

## The Nature of the Right to Sound and Image in Moroccan Criminal Legislation

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### Abstract

This research aims to shed light on one of the legal issues related to the right to one's statement and image and whether they are considered elements of an individual's private life, a privacy-unrelated right, or a dual-natured right. The study also examines the scope of criminal protection, based on both the nature of the place and the nature of the images and statements. This paper relies on a comparative legislative, jurisprudential, and judicial mixed approach, investigating Anglo-Saxon, Latin, and Arab legal experiences. The research concludes that the right to one's statements falls within the scope of private life, while the right to image varies according to different jurisprudential perspectives. Moreover, criminal protection of images is limited to private spaces, whereas the protection of statements is linked to its private and confidential nature, regardless of the location.

**Keywords:** Private Life, Right To Statement And Image, Private Space, Confidentiality And Privacy, Criminal Protection.

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### 1. INTRODUCTION

The person's life is not all about material interests but also requires rights that are attached to his personality (Fathi Srouf, 1986), most notably the right to privacy<sup>1</sup> that varies depending on different traditions, customs, moral values, cultures and other social factors that differ from one society to another (Raymond, 1974), creating a wide-scale controversy among jurists and judges regarding its connection With conflicting interests and it is difficult to strike a balance between them (Kayser, 1984), but despite the difference in the scope of this right from one society to another and from one culture to another, what unites it is defending it at the present time after it has become a slogan adopted by all revolutionary movements, liberation forces, political parties and many countries and Human rights organizations,

however it is not absolute but governed by controls and conditions according to legal requirements that must be respected and obeyed whenever necessary, in an effort to establish a real practice of individual privacy on the one hand, and to guarantee freedom of expression and the state's right to punishment and security on the other hand. so that the matter is not left to its own and the right to protect private life becomes a pretext for impunity and a means to inflict harm on individuals or institutions.

Among the rights that fall within the private life of the individual, we find the right to voice and images as one of the modern rights and one of the most violated (Nouiri, 2015) at the present time , especially in light of the emergence of new advanced technologies, as the smart phones, and tittle cameras that are easy to install in places that are difficult to see.

<sup>1</sup> The American Law Institute has defined the right to privacy in terms of invasion of privacy: "Any person who seriously and unlawfully violates another person's right not to have his affairs and conditions known to others, and not to have his image exposed to public view, is liable to the victim.

As long as the Protection of personal image and voice rights in criminal law is recent at the national level (Art. 447-1, 447-2, 447-3 of the Criminal Code, 2018), and as long as the Legislation did not provide a definition for it, it has become necessary to resort to some definitions of jurisprudence and comparative law. The right to voice is the right of every person to object to the capture and dissemination of his conversations without his consent (Nouiri, 2015), and the right to the image means the right that the person who was photographed has to object to the publication of his picture (Bahr, 2010).

Protecting private life is not a new idea, it is as old as humanity<sup>2</sup>, but the idea of private life has not been taken a shape in a clear way until the discovery of printing and the widespread of the phenomenon of reading among people causing reduction in the illiteracy rate (Kayer, 1995).

The Moroccan legislator, has given attention to individual privacy in general, and voice and image in particular, through many of its legislations, foremost of which is the Constitution (Constitution, 2011) (article 24), as well as the criminal law, especially the amendments to article 447 of the Criminal Code (Law No. 13-103, 2018). The criminal procedure (Law No. 22.01, 2003) has provided a set of guarantees to ensure the protection of calls and communications made by means of remote communication, (Articles 108 to 116). The Press and Publication Law (Law No. 88.13, 2016) has also constituted a vast field for the protection of this right, especially Article 89.

Given the preceding discussion, a main research question arises, which can be framed succinctly as follows:

- What is the legal status of the right to voice and image?

From this inquiry stem the following fundamental questions:

- Does this right fall under the purview of personal privacy? When does it garner legal safeguards?

In light of the rapid scientific and technological advancements in contemporary society, coupled with the widespread dissemination of images and statements through various channels, particularly in the virtual realm, there arises a pressing need to define its content (part 1), followed by establishing the extent of its legal protection (part 2).

## 2. The content of the right to voice and image

Despite the unanimity of various laws on respecting the right to voice and image, their content is not the same, This is not due to the mere difference of

states in the degree to which their people are exposed to the violation of this right under the influence of technological development, but rather due mainly to the subjectivity of legal systems that are affected by the various laws emanating from them, in addition to the traditions and customs prevailing in each state.

If the right to voice is one of the elements of private life (Mohammed, 1994), then the content of the right to image has divided the French jurisprudence over whether it is considered a part of private life, or a right independent of it. This resulted in the existence of three groups (Hijazi, 2000, 2001):

### 2.1. The first group: the right to the image is an element of private life

In French jurisprudence, there has recently been an opinion according to which the right to the sanctity of private life is subdivided into attached rights, including the right to the image, and that this last right shall be protected. As a personal right to the extent that it affects private life, meaning that the scope of protecting people against taking and publishing their photos overlaps with the scope of protecting their private life (Adam Hussin, 2000), In this regard, Kayser says: "The right to a picture always aims to protect private life, not only if the picture is related to this life, but also in the case in which the picture depicts the features of the person, because these features reveal one's personality. (Kayser, 1971)" And it was also said: "Taking a picture means taking a part of oneself, because there is a strong connection between the image and the person's intimacy. (Gourlou, 1957)"

Among the arguments presented by the supporters of this group, is that when some French jurists tried to define Private life by enumerating the matters that fall within its scope, they stated that the right to the image represents one of these matters (Mohammed, 1994). They also supported their opinion with examples from the French judiciary (Paris, 1972).

### 2.2. The right to the image is a right independent of private life

Contrary to the previous trend, he holds that the right to the image is considered as an independent and distinct right from the right to privacy, it is not necessary that the violation of the first one is the same as the violation of the second, it is a right that is attached to the human person, and it gives him the power to object to be photographed, not only during the practice of his private life, but also during the practice of his public life, also this right gives him the

<sup>2</sup>- Article 25 of the Code of Hammurabi stipulates that "if someone opens a hole in a house to burglarize it, he must be killed and buried in front of the hole".

power to object to the publication of his photo, even if such publication does not constitute any violation of his private life (Mohammed, 1994). In the same sense, Professor Nerson decides that even if the violation of a person's right to his image is often associated with his right to the secrecy of his private life, we remain with two rights completely independent of each other (Adam Hussin, 2000).

The supporters of this team supported their opinion with a number of judicial applications, most notably what has been awarded by the Court of Grasse<sup>3</sup>, the Court of First Instance of Paris<sup>4</sup>, and the Court of Marseilles<sup>5</sup>

### 2.3. The right to the image is of a dual nature

In the face of the controversy between the two previous trends, this group sought to combine and reconcile them, considering that the right to the image has a dual nature, it may be an independent right, and it may be a manifestation of violating privacy in other cases (Hijazi, 2000, 2001).

It is just an element of private life and one of its basic aspects if the image is attached to the private life of a person, as if it represents a reflection of his emotional or family life (Mohammed, 1994) , and in contrast it is a stand-alone right if the image is related to the person's public life, then it becomes indispensable to provide the desired protection in this regard (Ravanas, 1978).

It seems that the approach adopted by this group constitutes a strong guarantee to protect the right of the person to his image because it gives a wide protection to it, as it extends to include public life instead of limiting it to private life, and hence I call upon the national legislator to take the opinion of this trend (Adam Hussin, 2000).

### 3. The scope of the right to voice and image

Talking about the scope of the right to voice and image essentially motivates us to define the scope to which it extends this protection and the delineation of borders that devote the nature of confidentiality and privacy without violating it, and accordingly the private place constitutes the stronghold of this privacy , However, defining the concept of private place as a criterion for determining the scope of legal protection for this right has sparked a large debate in the jurisprudence and the judiciary. One group adopted an objective concept, another group embraced a personal concept, and another group has mediated between the objective and personal concepts.

### 3.1. The objective concept of the private space

According to this trend, the private place must be objectively determined, so the act is depending to the protection. considering the place itself regardless the state of privacy in which the individuals are (Aqili, 2011/2012), so what matters is the place and not the people, and it means the place that the public is not allowed to visit, if the place is public what is going on it is considered public , and everything that takes place in it is considered public (Ben Haida, 2016-2017) .

According to this perception, the public places mentioned by the legislator should be enumerated, such as roads, streets, And gardens, and playgrounds... As for other places, not like the ones previously mentioned, they are special places by their nature, and therefore they should be protected like housing (Nouiri, 2015).

In this context, the Public Prosecution circular considered the private place to be every place that is not open to everyone, it cannot be accessed without the permission or approval of the person who occupies it. In this context, the comparative judiciary considered that among the private places are the hotel room, the garage, the private swimming pool and the car, even if the latter is found on the public road, which is the approach taken by the Egyptian legislator (Art. 309 bis (1) of the Egyptian Penal Code., 1937), while his Moroccan counterpart did not adopt it except when protecting the right to the image (Art. 447-1 of the Moroccan Criminal, 2018) .

Regarding judicial work, it was stated in the decision of the Civil Misdemeanors Court "AIX-EN-PROVENCE" that what should be relied upon is not the state of privacy in which individuals are, but the nature of the place itself, and the matter was related to a public place where two colleagues who were photographed by a third person , and they were on the street in front of their home, so a journalist brought the photos and published them without their consent. The court considered the absence of the crime due to the lack of the component of the misdemeanor mentioned in the text of Article 368 of the Criminal Code (corresponding to Article 226-1 of the current Criminal Code (1992)), which is the private place (Aix-En-Provence Correctional Court, 1973).

Also, the objective concept of the private place was adopted by the Indictment Chamber of the Toulouse City Court by saying: "The violation of the

<sup>3</sup>- This court ruled, on February 27, 1971, that "the right to an image is independent of the right to protect private life, and attacks may occur during a person's public life even if there is no secret that must be kept.]"

<sup>4</sup>- This court ruled on July 3, 1974, that "every person has the right to object to his image, and he can object to its publication even if the publication does not involve an infringement on his private life.]"

<sup>5</sup>- This court ruled that "the right to an image is not mixed with the right to respect for life, and may be subject to infringement in circumstances related to a person's public life.]"

private life by publishing pictures is not punishable unless the picture represents a person in a private place (Administrative Court of Toulouse, 1974)."

In the United States of America, the Supreme Court initially adopted the criterion of place in its objective sense, but it changed its trend since 1964 and adopted the personal criterion (Sorour, 1976).

### 3.2. The subjective concept of the private space

Proponents of this view adopt a subjective criterion to determine the meaning of the special place (André, 1971), and this means that when there is a state of privacy, the place is private, meaning that what counts is the state of privacy and not the nature of the place, so that the state in which people are removes the character of privacy from the place (Aqili, 2011/2012), because the law protects people and not the place (Ben Haida, 2016-2017). which is what the Moroccan legislator adopted when protecting the sayings, the information, and the conversations issued by others (Art. 447-1 of the Moroccan Criminal Code, 2018), when their content is confidential and their subject is private, they are covered by legal protection regardless of the place in which they took place, what matters is the content, and not the place.

As for the picture, taking it in a public place may involve a violation of the right to the private life, in this context a distinction must be made between two cases, the first being the public place, and the presence of the person in the picture in a transient and accidental way, even without the photographer's knowledge, hence the photographer does not need to obtain Permission, but if the photo is published and the face of the person appears and can be identified easily, then he has the right to object, and the photographer must do everything that would blur the features of the person in the public place (Al-Ahwani, 1978). This principle has been approved by the French judiciary to the effect that it is permissible to photograph public places without permission (High Court, 1976). As for the second case, the person is the subject of the picture. The picture protected by law is the intended picture of the person regardless of the background that may be in the picture such as trees or monuments (Al-Ahwani, 1978), and in this case, it is not legitimate to take or publish the picture without permission (Kayser, 1965).

On this basis, the person who took the photo cannot be held accountable unless he misused it or it was proven that he intended to isolate it in the laboratory, or it was the main subject, and the person who was photographed was harmed by this publication, or the publisher exploited it for enrichment (Al-Azhar, M. (1989)). This is what the

Moroccan judiciary went to when it decided to award compensation to a popular singer who had a picture taken with his daughter and was commercially promoted as a postcard without his permission (Judicial Decision No. 2179, 1988).

### 3.3. The conciliatory concept of the private space

This trend has tried to establish a permanent dialogue between the objective and personal perceptions of the private place by combining them, as part of the French jurisprudence sees that speech has a legal protection, as long as it has the character of privacy regardless of the place in which it takes place (Al-Ahwani, 1978), while the protection of the image presupposes the presence of the person in a place Private out of sight of others, while if the photo was taken in a public place, then the crime is not based on the assumption of the tacit consent of the person that he is visible to everyone and does not differ from the things in the public place (Sheikh Youssef, 1993).

This trend has been known to be applied in many comparative systems, such as the American law promulgated in 1968 related to crime control and street security, German criminal law, as well as Dutch law (Aqili, 2011/2012), French law (Art. 226-1 of French criminal law, 1992), and Algerian law (Article 303 bis of the Algerian Penal Code, 1966), which is the same approach followed by the Moroccan criminal legislator (Art. 447-1 of the Moroccan Criminal, 2018).

Based on the requirements of the first paragraph of article 1-447 of the Criminal Code. It is understood that the scope of the right to voice focuses on the illegality of the act of capturing, recording, broadcasting, or distributing private or confidential statements or information, whether issued in a public place or a private place. What matters, then, is the nature of the conversation, not the nature of the place. It is unreasonable to deprive people of their private conversations just because they are in public places. it made no sense for person to resort to a private place whenever he wants to have a private conversation. Accordingly, the Moroccan legislator has adopted the personal criterion when protecting the right to voice, just like the French legislator who adopted the criterion of privacy of conversations, without which the crime of violating private life cannot be achieved (Pradel, 2004).

As for the scope of the right to image, the second paragraph of the article 447-1 of the Criminal Code, has limited it to the illegality of capturing, installing, broadcasting, or distributing a picture of a person in a private place, and did not specify a specific situation for the victim, as the crime occurs whether he is in a normal situation or in an intimate situation, and

in application of that, this crime does not occur if a person is photographed in Public place, and this is the basis of the difference between each of the scope of the right to voice and image.

#### 4. Conclusion

Throughout the foregoing elements, it has become clear that the right to voice and image has become one of the current rights closely linked to privacy. Despite its varying position on one hand and the diversity of the scope of its protection on the other hand, this right is not absolute, however it is natural for it to be subject to a set of restrictions and exceptions that set limits for it. This scope becomes broader, allowing the rights of others to begin and encroachment upon them to become permissible, and responsibility for their violators is eliminated, seeking to strike a balance between the individual's interest and the interest of society, as is the case for the person managing public affairs and the public's right to information, the right to proof and combating crime, and the satisfaction of the right holder in voice and image.

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