satisfaction of public interest" is a third element

exterior to the relation between the two parties directly involved – the press wishing to disseminate the information, and the person. If the interest is appreciated as sufficiently general, relevant or cultural, the publication and intrusion in the sphere of privacy is legit, even in the absence of the consent of the respective person or even despite his or her consent. The sphere of private life is difficult to outline in the case of public persons and the matter should be reasonably considered in each case (taking into consideration also the excessive exposure, voluntary or involuntary, of the person). Celebrities' right „to be let alone" still prevails in relation with their private activities where the public interest is not a legitimate one. The European Court of Justice ruled however that the search engine must erase, a request, certain information accessible on the Internet. By these endeavours one intends to avoid the breach of the fundamental right of Europeans, by the access to personal information accessible on the Internet, information that is inadequate, irrelevant for the public interest although the decision of the European Court of Justice left very many things unclear and triggered a series of questions that will find their ulterior answer, there still is no available guide about how we should respect this new right (what type of content must be erased and in what conditions), but it can be a change for the better, according to the Americans (Mădălina Stoicescu, 2014).

As regards the publication of the image of a deceased person, in the determination of the relation with the exercise of the freedom of speech, the courts used the same criteria like for the situation of the publication of the image of a person alive (the existence of the consent of the family or the heirs and the public interest). When analysing the violation of the right to privacy by publication of photographs of the person criminally indicted ut makes the distinction between the criminally indicted persons (who still enjoy the presumption of innocence) and the persons definitively sentenced and condemned.

The right to honour, honesty or reputation – the right to human dignity is considered a complex, subjective right. It refers to the protection scope of the right to image – right constituting one of the content elements of the right to privacy. The examination of this right requires the clarification of the notion of *„harming information"* – notion designating any information which, related to the concept of law and norms of cohabitation, leads to the harming of honour and reputation of the person in certain conditions (cumulatively): to have a defamatory character, to be brought to the cognisance of at least another third party, the information thus disseminated to be false. According to some opinions, the legal character of such rights belonging to the category of the rights of personality, must sometimes be regarded in a nuanced manner; there are interferences between the personality rights (which are, as shown in the doctrine, either extra-patrimonial or patrimonial). Indeed, the law acknowledges the validity of connections related to personality rights (exploitation of image, voice, name, private life etc..) so that one speaks more and more about the occurrence of certain patrimonial rights of personality or a *patrimonialization* of these rights (Ovidiu Ungureanu, Cornelia Munteanu, 2015). For a full analysis we are interested in all the rights having a resonance in civil law, but also in the plane of public law; in other words, human rights opposable to other people (in the relations between private persons), but also opposable to the state.

The limits of the freedom of speech in relation with the defence of honour, dignity and reputation are set first of all depending on certain criteria: distinction between public figures and ordinary people, distinction between *„facts"* and *„judgements of value"* (the materiality of the former may be proved, the latter are not fit for a demonstration of their

exactness). Nevertheless, even a judgment of value may prove excessive if it is completely devoid of factual foundation; the degree of contradiction of the information to the debate of general interest matters is another criterion to complete the aforementioned ones. The protection of honour is granted both to journalists and other persons, without distinguishing according to the capacity of the persons freely expressing opinion in relation with political figures. Jurisprudence connects the defence of the magistrates' honour to the necessity to enforce justice, and the criminal and civil means must be put at the disposal by the national legislation for the protection of journalists, desincrimination of insults and defamation, of the regulations in the field of civil penal liability, etc.). Nowadays there are also some controversies also the reasonable suspicion of the involvement of the Romanian Intelligent Service in the act of justice beyond the limits of the law – suspicion inducing the citizens' solid doubts related to impartiality and implicitly the correctness of the act of justice (Natalia Roman, 2015).

A new law regarding the „right to privacy at the place of work" already constitutes the object of the debate in Germany. The issue of secret monitoring of the employees at the place of work – although forbidden by the European legislation – is far from being solved in reality, on the contrary, it has even increased. According to art.8 of European Convention of Human Rights, the protection of domicile and correspondence (secrecy and right to their inviolability) should enjoy adequate protection. European jurisprudence, in its practice, stated that the professional headquarters - if the persons deploy there a great part of private life – naturally falls within this protection scope in any democratic society. Receiving or sending mails (using the employer's computer) to enjoy the protection instituted, a minimum requirement imposed to mark this correspondence as „private" (Dollores Benezic, 2011).

Some legal issues, „more controversial" in relation with the right to an image are also the situations connected to the caricature or deformed image, as an artistic form of expression. The legal rigour, including the sanction systems, shows than even in the case of caricature one may conceive deeds that harm either the right to image, on the one hand, or the right of the public to be informed, on the other hand (Corneliu Turianu, 2015). The situation related to the use of another persons' image („twin/look-alike") by some public persons - celebrities/politicians etc. - to prevent the fact that third parties invokes the right to one's image of aspect (Dragoş Mărginean, 2015). A correct solution - in our opinion - may be made depending on the just interpretation given to the notion of „one's image". The notion of „one's image" requires the examination of the two opposite doctrines (Corneliu Turianu, 2014), on the one hand, and natural right, on the other hand. A first (majority) opinion considers the harming of the right to one's image restrained only by the caption, observation and dissemination of a person and the montage realised by the reunion of independent images, with the purpose to obtain a certain examples. It would result that the freedom of speech prevails (including the artistic one). The opposite reconsiders that the notion of *„one's image"* has a much wider scope (being the resultant of all the qualities of a person. Thus, „one's image" is a homogenous notion, connected to the person's conduct, and not a material object, like a photograph, printed image, etc. It would result thus – in this opinion – that the right to one's image should prevail to the detriment of the restriction of freedom of speech, although it is an opinion closer to the natural right as regards the approach of a person's image, the solution is still a simplistic,

reductionist one, being able thus to bring unjustified harm to the freedom of speech, especially the artistic one.

In the conception of the natural right, the issue of the protection of rights is solved differently, using both natural and positive criteria. The relations between freedom of speech and the right to information have naturally a symmetric character. Between this freedom and this right there is often interposed the right to dignity/honour/reputation/person's image, and in a certain context – also the right (national) safety and security. It is obvious that „following the Charlie Hebdo attack, the public opinion desires more security" but at the same time also the protection of freedom of speech and the right to privacy. The states have the obligation to protect its citizens but by just procedures. And thus the solution to this apparent conflict should not be regarded in contradictory terms. The terrorist threats against society affect the fundamental interest of the state and individual liberties in the context of the need for security (Gheorghe Popa, 2012). The respect of private life in the confrontation with this reality is characterised by the information trend, estimating that only those who affirm their rights with vigour and conviction will win. Thus, starting from the attribute of uniqueness, the person should manifest his or her personality, whereas privacy should affirm it existence, irrespective of the hindrances encountered (Popescu Legal, 2011).

The realisation of a scientific endeavour in the zone of public security is necessary, as this segment and the concept of *public security* have not been sufficiently analysed yet. For instance, „the challenges in the field of public security, they particularise of communication and ethics and deontology in the system of public security, as well as the activities of cooperation in this field" (Gheorghe Popa, 2012).

Nevertheless, the mass surveillance, although efficient, is a procedure harming private life. The science of natural law – part of the science and art of law – offers solutions for settling such apparently insurmountable issued. In short, first of all one starts from an accurate classification of all rights (*natural, positive* and *mixed*), depending on simple, objective criteria – for example, according to the criteria of the provenance of the title or right measurement. Partially natural (mixed) rights are considered as such only those where the title or measure – or part of the title and measure – are natural and not conventional for instance according to the criterion of tithe provenance of the law title or measure. Consequently, natural mixed rights (partly natural and partly positive) allow also a positive adjustment by man's will, as, in reality, there are naturally many situations there is not always a naturally determined measure. To conclude, there are rights where the title or measure – or both – are partially natural and partially positive. In fact, inside a legal system in vigour, *the natural* and *the positive* are generally united, form together the different rights, so that the deterioration of each of them requires the simultaneous natural and positive criteria. The exclusive use of positive criteria leads, in a way or another, to injustice. Even the positive measure is often regulated by a natural measure. Thus, in the case of freedom of speech or private life, the limitations brought to them may fluctuate depending on certain concrete situations at a certain moment (public interest, national safety, other persons' rights, etc.). However the scope and type of interference may be excessive, leaving room to injustice. The limitations may not present a great difference or disproportion compared to the situation imposing them or having determined them, because in this case the limitation or imitations inflicted, like in fact the absence of any limitation, become unjust bay excess, or answers, guaranteeing in these cases the

obligation to repair the violated rights or other remedies that the positive laws usually offers.

It is important to know that natural rights, including the mixed ones, imply certain sub-classifications in: *original* rights and *subsequent rights.*

The original right come from human nature and belong to all persons at any moment of humanity history. In exchange, there are subsequent rights those coming from human nature in relation with man-made situations. There are examples of primary rights those representing fundamental assets of human nature and those corresponding to these basic trends); the derivative rights are those right presenting manifestations or derivations of a primary right.

The importance of these distinctions is found in the influence of historicity, which is very powerful in subsequent and derivative rights, given the fact that the historic situation created by man varies, and thus also the *titularity* as extension of these rights may vary. For instance, both the right to life, including to privacy, and their derivatives – the right to care / the right to preserve intimacy, honour, etc. are original rights; self-defence, national safety and on the contrary, are subsequent manifestations: given the presupposed situation of attack/cyber attach/terrorism – created by man, defence appears as a manifestation subsequent to the right to life/ including the right to privacy. To conclude: freedom of speech, right to privacy, right to image, as well as other similar rights (free circulation, freedom of association etc.) known as continual rights, are natural mixed rights, as theory are not *absolute* or *intangible*. One has, however, made a clear distinction between primary and subsequent rights when the issue is raised which of these rights must prevail in case of conflict – given that some of them are manifested even as conflicted rights in their exercise. In the effort to trace a border between them, as between the right to image and right to free expression, law, legal practice and doctrine attempts to define main rules and criteria. The freedom of speech and the right to private life (due to the content of each of them) have a certain point where they encountered. The interfering protected values and the mutually exclusive ones, prove that in most situation, freedom of speech (especially in the press and the artistic one) comes in conflict with the person's rather to image of the person – in a wide sense (from the publication of the image of a person to the defence of his or her honour and reputation). There are other values composing the right to privacy interfering with freedom of speech - which require special analysis - such as the right to the inviolability of domicile and the right to correspondence secrecy. One concludes thus that freedom of speech, by all its content elements (freedom of opinion, freedom of information , freedom of the press) interfere with the right to private and family life, to the extends to which the values protecting this right are brought to the public cognisance (Daniela Valeria Iancu, 2013).

The choice of the human option of the prevalence of one right over others is not equal with the arbitrary – although there are arbitrary choices! The just choice, as such, is a rational act. The essence of the law is rationality; when it is absent, this is something different from the law. There is often the trend to balance the life and safety of persons against their liberties, arguing the prevalence of the former over the latter, arguing that otherwise the rest of person's rights would remain mere abstractions the right to private life, to free expression, etc. have nothing abstract in their content. Each person's life is as real and concrete as the fact that each man is real and concrete. Assassination, terrorist attacks or cyber attach, censorship, interferences and unjust harms brought against

intimate of person's image and dignity does not attach abstractions, but concrete realities the denial of these rights or attaching them engage a specific and real manner of injustice. To observe these rights is not a matter related to the free play of political options, or the social right of interests, but the justice in the proper meaning of the term.

The variability in the enumeration and classification of these rights originates in the diverse scientific criteria used fro their systematisation. Thus, the freedom of speech and private life incorporates for some authors the existence of one or several distinct rights. The foundation of each right is represented nevertheless by the human person. Even if there is a permanent change in human society, it has its place within the same being (man does not turn into another being). The man who changes during his or her life and the evolution of humanity remains himself, does not become another being. From the perspective of the theory of natural right, one does not mistake *change* by *transformation.*

Historicity is a change; man remains the same, however. Consequently, globalisation – with its advantages and disadvantages – does not change human nature and foundation of rights. The man remains the same in his essence. Human rights - not only are they devoid of historicity, but also constitutes one of these dimensions. And hits in two manners: a) consisting in really exiting rights, they are not *supra-temporal/atemporal*, but temporal and historic rights, as the human person is immersed in history; b) although change does not affect the foundation *in se*, but only the defined modality of exercise, an adjunct is necessary between things or between persons and things. Consequently, a configuration of society here such right are not respected or a reduced estimation, represent an unjust society. Hence the quality of systems as *unjust* (Hervada, Javier, 1991).

In the field of IT and security in the informatics environment, the stage of Romanian legislation must be harmonised with the European one. The environment and virtual services do not have yet their legal regulation; they are applied the regime of personal data protection - as the virtual environment naturally implied by this type of data. The personal data regime and the regulations in favour of the private life protection may limit the actions of authorities in the field of national security. At present, the Law in the domain of cyber security in Romania is being debated, the previous form being declared unconstitutional along ten categories of reasons among which only two regard the right to private life. The remaining reasons were justified by the absence of the provision of guarantees allowing an efficient protection against the risks of abuse. There are several European, international and national regulations in vigour with the incidence as regards the right to privacy and personal. Data protection that, in their entirety, assures an adequate level of person's protection. Their application is constantly updated by the approvals of the Work Group art.29, the decisions of the European and notational courts (Andreea Lisievici, 2015). Recently and by the involvement of the UN Council through the Human Rights (by the decision of appointing a special reporting expert regarding the right to privacy).

The domain, however, has inadvertences (difference of legal regime from one state to the other, of legislative interpretation and legal practice). For a complete harmonisation in the field, the member states have at their disposal only the appreciation margin (the task to establish the details or to choose form among options, without being able to introduce more relaxed or stricter conditions). The limitation of the right to private life – determined by the requirement of national security – is allowed, but with the absence of the principle of proportionality and necessity. What should prevail is the adequate legal guarantees

instituted to assure that interference is not abusive. The users, in the context of the progressive growth of knowledge in the digital era, claims the right to be informed correctly, but also protected as regards the manner in which data about them are processed and retained. „Caution" in the online environment is a continual effort of awareness and responsibilization and adaptation of the reality of the moment, as also the threats undergo the same sophistication trend (Mihaela Mocanu, 2015).

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