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THE RIGHT TO ONE'S IMAGE, AS A RIGHT OF THE HUMAN PERSONALITY JURISPRUDENCE

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Abstract

Through a theoretical and practical approach, the study presents the main regulations of the right to image, as a personal non-patrimonial right: the Romanian Civil Code, the Romanian Constitution, and the new legislation in the field of personal data. The study presents practical issues such as jurisprudential solutions in Romania regarding the violation of the right to image in the online environment (Facebook, Instagram), television shows, and press articles. Also, the study deals with the much-disputed issues of using the person's image in the procedures for sanctioning the employees, analyzing how the National Authority for Supervision of Personal Data Processing (N.A.S.P.D.P.) from Romania sanctioned the abuses of the employers. The case studies and the analysis of European and Romanian legislation are also useful to students, theoreticians, and legal practitioners.

Keywords

The Right to Image, Freedom of Expression, The Right to Privacy

1. Introductory Considerations

The right to image presupposes, mainly, the right of the person to dispose of his image, a right that includes the possibility to refuse its publication (Rainey et al., 2017).

On the one hand, freedom of expression grants the possibility to publish films, photographs, and images of the person, both online (Facebook, Instagram) and in print media (newspapers or magazines).

According to international regulations, the right to image is not regarded as an independent right, but as a limit to the freedom of expression, especially freedom of the press which has the power to publish images and photos of the person.

2. The Free Expression and the Right to Image in the Vision of the European Convention on Human Rights

In the view of the European Convention on Human Rights (2021), freedom of expression is a generic concept comprising two freedoms: opinion and information. In this sense, article 10 paragraph 1 of the European Convention establishes that the freedom of expression implies the freedom of opinion and the freedom to receive and communicate ideas without interference by public authorities (Guide on Article 10, 2022).

First of all, the Convention guarantees the individual's freedom of opinion, as a main form of freedom of expression, in the sense that anyone can propose an opinion, without being condemned for his ideas. The second element, freedom of information implies both the freedom to publish information and the freedom of the reader, the public, in general, to receive information freely and from various sources. At the same time, freedom of information also implies the free circulation of information supports (words, images, videos, or sounds) regardless of borders. Freedom of information must be ensured for all technical means of communication, both the classic ones (photo images published in magazines and newspapers) and the modern ones, such as Instagram, and Facebook.

Although guaranteed by the state authorities as a fundamental right, freedom of expression cannot be exercised beyond any limits. As a social freedom, freedom of expression is subject to limitations, and restrictions according to the art. 10 paragraph 2 of the Convention, such as the reputation and right to privacy of other persons. At the same time, the European Convention regulates in Art. 8 the right to respect for private and family life, stipulating that the interference of the public authorities in the exercise of this right is allowed only for the protection of the rights and freedoms of the others (Guide on Article 8, 2022).

The European Convention establishes that the state respects the right to private life, but without mentioning the right of the person to his image, as an independent right. In this vision, the right to one's image is a component of a person's private life. (Guide on Article 8, 2022).

3. The Free Expression and the Right to Image in Romanian Legislation

3.1. Constitution of Romania

In Romania, freedom of expression is included in the category of fundamental rights and freedoms, being regulated by Art. 30 of the Constitution according to which the freedom to express opinions and beliefs through live speech, writing, images, sounds, and the freedom of the press cannot be censored by authorities.

At the same time, freedom of expression is not absolute, knowing the restrictions imposed by Article 30 paragraph 6 of the Constitution, namely the protection of the rights of another person, such as honour, dignity, private life, and the right to image

Although it explicitly mentions the right to one's image, the Romanian Constitution regulates it as a limit of free expression and not as an independent right.

Exceeding these limits leads to an illegal exercise of this right engaging the legal responsibility of the author. In this sense, in a provision of major importance, Article 30 para. 8 of the Romanian Constitution establishes that the civil responsibility for public information rests with the publisher, the owner of the means of multiplication, of the radio or television station. Thus, it is the first legislative text that enshrines the civil legal liability of the author of the information and the owner of the means of multiplication regarding postings in the online environment.

3.2. Romanian Civil Code

Instead, we find the regulation of the right to image, in the New Civile Code. This right is included in the chapter regarding human personality rights, and represents a new right in

Romanian legislation in this sense, Article 58 Civil Code stipulates that every person has the right to image.

But what is the right to image? The definition can be found in Article 73 of the Romanian Civil Code which states that in exercising the right to his image, everyone may prohibit the reproduction, in any way, of his physical appearance or voice. Unlike the Constitution, in the Romanian Civil Code, the right to image is regarded both as an individual right and as a limit to the right to privacy (Pop, 2012). In this sense, Article 74 of the Civil Code provides that using the image or voice of a person in a private space without their consent may be considered an invasion of privacy (Sabau, 2014).

In the context of these regulations, everyone has the right to prohibit the publication of his image without his consent.

Creation of the judicial practice, the right to the image was assimilated to the right to property which confers the right to prohibit the use of external reproduction of its finished. Thus, any person has an exclusive right over his image and can oppose its reproduction or use without prior authorization (Lindon, 1974). In this conception, the right to the image was qualified as good, but not part of the person's patrimonial property.

In another opinion, the right to the image is based on the author's right, more precisely the copyright of the individual to his features (Aquarone, 1985). We consider that the right to the image, as regulated in the Romanian Civil Code, is a personality right, giving the owner the possibility to censor the use of his image.

4. Legal protection of the right image in online postings

In the context of the evolution of the means of communication, new problems have appeared related to postings in the online environment, and to the coverage and quantification of the damage caused to other people by publishing images on Facebook and Instagram pages. The role of the Internet was recognized by the European Court (ECHR), which assessed that the sphere of protection granted to posts in the online environment is similar to that granted to the press, due to the possibility of the Internet ensuring public access to a lot of information and its extremely rapid dissemination: (Case of Ahmed Yildirim vs. Turkey, 2012). Although he was fully aware of the role that the Internet has in disseminating information, he also emphasized that the risk of the

online environment affecting private life is considerably greater than the risk inherent in the print media (Case Tamiz vs. Great Britain, 2017)

Whenever the claimant's private life has not been respected, the courts grant compensations, taking into account a series of criteria identified in ECHR jurisprudence. These criteria established by the Court regarding freedom of expression also apply to online postings (Facebook and Instagram). (Case Times Newspapers Ltd. v. the United Kingdom, 2009). Since the creation of archives on the Internet represents an essential aspect of the role played by Internet sites, the jurisprudence of the European Court considers that it falls within the scope of art. 10 (the free expression) and art. 8 (the right to privacy) of the European Convention on Human Rights (2021).

4.1. The Principles Established By the European Court In The Matter Of Private Life, the Right to Image and Freedom of Expression

The European Court has shown, in its constant jurisprudence, that a balance must be found between freedom of expression and the right to privacy (Guide on Article 8, 2022), a balance that requires the liability of persons guilty of committing derogatory statements and posting images of persons, through means of communication through the press and mass media in bad faith (Case Petrina vs. Romania, 2008 & Case Andreescu vs. Romania, 2010)

In the jurisprudence regarding the person's right to image, the European Court based its solutions on the provisions of Art. 8 of the Convention regulating the right to private life, appreciating that the publication by the press of some photos that showed people, in daily life, concerns their private life. It was noted that the issue is not the dissemination of ideas, but images that contain personal information, and the images that appear in the media often constitute continuous harassment and even persecution of the person in question. (Case of Van Hannover vs. Germany 2004).

The ECHR jurisprudence synthesized several criteria in analysing the relationship between freedom of expression and respect for privacy: (1) the contribution to a debate of general interest; (2) the object of the report, the content, the form, and the repercussions of the publication; (3) the notoriety of the person concerned (Case of Axel Springer AG vs Germania, 2012).

Regarding the first criterion, if the statements made are necessary for informing the public or generating public debate, the right to privacy and the right to image are not violated, and the compensations are not granted. In the case of von Hannover vs. Germany (2013), a German magazine published two photographs of Princess Caroline von Hannover and her husband, Prince

Ernst August von Hannover, during their vacation, without their consent. The photos were accompanied by an article about the tendency of wealthy people to rent out their vacation homes. The Court stated that there was no violation of the right to privacy because the article contributed to a public debate.

The second criterion, the negative consequences concerns how the victim's family, professional, and social situation was affected. In the case of *Hachette Filipacchi et Associés vs. France* (2007), after the assassination of a French prefect, the *Paris Match Magazine* published several photos of the prefect's lifeless body on the ground. The European Court established a violation of the privacy of the prefect's widow and her children, taking into account the negative consequences of the publication of the image on the family.

Regarding the third criterion, a public person cannot claim protection of their private life just like a common person, unknown to the public. As a rule, according to the practice of the European Court due to their status as a public person, they could not claim compensations.

In the case of *Lillo-Stenberg and Saether vs. Norway* (2014), a musician and an actress, well-known in Norway, complained that the media had invaded their private lives during their wedding in August 2005. The marriage ceremony was held on an island in the Oslo Fjord and was accessible to the public. The *Se og Hor* magazine published six photographs of their wedding, without the couple's consent. The event being a well-known one, The Court decided that there was no violation of the private life.

By contrast, in the *Case Peck vs. the United Kingdom* (2003), a filmed sequence taken by a CCTV camera was disclosed in the media. The film showed the applicant, who was suffering from depression, walking alone with a kitchen knife in his hand, attempting to commit suicide by cutting his veins. The Court decided that the disclosure of the film constituted an unjustified interference in the private life of the applicant.

4.2. The Assessment Mechanisms of the Romanian Courts Regarding the Protection of the Right to Image

Starting from the criteria identified in the ECHR jurisprudence, the courts have the task of ensuring the balance between the two rights: the right to image and the right to privacy (Guide on Article 8, 2022)

In the light of the principles laid down by the ECHR jurisprudence, the Romanian courts applied their mechanisms (Niță & Raducan, 2019), in awarding moral compensations for the violation of the right to image, noting contradictory solutions and moral damages varying from

200 euros to 30,000 euros. Also, the Romanian Civile Code established in Article 71 that nobody can be the subject of interference in private life without his consent. In this way, disseminating news, debates, images, and photos of personal life without the consent of the person is considered an infringement of privacy.

Thus, in a series of similar cases, the defendant was obliged to pay compensation for the violation of free expression in the online environment (Instagram) for 2000 euros, respectively 4000 euros (Civil Judgment no. 1629/24 November 2021 of the Bucharest Court, Sentence civil case no. 1388/October 19, 2021 of the Bucharest Court, unpublished). In the mentioned cases, the defendant published on his Instagram page, in the story section, a series of photos or videos accompanied by comments regarding the actions of the plaintiffs - public persons - promoting some services and products. The posts of the defendant (public figure) in the online environment took place in the context where there were numerous debates in the public space regarding "influencers" and their promotion of numerous products and services, without assuming any responsibility towards the followers and without specifying the fact that the respective posts represent paid advertising, creating a phenomenon of manipulation of the general public. The defendant reasoned in his defence that, as a public figure, he felt the need to take a stand and show his followers that not everything that appears on Instagram is real and not everything posted by these influencers should be accepted as such. Under the prerogative of public interest, he started publishing these satirical posts about influencers.

Related to the fair balance between the two rights, (the free expression of the defendant and the right to the image and reputation of the plaintiffs), the court had to determine if a public interest justified the posts and generate a debate of general interest (Rainey et al., 2017). Indeed, the defendant's posts appeared on the background of the subject of interest of the influencers, however, in terms of the balance between public and private interest, the courts noted that the defendant's posts cannot contribute to a real and alert discussion on the issue the subject in question (disguised advertising and the promotion of products on social networks for some sums of money). Thus, it was concluded that the final purpose of the reports was not to maintain public debates of general interest regarding the online behaviour of some influencers but to ridicule the image of the person in question.

In the effort to inform his followers about the online behaviour of the complainants manifested on the social media page, the defendant did not limit himself to moderating a public

debate on the topic of general interest regarding online commerce, but, went beyond the role of whistleblower, acted to annihilate the image and credibility of the complainants, exposing their private life in a brutal manner, of the nature of causing damage to the image.

In a similar case, the court (Civil Decision no. 2370/2022 of the Bucharest District 1 Court, unpublished) found that the parties did not demonstrate the existence of a public debate, involving a significant number of people, regarding the activity carried out in the online environment by influencers and the fact that they would sell counterfeit products at much higher prices than the ones at which they were purchased, not having demonstrated the fact that this would represent a subject of general interest. Similarly, in another case (Civil Decision no. 41/2021 of the Bucharest District 1 Court, unpublished), it was decided that the statements and postings in the online environment are of a nature to give the public a negative perception of the image of the complainant. The pictures were published only for harassment and defamation, and not to communicate objective information or to draw the public's attention to disguised advertising or other aspects of general interest. Moreover, the party has repeatedly inserted offensive symbols in the pictures showing the complainant, posted on the Instagram platform.

Regarding the quality of public person of the plaintiffs, although in ECHR jurisprudence it was appreciated that public persons are more exposed to interference in their private lives, however, the Romanian courts adopted a diametrically opposite solution. In the litigations taken as a point of reference, the Romanian courts concluded that although the plaintiffs are an active presence in the online environment, and although they have the status of a public person who chose to expose their private life to the public, they benefit from the protection of the Article 8 from the European Convention on Human Rights (2021). In a single isolated case, the court interpreted restrictively the criteria of the ECHR jurisprudence in the analysis of the balance that must be ensured between the freedom of expression and the respect for private life, proposing a diametrically opposite solution, rejecting the request for compensation for infringements on private life. (Civil judgment no. 869 of March 22, 2021, of the Bucharest Court, unpublished). In fact, on the Instagram page used by the defendant, several Instagram stories (photos and videos) were published that referred to the person of the plaintiff, these being accompanied by several comments from the defendant. From the administered evidence, it appears that the defendant gave the plaintiff the nickname Pinocchio and under that name, he ridiculed her and addressed offensive words.

First of all, the court found that the aspects, addressed by the defendant, were matters of general interest, constituting topics of debate in a democratic society as they concerned the activity of influencers for the promotion of certain products or services. Secondly, the court established that the plaintiff was a public person, the fact that she participated in numerous TV shows and interviews in the mass media was well-known. Moreover, the ECHR ruled that public persons, cannot claim a manner of protection of their private life identical to that applicable to individuals unknown to the public, so that they are more exposed to the surprise of aspects from their private lives. The fact that the photographs posted online were distorted unrealistically and exaggerated by the defendant, including by superimposing some drawings, cannot lead to the conclusion that they were intended to reflect or suggest reality, such a portrayal constituting a caricature by using satirical elements.

4.3. The Right Image and the Freedom of Expression of the Press

One of the main issues that arise in connection with the right to the image is the need to find a proportional balance between the right to privacy and the freedom of the press. In Romanian legislation Law no. 190/2018 on implementing measures to Regulation (EU) 2016/679 (General Data Protection Regulation, 2016) appears to elucidate this aspect in one principle: "*Processing for journalistic purposes is allowed if it concerns personal data made public manifestly by the person concerned or closely related to the quality of public person of the person concerned or to the public nature of the facts in which is involved*"(Article 7, 2018). In other words, the public character of the act and the quality of being a public person are sufficient criteria to justify the interference in the right to privacy.

In Romania, there are many lawsuits against journalists who publish images of public figures or common people. Generally, newspapers win these cases, due to the quality of a public person of the data subject or to the public facts in which a common people is involved (Ispas, 2022).

Even if the newspaper benefits from the highest degree of protection, in one case (Sentence no. 27099/2016 of the District Court 1 Bucharest, unpublished), the Court granted only 500 euros compensation. The writer qualified his published paper/work as a pamphlet and posted photos from a private party using funny words and phrases about the appearance of a public figure under the influence of alcohol. However, the court ruled that the public's right to be informed did not cover published photos and comments that exclusively concern the private lives of public

figures. The author qualified his work as a pamphlet, but the court established that a simple warning like – „This work is a pamphlet” – could not be an exonerating cause of liability.

5. Can We Use the Person's Image in the Procedures for Sanctioning the Employees?

A much-disputed issue in judicial practice and specialized literature is the question: Can we use the image of the employee to sanction the person disciplinarily?

In trying to find the answer to this problem, it deserves to be presented Decision of the National Authority for Supervision of Personal Data Processing (N.A.S.P.D.P) of Romania (17.10.2022). The claimant, as an employee of a public institution, was sanctioned for leaving her job before the end of the program. The employer used as evidence the video image, showing the employee leaving the workplace. In December 2021, the former employee complained to the National Authority for Supervision of Personal Data Processing (N.A.S.P.D.P) of Romania stating that the video image was illegal because the employee was not informed about the existence of the cameras, and the purpose of the TV cameras was security and protection and not their use in sanctioning employees.

The National Authority for Supervision of Personal Data Processing (N.A.S.P.D.P) of Romania found the institution guilty of violating the right to image but applied the sanction of warning. In the application of sanctions, in Romania, a distinction is made between public institutions (which are sanctioned with a warning in case of violation of the regulations regarding data projection) and operators from the private system (sanctioned with a fine). The National Authority for Supervision of Personal Data Processing (N.A.S.P.D.P) of Romania considered that the public institution illegally processed personal data by using recordings from the video surveillance system for other purposes incompatible with the purpose for which it was installed. The public institution did not present evidence that it ensured the information of its employees regarding the processing of data from the video surveillance system.

In conclusion, the use of the video image of the employee must not be used for any other purpose than the one declared, namely the protection of property and people. In other words, the video image cannot be used against the employee, in a disciplinary investigation, in this case, there is a diversion of the original purpose for which the images were collected.

Starting from 2018 until now, the National Authority for Supervision of Personal Data Processing (N.A.S.P.D.P) of Romania has sanctioned several operators who have processed the personal data of their employees by using an audio-video system (image and voice), located in offices, halls of tables and changing rooms, applying fines for 5000 euros. A problem that aroused the interest of the specialized practice in the field of personal data ~~protection~~, was the question of whether or not employees' consent is requested for video monitoring, to avoid such sanctions. Most of the time, in practice, to ensure real proof, the operator requires the express consent of the employees in this sense.

Considering the subordination relationship in the execution of the employment contract between employers and employees, such consent cannot be qualified as "being freely granted" and from this perspective the consent is flawed, producing no legal effects. In this context, the operator should not rely on consent when processing employees' data, especially video image processing.

6. Conclusions

The right to image, understood as the faculty of each natural person to preserve his image and decide on its use, without any external interference, is recognized by European legislation. Thus, in the Romanian Civil Code, the right to image is considered an aspect of the right to privacy.

From the analysis of the ECHR jurisprudence, a violation of the right to the image means the use of a person's image (video/photo) without his consent or the use of the image in bad faith, of a nature to harm his reputation and honour.

It should be stated that not only the use of the photo image but also video camera surveillance is included in the content of this right and its legal protection.

Judicial practice has established a series of criteria for evaluating the relationship between the freedom of expression and the right to privacy for private life. The first criterion is the contribution of publishing the photo to a debate of general interest (Guide on Article 10, 2022). Such a general interest has been recognized jurisprudentially if the publication of the person's image concerned political issues, committed crimes, or matters related to sports or performing artists. In contrast, marital problems or financial difficulties were not considered matters of general interest, even if they concerned a person known to the public.

A second criterion concerns the notoriety of the person (role and function in society) and the nature of the activity that is the object of the photo or video image (Guide on Article 10, 2022). If a private person, unknown to the public, can claim legal protection of his right to image, the same cannot be claimed by a public person. In the second case, the media is a guardian, a protector of democracy and personal freedom, a “watchdog of democracy” (Guide on Article 10, 2022), which has the task of communicating information on issues of public interest.

Another criterion concerns the repercussions, and the consequences of publishing the photo (Guide on Article 10, 2022). Thus, the courts refer to how the person is presented in the photo, as well as to the extent of the broadcast of the report and the photo, as well as the type of newspaper, and the reputation of the television (national or local circulation, local/national television).

In a final criterion, it was ruled that the context in which the published photos and broadcast films were taken cannot be disregarded (Guide on Article 10, 2022). Concerning this criterion, it is analysed whether the person gave his consent for the making of the film, the publication of the photographs, or whether they were made with the help of fraudulent maneuvers.

Regarding the amount of compensation for the moral damages caused to the person through the violation of the right to the image, initially, the judicial practice in Romania oscillated between awarding them a moderate amount (500 euros) and rejecting the actions for damages. Currently, however, there are more and more court decisions awarding moral damages for non-respect of the right to the image and the right to privacy of the person, the amount of compensation reaching 15,000 euros.

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