Searching the Balance between the Right to Privacy and Freedom of Expression

Abstract:

Gabriel Liiceanu stated that ”human freedom shall be construed in a bundle of limits”[1] meaning that freedom makes sense only if there are some limitations or coordinates that it depends on. Also, the legal doctrine held that in the relations between rightholders ”one’s freedom stops when other’s freedom begins because the inherent condition of a person is her relationship with others”[2].

The exercise of fundamental rights and freedoms shall not contradict the existing order in society that requires tolerance and mutual respect between the subjects participating in social relations.

Legal regulations must achieve a balance between the individual interests and the public interest and also to guarantee fundamental rights and freedoms in situations which could limit or restrict the exercise thereof. They also need to ensure protection of the individual against the arbitrary state interests in exercising his rights and freedoms[3]. Therefore, the limits to the fundamental rights and freedoms must be adequate for a legitimate purpose. Related to the theme of this paper, the legitimate aim of restricting freedom of expression is to protect the rights of others, namely, the right to privacy.

[1] Liiceanu G., *Despre Limită,* Ed.Humanitas, București, 2004, p.11.
[2] Deleanu I., *Drept constituţional şi instituţii politice*, Ed.Europa Nova, Bucureşti, 1996, vol.I, p.269-270.
[3] Muraru I., *Protecția constituțională a libertăților de opinie*, Ed. Lumina-Lex, Bucureşti, 1999, p.16-17.

However, the restriction must not deprive the law itself, but to ensure its exercise in such conditions.

The entry into force of the new Criminal Code on the 1st of February 2014 in Romania stopped the criminalization of insult and defamation. It was also activated a new regulation, namely that of ”violation of privacy” (226 Criminal Code). Clearly, the criminalization of this crime and thus the concern of the Romanian legislator to protect the privacy of every person is a necessity for Romania; it represents not only an adaptation to European legislation, but also an important step towards a democratic civilization. This new criminal offense is an additional guarantee regarding the protection of the individual against arbitrary interference by any public authority or anyone else. This way, our legislation agrees with the European one, specifically by the Universal Declaration of Human Rights, and respectively with art. 8 of the European Convention of Human Rights.

At first glance, one might say that through this new regulation a greater protection is granted to the privacy and, at least theoretically, our state has resolved the conflict between the freedom of expression and privacy, preferring the one the latter. However, time will tell what direction the courts has chosen and to which extent it aligns to the European jurisprudence. Therefore, this paper aims to meet the possible difficulties in practice and aims to be a support to the skilled, eager to meet a number of implications, that a decision to favor one of the two competing rights at the expense of other, might have.

The main objective of this paper is to compel an answer to the question: *under what conditions it may be maintained a reasonable relationship of fair measure between the exercise of right to privacy and freedom of expression?*

Part I seeks to reaffirm the importance of the two rights in a democratic society. The protection to be granted to freedom of speech and right to privacy is justified by the content of each of the two competing rights. But the dynamic interpretation of freedom of expression and the right to respect for private and family life involves extending the applicability of both rules and, consequently, the scope of rights.

Appealing to the content, the direction followed by the European Court of Human Rights, but also by the domestic courts was in order to protect the freedom of speech, as the foundation of a democratic society, to provide a wide range of protection and, where appropriate, to limit the exercise of freedom of expression in terms of protecting the rights of others, without neglecting, any moment, the reason for which freedom of expression experienced a legislative consecration **(Title I).**

Chapter I shows that since the early assertion of the right to free expression, it has been provided a valuable insight to the place occupied by the freedom of expression within the legal system. A close look at the theoretical and normative legal consecration of freedom of expression reveals the importance of this right for man as an individual and as a citizen.

First, freedom of speech was regarded as absolute by the natural law theorists as it was part of the bundle of rights that man naturally acquired by mere birth. Indeed, under the pretext of freedom of expression, it was implicitly claimed a freedom with no laws or limits, a freedom to speak, write and act on the principle that ”everything is permitted”[4]. The reason for asserting a right to free expression was the human desire to communicate freely and have an opinion. And this aspiration has led to the delusion of

[4] Polin R., *Vérités et libertés - Essai sur la liberté d'expression,* PUF, coll. Questions, 2000, p.5.

unfortunate revolutions, culminating in the adoption of initially US Declaration of Independence in 1776, and then the French Declaration of the Rights of Man and the Citizen of 1789.

With the revolt within positivism the tendency was to consider that there is no right higher than the state and to attempt the consecration of natural rights through the rule of law[5].

But enshrining a fundamental right to free expression does not mean asserting a superior and absolute right. Often the needs of social life or the respect for the rights of others are inevitably restricting this freedom.

It is true that, within the doctrine and jurisprudence of the United States freedom of expression occupies the highest position (*primary right*) towards other fundamental rights; the provision in the First Amendment gives unprecedented protection to it[6]. The tendency to favor freedom of expression in the bundle of rights, both protected by law, is sometimes found in European jurisprudence. Thus, the French Constitutional Council has described freedom of expression as ”freedom of premier rank” (*liberté de premier rang*), after it had consecrated it as an essential guarantee of the respect for the other rights and freedoms of national sovereignty[7]. Also, the German Constitutional Court has admitted the primacy of freedom of expression among other rights and

[5] Dănișor D.C., *Drept constituţional şi instituţii politice*, Volumul I, Teoria generală, Ed. Sitech, Craiova, 2006, p.606.

[6] Moldovan C., *Valoarea constituțională a libertății de exprimare în doctrina și jurisprudența din Statele Unite ale Americii*, Revista de Drept public, nr.4/2010, Ed. C.H.Beck, p.99.

[7] C.C. 84-181 D.C. 10-11 octombrie 1984, RJC I-199, §37 in Pech L., *La liberté d'expression et sa limitation. Les enseignements de l'expérience américaine au regard d'expériences européennes (Allemagne, France et Convention européenne des droits de l'homme),* Les Presses Universitaires de la Faculté de Droit de Clermont-Ferrand L.G.D.J., 2003, p. 17.

freedoms, considering it ”absolutely essential”[8]. But by giving a privileged position, freedom of speech does not acquire a higher value, and the more so, not an absolute one.

The status of a superior right, sometimes attached to the freedom of expression, is justified generally, given its importance in a democratic society. Therefore, freedom of expression enjoys a broad international protection through a number of legal instruments, such as the Universal Declaration of Human Rights (article 19), the International Covenant on Civil and Political Rights (Article 19), the American Convention on Human Rights (13), the European Convention on Human Rights (Article 10), the States Constitution etc.

But such an interpretation should not lead to the conclusion that freedom of expression is absolute and that it may be exercised beyond all limits and regulations. Freedom of expression is necessarily limited by the need to ensure the respect for other rights and interests of different subjects or public interests protected by the Constitution or by the laws.

A compilation of all international instruments governing freedom of expression leads to the conclusion that the system of restrictions on the freedom of expression typically retains the same elements: the interference must be prescribed by law, the interference must pursue a legitimate aim, the interference must be necessary in a democratic society, the interference must be proportionate to the legitimate aim pursued **(Chapter II).**

Regardless of the legal text, it is unanimously acknowledged the very special importance of political and social freedom of expression. The European Court of Human Rights pointed out for the first time the ”status” of

[8] BverfGe 7, 198, p.208 in Pech L., *op.cit.,* p. 17.

freedom of expression, especially in the case of Handyside v. The United Kingdom, and it is then constantly restated in all subsequent cases in this area. Thus, it is the essential foundation of a democratic society and one of the basic conditions for its progress and each individual's self-fulfillment[9]. Freedom of expression is not only the cornerstone of democracy[10], but also a precondition for the exercise of other rights and freedoms enshrined in the Convention: freedom of correspondence (Article 8), freedom of thought, belief and religion (Article 9), freedom of assembly and association (Article 11).

Freedom of expression includes in two freedoms: freedom of opinion and freedom of information. We can not think of freedom of expression without considering, in advance, the freedom of opinion, the latter representing an outward manifestation of the former. Freedom of opinion ensures that no one can be prosecuted or punished for his opinions as the possibility for everyone to have and express an opinion, whether minority or even shocking, is an essential part of any democratic society. But perhaps the freedom of information is even more important; several ECHR cases, that consistently called compliance, serve as proof.

Freedom of information or the public's right to be informed is not absolute; it is susceptible to limitation arising from the necessity of taking responsibility for all activities that might affect the rights of others. Based on this freedom, the press has not only the right but the obligation to provide public information in accordance with the public's right to receive this information, especially when it concerns "the political issues, including that

[9] Curtea Europeană a Drepturilor Omului, *Handyside c/ Regatului Unit*, precitată, §49.
[10] *Ibidem*.

dividing society, but also showing justice"[11]. A public information must draw the public's attention on the general interests in a social context existing at a given time and on how they can be met. But when the information provided means personal or intimate statements, which have the sole purpose of *supplying* the public hungry for sensational news, restricting freedom of information appears to be justified. However, "information is legitimate, even if it relates to privacy, whether it is a public interest, provided that it does not damage human dignity"[12].

The press has a duty to distinguish between facts and value judgments, but also between public information and personal information, so as to ensure the public debate on subjects of general interest, based on its role as guarantor of democracy **(Chapter III).**

In **Title II** we try to establish the content of the right to privacy, watching how it was shaped over time, influenced by the extensive doctrinal debate, but also the creative effort of jurisprudence.

The right to privacy is in tense tandem with freedom of expression since the time of asserting the existence of an intimate sphere of the person. The concept of "privacy" is first mentioned in 1890 in Warren and Brandeis's article, which was written in response to the technological developments of the time, namely the photography and the media sensation ("yellow journalism"[13]).

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[11] Tănase A.-R., *Noul Cod Civil. Persoana fizică. Despre familie (art.1-186, art. 252-534). Comentarii și explicații*, Ed.C.H.Beck, București, 2012, p.94.
[12] *Idem*, p.96.
[13] **Yellow journalism**, or the **yellow press**, is a type of journalism that presents little or no legitimate well-researched news and instead uses eye-catching headlines to sell more newspapers. Techniques may include exaggerations of news events, scandal-mongering, or sensationalism. By extension, the term *yellow journalism* is used today as a pejorative to decry any journalism that treats news in an unprofessional or unethical fashion. http://en.wikipedia.org/wiki/Yellow_journalism

Initially theorized as ”right to be let alone”[14], right to privacy meant a person's right to refuse publicity. Since the definition was considered weak and insufficiently clear, the doctrine and the jurisprudence have started a difficult process of outlining the private sphere of the individual, which culminated in the recognition of a constitutional values of a right to privacy[15] in nearly four decades after the first reference to this concept.

Despite the rich doctrinal and jurisprudential construction, more or less tortuous and controversial, more than a century after the first theorization of the concept of ”privacy”, its scope is still vaguely defined and the limits of privacy vary from state to state and from individual to individual **(Chapter I).**

The progressive secularization of society has contributed to the expansion of privacy and with the development of the society appeared more and more opinions on the content of privacy. We support the opinion that the right to privacy includes ”the right to intimate personal life, the right to privacy in social area and the right to a healthy environment”[16]. Finally, the definition must correspond to and be construed according to changing social reality as to ensure an effective protection of this right **(Chapter II).**

Inspired by the provisions of the Press Act (1881) and the Criminal Code French, the French doctrine[17] was tempted to define it in a negative way: everything is not related to public life is of concern to the individual’s private life. Media interference in the private lives of the individuals revealed the

[14] Warren S.D., Brandeis L.D., *The Right to Privacy*, Harvard Law Review, vol. IV, nr.15, 1890.
[15] See Brandeis's opinion in the case of *Olmstead v. United States*, 277 US 438 (1928), a monumental decision of constitutional justice in the United States.
[16] Bârsan C., *Convenția europeană a drepturilor omului*. Comentariu pe articole. Vol.I. Drepturi și libertăți, Ed.C.H. Beck, București, 2005, p.600.
[17] Rigaux F., *La protection de la vie privée et des autres biens de la personnalité*, Paris, Librairie Générale de Droit et de Jurisprudence, 1990, p.725.

problem of space, namely if we can talk about privacy in a public or publicly accessible space.

A general acceptance for the concept of ”free speech” and ”privacy” causes the enlargement of the content of each of the two rights. In these circumstances, it is inevitable that freedom of expression and privacy do not react and produce tension that often culminates with arbitrary restriction on the exercise of one or the other. In **Part II** of the thesis we aim to bring to the fore the conflict between the right to privacy and freedom of expression and we propose a detailed analysis of the bearings of the conflict as well as solutions to harmonize the two rights.

With the development of the society, privacy has become a very profitable market for the media. In pursuit of sensational headlines, the journalists forget about the rigors of professional requirements and appeal to a variety of methods to capture public figures in compromising situations causing a serious harm to human dignity, right to honor and right to own image. Therefore, the media intrusion may give rise to a conflict, especially between the freedom of press and right to image. However, the coordinates of the conflict between the right to privacy and freedom of expression are clearly more extensive as including the content of competing rights is complex and is related to several factors, such as the nature of the right or the activities involved, the legitimate aim of the interference, whether there is or not a general interest, the content and form of the published information, etc. **(Title I).**

A close look at the nature of the competing rights do not reveal a lot of information. Considered equally essential, equivalent, conditional and susceptible to limitations human rights, both freedom of expression and the

right to privacy should receive an equal and effective protection from the Member States **(Chapter I).**

Nevertheless, the courts will favor one of the two rights, using mainly the reputation criteria. A comparative analysis of the intimate sphere the public figures enjoy on both continents, North America and Europe, reveals the direction taken by them in the conflict between the right to privacy and freedom of expression. Thus, if the US employs a presumption in favor of the media that the press has the right to report on the actions of the public figures based on the fact that this type of information is *per se* news, the European perspective is different and varies depending on the state to which we refer. In principle, the tendency is to value privacy due to the influence of the ECHR. There is a more acute need to balance the right to privacy and freedom of expression to the same extent as the concept of ”privacy” continues to expand in Europe. The European Court of Human Rights seeks to give a common direction to European states, and constantly discourages the freedom of expression in favor of extending the applicability of the right to privacy, especially when the published information is strictly related to an individual's private life.

We note that there is a significant difference leading to a different treatment. And this difference is due to the *importance* that a certain law requires in a given case in society[18] by reference to the the broader notion of *public interest*.

According to the American concept, a public person is also a person who gets public attention involuntarily, named quasi-public person. The notion of public interest is so extensive that destroys all traces of any right to

[18] See Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe.

privacy for public figures. In the US a public person has no secrets; in fact, it has no right to have secrets. That does not mean that American society no longer complies with the concept of ”privacy”, but it rather rejects the idea of an intrusive press. On the other hand, in Europe, the relevant criteria for finding a balance between the two competing rights seems to be not only the nature of the information and the status of the individual – the subject of the news, but also the nature of the media. In other words, it is presumed that the tabloids seek rather to satisfy the curiosity of the readers and to make huge profits, than to contribute to the debate of general interest in a democratic society; in such cases, the European Court of Human Rights is less *protective* of freedom of expression **(Chapter II).**

We found that the nature of the published information is actually the source of countless conflicts between the freedom of expression and the right to privacy as often the articles and photos published in the newspapers do not meet the public interest to know. It is true that the notion of public interest is vaguely defined and probably incapable of precise definition. It is notable the jurisprudence attempt to provide, through countless decisions, essential clues in order to outline a proper definition to prevent and eliminate unwarranted intrusion into the sphere of privacy.

Therefore, the use of confidential data may give rise to a conflict between freedom of expression and the right to privacy. Any person, no matter the name, age, sex, nationality, ethnicity, marital status, has the right to privacy whether it is about the protection of medical data, secret opinions or intimacy of a private place.

Then, the intimate photos of celebrities and not only, published in magazines because of the mere curiosity of a specific audience, are likely to contribute to the wider debate on the protection given to the right to image,

either as autonomous right or as part of privacy. Usually, it is considered that such photographs, taken in a climate of continuous harassment, lead rather to a strong sense of intrusion. Most of the time, those photos do not contribute to the discussion of general interest, but they are published just in order to satisfy the curiosity of a public who is keen on the tabloid press. The European Court of Human Rights noted that the Member State should guarantee to everyone, even if it is a public figure, a "legitimate expectation" regarding the protection and respect for his privacy against sensational media practices[19].

Sometimes, privacy may include the most various aspects of the individual's existence, because, as the Court has consistently held, the concept of "privacy" is not susceptible to an exhaustive definition. Thus, it is considered that the publication of information on sexual behavior, emotional life, religion, one's wealth etc. is also an abusive interference in privacy.

The need to balance the two rights, which are the subject of this study, led to the regulation of certain exceptional situations when it is permitted to limit the exercise of the right to privacy. The premises of such limitations are found both nationally and internationally.

Title II presents solutions in order to find a balance between the right to privacy and freedom of expression, which where found after a large examination of the case-law on how the European and US courts apply the proportionality test.

The proportionality test is one of the instruments of interpretation that gives a lasting solution to the norms that need to be applied simultaneously. Proportionality, expressing the idea of balance, accuracy and weighting, refers to the concept of the rule of law. For this reason, in most legal systems, the

[19] See European Court of Human Rights, *Schussel v. Austria*, February 21, 2002.

jurisprudence and the doctrine link the notion of proportionality to the rule of law[20], without specifying whether it is the result or the condition of the rule of law.

We can distinguish two major systems of proportionality test at the international level. The first system was proposed by the German constitutional court and it was followed by several European countries; the second one applies the rule of *balancing* and it is shared by the countries with common law system. The latter was adopted also by the United States, and this way US came closer to the European approach. However, the US tends to favor freedom of speech constantly, and sometimes it is considered even a supreme law in the state.

The proportionality test performed by the Constitutional Court of Romania is often formally. Article 53 provides the legal framework that can operate the restriction to a right; the purpose of this regulation is "to maximise the protection of the person, by strict legal classification of state action, which means that the list of reasons that may underlie the restrictions should be interpreted as a restrictive framework, as causing maximum constraint for state authorities"[21]. However, the Constitutional Court refuses to make a real application of this test, leading to repeated violations of the rights concerned. "The rights and freedoms the legislator protect by limiting other rights must be specifically and certainly defined"[22] **(Chapter I).**

[20] Manitakis A., *Etat de droit et contrôle juridictionnel de constitutionnalité,* Vol.I, Sakkoulas, Atena-Thesalonic, 1994, p. 204-209, that the principle of proportionality is an extension of the rule of law.
[21] Dănișor D.C., *Justificarea necesității restrângerii exercițiului drepturilor ori libertăților într-o societate liberală*, RRDP, nr.1/2014, p.50.
[22] *Idem,* p.51.

By carrying out the proportionality test, the national and international courts have concluded that a right or another has priority based on several criteria. The contribution of the European Court of Human Rights is significant and gave a direction in this regard, setting some rules to solve the difficulties of finding a balance between the two competing rights.

Thus, the Court held constantly that the limits of the acceptable criticism are wider as regards a public figure than on an individual. Although public persons enjoy the protection afforded by Article 10, para. 2, the requirements for protecting its reputation must be balanced against the interest of a free discussion about the issues of general interest. Then, where critics represent a supposed defamation it must be distinguished between facts and value judgments.

The national authorities have also a duty to ensure the correct exercise of the rights and freedoms provided for in the European Convention of Human Rights; The Court acknowledges that the Member States have a certain margin of appreciation regarding the legitimacy and necessity of the interference with the freedom of expression and, where appropriate, the right to privacy, by reference to the whole case and its particular circumstances.

By balancing the freedom of expression and right to privacy, national courts must not establish a hierarchy between the two rights, but to find a legitimate interest justifying the option for one or the other of the two competing rights in a particular situation. The European court drew some guidelines in that sense, clearly stating the relevant criteria to ensure a fair balance between the freedom of expression - meaning the freedom of information - and one’s right to privacy - both in terms of pure private aspects and those related to a person's reputation and honor **(Chapter II).**

Finally, the issue of the relationship between the freedom of expression and the right to privacy is limited to a single aspect: there is no unique solution for all cases and the limitation of a right over another depends on the circumstances of the case. The judge's choice for freedom of expression, or the right to privacy can not be generally available, but only circumstantial, taking into account the specific case before the Court. To the extent that the freedom of expression is exercised for the analysis of a matter of general interest or on a public activity, in that case, freedom of expression must be regarded as the principle, and the right to privacy as the exception. To the contrary, if the reason for exercising the freedom of expression is not one of general interest, then private life is usually protected.