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# THE LEGAL INSTITUTION OF CONTROL IN THE CONSTITUTIONAL LAW

**Florina MITROFAN**[1]

***Abstract:***

*The current theme aims the analysis of the legal institution of control in the constitutional law, which refers to the identification of all forms of control mentioned by the Romanian Constitution and the specificity of each of them.*

*The legal institution of control refers to a system of guarantees established to ensure the achievement of the attributions of the public institutions within the limitation stated by the fundamental law.*

*This is the reason why the legislator has detailed the forms of control, with the express mentioning of the means and limits within which it is possible.*

***Key words:*** *legal institution; control; parliament; parliamentary commissions; interpellation; public administration; prosecutor*

## INTRODUCTION

The special role of the Parliament in state management refers not only to the drafting of laws, establishment of directions for activities, establishing state organs, but also control. The achievement of the control by the Parliament is of great importance. This control is necessary and complete and has different forms of manifestation.

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It is necessary because the Parliament as state organ who is empowered with the deliberative function, must ascertain, directly, the compliance and application of the Constitution and the laws, as the state authorities perform their role in the state mechanism.

The control performed by the Parliament is a full control. Mainly, it is expanded over all the activity performed according to the Constitution and the laws, the Parliament having only the right to cancel the illegal acts, to revoke the state organs or high public clerks, whose activity is unsatisfactory.

In the same time is a differentiated control both depending on the nature of the activity under control, as well as on the position in the state system of the controlled authority. This explains the nuances of the constitutional provisions, as well as the diversity of the forms and means of control[1].

The judicial controll of administrative acts of public authorities on the way of the administrative soliciter"s office is Parliament as well as the acts of commandment of military nature. The instances of administrative soliciter"s office are competent to solve the demands of harmed persons by injunctions or by disposals from the injunctions declared unconstitutional.

The institution of administrative soliciter"s office is the judiciary ,,guard" of the citizen confronted whit the abusive behaviour of the mayer, of the prefect, of the minister, of all theee public authorities, including the Government. That is why it is essential that the text of the Constitution stipulates express the categories of administrative acts of public authorities that are considered an exception from the controll of judicial instances on the way of the administrative soliciter"s office, in order to not allow the parliamentary majority that, from political reasons, from group interests etc., to always increase the area of exceptions, up to their transformation in rule, as it happened to the law nr. 1/1967 of the old political regime.

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[1] Ioan Muraru and Elena-Simina Tănăsescu, *Drept constituţional şi instituţii politice*. 13th Edition, 2nd Volume (Bucharest: C.H. Beck, 2009), 157-158

Considering the actual terminology, as well as the general disposals of the Constitution, the Editors of the revise law of the Constitution stopped, as well as the constituent legislator in 1923, at two exception, specifyng that the acts of government from 1923, are now called ,,the acts that regard the relations with Parliament".Other forms of controll are: the parliamentary controll exercised by questions, interpellations, notifications, reports, accounts, programmes, the right of deputies and senators to ask for and obtain the necesary information, the controll exercised by solving the applications of the citizens, the controll exercised by People"s Advocate, the controll exercised by prosecutors over the activity of penal research of judicary police, the controll of constitutionality performed by the Constitutional Court etc.

*The parliamentary control*. In order to fulfill its prerogatives, the Parliament must control its own social activity, performed by all authorities. Thus, there are the following forms:

a) The control performed through notifications, messages, reports, programs presented to the Parliament;
b) The control performed by the parliamentary commissions;
c) The control performed by questions and interpellations;
d) The performance, by senators and deputies, to ask for and receive the necessary information;
e) The control performed over the means of solving the petitions from the citizens;
f) The control performed by People's Advocate[1].

Regarding the control using the examination of messages, reports, programs presented to the Parliament, we could note that, for the fulfilment of this form of control, the Romanian Parliament receives the annual message from the President of Romania concerning the main political issues of the nation, according to Art 88 of the Constitution.

Also, the Romanian Parliament examines the reports submitted by the CSAT and by the Court of Accounts according to Art 65 Let h) of the

[1] Ioan Muraru and Elena-Simina Tănăsescu, *Drept constituţional şi instituţii politice*. 9th Edition – revised and amended (Bucharest: Lumina Lex, 2001), 455

Constitution, hears the report from the Director of the Romanian Intelligence Service, hears the reports from the People's Advocate according to Art 60 of the Constitution, hears and approves the Government's program.

The control performed by the parliamentary commissions is that form of control performed by the investigation commissions or by different special commissions.

Through questions, the MPs request clarifications or information about the activity performed by the executive structures.

The question refers to a simple request to confirm if a situation is true, if the information is accurate, if the Government and the other public administration organs understand to provide to the Chamber the information and documents requested or if the Government has the intent to adopt a decision in a certain matter.

The President of the Chamber has to right to decline the questions which: refer to matters of personal or particular interests, exclusively aim a legal consultation, refer to litigations currently under the analysis of the courts or may affect the solving of litigations in course; refer to the activity of persons not in charge of public positions.

The interpellation consists in a request addressed to the Government by a parliamentary group, by one or more MPs asking for information about the Government's policy in important matters of its domestic or foreign affairs. The Government and every member has the obligation to answer the interpellations.

According to Art 111 of the Constitution, the Government and the other public administration have the obligation to present the documents and information requested, during a parliamentary control.

The Chambers and commissions may ask the Government and the other organs of the public administration for information and documents, during the procedure of the parliamentary control for their activity.

If the requested information or documents refer to state secrets, according to the law the Government shall inform the parliamentary Chambers about this situation, and they shall decide during secret meetings.

The documents shall be returned after consultation.

*The control performed over the means of solving citizens' petitions*

As political tribune, whose members are the citizens' representatives, the Parliament shall represent a place for public debate between the citizens and Government. The citizens, in the performance of their fundamental right to petition, shall address the executive authorities in general, and the MPs shall have to check the means for solving these petitions. Of course, the Chambers' Regulations refer to the means of registering and solving the petitions.

Every person shall have the right to address petitions.

The petitions shall be submitted in writing and signed, by stating the petitioner's domicile or the domicile of one of the petitioners. These shall be logged into a registered, following the order of their reception, by stating the number of registration, name, surname and domicile of the petitioner and the object of the request, after which they shall be sent to the Commission for the investigation of abuses, corruption and for petitions, as well as to the other permanent commissions, for debates and solution.

Each MP may access the content of a petition, by addressing the President of the notified commission.

Quarterly, the Commission for the investigation of abuses, corruption and for petitions shall present to the permanent bureau in the beginning of each session, a report with the petitions received and the means for their solution. The report shall also refer to the solutions given by the public authorities to petitions which have been sent for solving[1].

*The control performed by the People's Advocate*

Regarding the control performed by the People's Advocate it must be underlined that the purpose of this institution is the protection of the rights and fundamental freedoms of the citizens in their relations to public authorities.

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[1] Ion Rusu, *Drept constituţional şi instituţii politice*. 4th Edition- revised and amended (Bucharest: Lumina Lex, 2004), 481-482

The control over the means in which the local authorities perform their activity, by complying with the law, shall be performed by administrative guardianship. In a general definition, it refers to the entire means through which the central authorities are over watching the compliance with the law of the territorial organs[1].

According to Law No 35/1997 for the organization and functioning of this institution, the People's Advocate shall not be subjected to any public authority but "he also shall not be subjected to an imperative or representative mandate".

The People's Advocate shall become a powerful antidote against bureaucracy which is a wide spread plague[2].

The involvement of the People's Advocate in the control for constitutionality is shaped under two circumstances for the analysis of this control, namely the general control for the application of the Constitution and the control for the constitutionality of the laws[3].

*The control for constitutionality*

The emergence of the Constitution, as fundamental law, characterized by supremacy and hierarchal positioning at the top of the legal system, correlated with the situations in which its supremacy is violated by laws has imposed the institution of the control for constitutionality. And the means (control) once established has determined the identification of the authority, state or political organ to be entrusted with the performance of this complicated position[4].

The control for constitutionality represents an organized activity for the verification of the conformity of the laws with the Constitution, and as an institution of the constitutionality it refers to the rules regarding

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[1] Verginia Vedinaş, in *Constituţia României. Comentariu pe articole*, ed. Ioan Muraru and Elena Simina Tănăsescu (Bucharest: C.H. Beck, 2008), 1161

[2] Ioan Muraru and Elena-Simina Tănăsescu, *Drept constituţional şi instituţii politice*. 9th Edition, 462

[3] Ioan Muraru, *Avocatul poporului – instituţie de tip Ombudsman* (Bucharest: All Beck, 2004), 78-79

[4] Ioan Muraru and Mihai Constantinescu, *Curtea Constituţională a României* (Bucharest: Albatros, 1997), 13

the competent authorities to perform this verification, the procedure to be followed and the measures to be adopted after the performance of this procedure.

Among the attributions of the Constitutional Court it can mentioned the control for the constitutionality of the laws, the regulations of the Parliament, ordinances, international treaties or agreements, initiatives for the revision of the Constitution, the constitutionality of a political party.

Controlling the fulfillment of the conditions for the exercise of the legislative initiative by citizens – other than the revision of the Constitution – will mainly focus on checking its representativeness – numerical and territorial – required by the Constitution[1].

*The control performed by the Court of Accounts*

The Court of Accounts shall perform a control over the means of establishment, administration and use of the financial resources of the state and of the public sector. Under the conditions of the organic law, the litigations resulted from the activity of the Court of Accounts shall be solved by specialized courts[2].

Unlike the new perspective on justice and the courts, implicitly unlike the administrative jurisdictions, which have become optional and free, the attributions of the Court of Accounts were left without justification.

Not least, unlike the importance of the Court of Accounts in guaranteeing the correct use of public money on the one hand, and for institutional symmetry on the other hand, the Court of Accounts has been organized as the Constitutional Court, thus becoming a much more important institution, the new regulation defining it in the area of the authorities with exclusive control, as well as the Constitutional Court and the People's Advocate, in the area of the autonomous authorities, which are not listed among the three state powers – legislative, executive and

[1] Mihai Constantinescu et al., *Constituţia României-comentată şi adnotată* (Bucharest: The Official Gazete Press, 1992), 310

[2] Art 140 Para 1 of the Constitution

judicial – but with significant contribution for their functioning and balance[1].

According to Art 140 Para 3 of the Constitution, at the request of the Chamber of Deputies or the Senate, the Court of Accounts shall check the management of public resources, and report on its findings. Nevertheless the organic law of the Court states that it has autonomous power of decision on its activity, the Parliament may request the performance of controls, concluded with reports about the irregularities found. … The analysis of the annual report regarding the accounts for management is required by the achievement of the purpose of the parliamentary control of the public administration through the Court of Accounts, all the more so as the report is subsequently published in the Official Gazette and is taken into consideration when approving the discharge of the Government.

Since the Court does not currently have jurisdictional powers, the reports only on the finding of irregularities, with no provision on how to resolve the findings, does not give a complete picture of their financial implications.

*The control performed by prosecutors*

The control performed by the General Prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice or by the General Prosecutor from the Prosecutor's Office attached to the Court of Appeal on the subordinated prosecutors may be performed directly or through especially appointed prosecutors. On the other hand, the Minister of Justice, at his own initiative or at the request of the Superior Council of Magistracy, exercises control over prosecutors through prosecutors appointed by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice or by the Minister of Justice. The control consists in verifying the managerial efficiency, the means in which the prosecutors perform their duties and in which the service relations are carried out with the justice

[1] Ioan Muraru and Elena-Simina Tănăsescu, *Drept constituţional şi instituţii politice*. 13th Edition, 2nd Volume (Bucharest: C.H. Beck, 2009), 122

seekers and with the other persons involved in the work of the prosecutor's offices. This control cannot aim the measures ordered by the prosecutor during the criminal investigation and the solutions adopted[1].

The prosecutor's offices operate near the courts, lead and supervise the criminal investigation activity of the judicial police, according to the law[2].

With the entrance into force of the Law for the revision of the Constitution, the control and supervision of the activity of criminal investigation performed by the judicial police are transferred from the Ministry of Domestic Affairs to the Public Ministry, in order to insure a higher efficiency and operability in protecting the society, the assets and citizens against those who commit acts of criminal nature[3].

*The judicial control*

Certain imperfections of the constitutional texts of 1991, as well as the limitative practice of the courts for administrative contentious, have led to a real judicial paradox regarding the protection of the natural and legal persons against individual ordinances, which have become a trend after 1997[4].

Regarding the judicial control, it represents a guarantee in the achievement of the state of law, within which the universal access to justice is a supreme norm.

According to the Constitution, the documents drafted by a court are subjected to the means of appeal stated by the law.

The revised Constitution has inserted a new paragraph – Para 6 – to Art 126 (former Art 125), which states that the courts, by way of the administrative contentious perform the judicial control of administrative acts of the public authorities (guaranteed, according to the text), except

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[1] Mihai-Viorel Ciobanu, in *Constituţia României. Comentariu pe articole*, ed. Ioan Muraru and Elena Simina Tănăsescu (Bucharest: C.H Beck, 2008), 1259

[2] Art 131 Para 3 of the Constitution

[3] Mihai Constantinescu, Ioan Muraru and Antonie Iorgovan, *Revizuirea Constituţiei – explicaţii şi comentarii* (Bucharest: Rosetti, 2003), 111

[4] Mihai Constantinescu, Ioan Muraru and Antonie Iorgovan, *Revizuirea Constituţiei – explicaţii şi comentarii* (Bucharest: Rosetti, 2003), 106-107

for those regarding relations with the Parliament, as well as the military command acts[1].

## CONCLUSION(S)

Regardless which of these authorities perform the control, it represents one of the guarantees of the state of law and a responsibility of the authorities entrusted to issue the acts whose legality can be analyzed through one of the means above mentioned.

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[1] Mihai-Viorel Ciobanu, in *Constituţia României. Comentariu pe articole*, ed. Ioan Muraru and Elena Simina Tănăsescu (Bucharest: C.H Beck, 2008), 1238

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# SOME DISCUSSION ABOUT FREEDOM OF SPEECH AND INTERNET

**Marius VĂCĂRELU**[1]

***Abstract:***

*Liberty is the best value for human beings and for animals too. Sometimes, liberty is bad understood by politicians and by some tycoons of finances, who tries to limit it to a small appearance. In such paradigm, citizens are not always satisfied and they try to use some individual strategies to adapt and to grow their freedoms. In this complex relationship internet plays a specific role and the regulation of internet becomes a priority is the less democratic regimes. Some aspects of the relations between freedom of speech and internet, related also to the citizen's liberty problem will be analysed in this text.*

***Key words:*** *freedom of speech; internet; limits; ideas; achievements*

## INTRODUCTION

Liberty is the best value for human beings and for animals too. Sometimes, liberty is bad understood by politicians and by some tycoons of finances, who tries to limit it to a small appearance. In such paradigm, citizens are not always satisfied and they try to use some individual strategies to adapt and to grow their freedoms. In this complex relationship internet platforms plays a specific role and the regulation of internet becomes a priority is the less democratic regimes.

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Internet platforms around the world are under increasing pressure from governments and many other stakeholders to remove objectionable content. From misinformation to hate speech to extremist content to harassment and abuse, these platforms have become gatekeepers of what information the public can access and share. Yet, despite the important role they play in mediating public discourse, and despite progress by some companies in recent years in disclosing policies and actions related to government requests, the process of policing content on internet platforms remains unacceptably opaque. As a result, users of internet platforms cannot adequately understand how their online information environment is being governed and shaped, by whom, under what authorities, for what reason[1].

When transparency around the policing of online speech is inadequate, people do not know who to hold accountable when infringements of their expression rights occur. This situation is exacerbated by the fact that some of the world's most powerful internet platforms do not conduct systematic impact assessments of how their terms of service policies and enforcement mechanisms affect users' rights. Furthermore, grievance and remedy mechanisms for users to report and obtain redress when their expression rights are infringed are woefully inadequate[2].

Liberty of internet platforms means also freedom of speech of everyone – no matter as we understand this liberty, internet is the best spreading medium for ideas and projects of human cooperation for development.

**1.** As a surprise of the last years for a lot of states[3] (including our country, unfortunately) at various phases of development and consolidation it was the proven vulnerabilities to hate speech and its ill-

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[1] Ilana Ullman, Laura Reed and Rebecca MacKinnon, *Ranking Digital Rights – Submission to UN Special Rapporteur for Freedom of Expression and Opinion David Kaye: Content Regulation in the Digital Age* , 15 of December 2017, (New York, 2017), 2.

[2] Ibidem.

[3] States here include not only state institutions, but also scientists and universities.

effects. Election campaigns provide particularly fertile ground for hate speech and incitement to hatred. Elected officials, political parties, candidates, other opinion makers (especially televisions) and members of "civil" society are all among the influential purveyors of hate speech. The authority wielded by, and the amplifying effect of, mass media, social media in particular, carries considerable weight[1].

For responsible electoral institutions, the problem is dynamic and complex. Remedies involving restrictions on free speech and on political and electoral rights are controversial, as they may limit fundamental rights in a democratic society. Indeed, some "human rights activists" and international institutions have insisted that the best response to hate speech is more speech. But is not only "activists" who are against limitation of fredom of speech; all citizens who lived in dictatorships of XXth century remembers the limitation of their rights and they act for preserving them – is true, with specifical ideas brought by their education, moral and personal context.

**2.** Politicians are not happy to accept the freedom of speech, because they are now in a different paradigm of power. To be well understood we must underline that many centuries politics was dedicated just some families and group of professions (military, ecclesia, lawyers and some very rich and influents landlords). The last 150 year and mostly the last century brought the possibility to involve in politics for some professions and people who was unusual for centuries. How was that possible? Of course, because the freedom of speech became stronger every day passed.

Thus, today is possible to confront any politicians – no matter his provenience – with any words or facts (made by him of by his political party). To confront means today not only to have a victory in a public gathering, but also to be online on internet platform and the verbal confrontation can be seen by thousands in the real time. Real time means also to change public opinion of people in few minutes and to decisive

[1] Vasu Mohan and Catherine Barnes, *Countering Hate Speech in Elections: Strategies for Electoral Management Bodies*, (Arlington: International Foundation for Electoral Systems, 2018), 4.

defeat a politician with this combination: freedom of speech and internet platform power. We can describe one of the internet effects on politics as "killing machine of un-prepared politicians".

Facts are today more dangerous for politicians than anytime else. To defend against them by words or by armies of internet bots or trolls is not possible now, because facts remain in the internet links and in any moment someone can re-bring them into the lights. The revelations about politician's irregularities are good for citizens, for states and for public morality, but not for politicians – which are starting to hate internet platforms and – by mental extension, the freedom of speech. In these years, the mask of politics start to fail and everyone is able to see its hideous face, based in to high percent on bribe, corruption, influence traffic and many other not moral practices. In those years, in every nation the trust over politicians strongly decreased and less people believe politicians. Who made possible these revelations? The answer is obvious: the natural alliance between freedom of speech and internet platforms.

**3**. The freedom of speech is stated in the article 19 of the Universal Declaration of Human Rights, as a right for everyone. The right includes the "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". The universality of this has been reinforced in Article 19 of the International Covenant on Civil and Political Rights (ICCPR) as well as General Comment number 34 on this article by the Human Rights Committee.

In 2012, the Human Rights Council affirmed the applicability of the two articles to the internet. In terms of international standards, a right (in this case, free expression) should be the norm, and any limitations should be exceptional in nature. The latter should be justifiable in terms of international standards, which require any such constraints to be law-based, necessary and proportional, and for legitimate purpose. Thus, the ICCPR sets out that restrictions are considered as legitimate only if provided for by law and demonstrably essential for the achievement of a legitimate purpose. Such purpose is spelled out as being: respect of the rights or reputations of others or the protection of national security, public order, public health or morals. As the UN Special Rapporteur on

the promotion and protection of the right to freedom of opinion and expression, David Kaye, has written, 'Any restriction must be precise enough and publicly accessible in order to limit the authorities' discretion and provide individuals with adequate guidance'[1].

Freedom of speech is connected also strongly with the concept/idea of journalism. Today there are some fundamental changes in the exercise of this profession and internet is the reason of this paradigm modification.

Journalism can accommodate a range of narratives with various political or other leanings, up to the point where boundaries blur into different kinds of communications such as advertising, fiction or propaganda. Journalism is a special use of communications that is especially relevant to development, rule of law and democracy. Not all users of press freedom produce journalism as such, although media freedom applies no less to them. Today internet creates by accident a journalist in few days, if a normal person posts are visualised by thousands of people; he can generate contain and he can change public opinions.

In this case, we should remember the motto of journalism: savoir, faire, savoir faire, faire savoir. Those principles are very important for the relation between internet and freedom of speech: "faire savoir" (to make possible to know) means in fact to spread all information to public, and internet is the best instrument for that.

**4.** The speed of information spreading can be described today as a part of "freedom of speech". We say that because is almost impossible to cover a country with such a filter who can stop all important information. (There is almost an exception: China's online population of 731 million gets a highly restricted internet, one that doesn't include access to Google, Facebook, YouTube or the New York Times. There's little coverage of the 1989 student protests in Tiananmen Square. Even Winnie the Pooh got temporarily banned. China is able to control such a vast ocean of content through the largest system of censorship in the world,

[1] UNESCO, *World Trends in Freedom of Expression and Media Development: 2017/2018 Global Report*, (Paris: 2018), 20.

aptly known as the Great Firewall of China. It's a joint effort between government monitors and the technology and telecommunications companies that are compelled to enforce the state's rules. The stakes go beyond China, which is setting an example that other authoritarian countries can imitate[1] – look also to the map from the text). But important information reach even on dictatures. But not so fast.

This speed separate the effectiveness of freedom of speech today: where the internet acces is not prohibited at all, people can express in just few seconds after an event their opinions (positive or negative) and journalist are on strongest competition ever to reach the people fast. The legislators should respect the relation between this liberty and internet and they must adapt to the changes brought by this symbiosis between legal dimension and technical dimension. Is not possible to control, but is possible and necessary to adapt to these changes, because internet helps every voice to me listested more efficient.

Media freedom can be conceptualized as the liberty to publish and distribute content on media platforms. This is a precondition for many organizations as well as any individual who wishes to reach a public – for example, through social media. It is also essential to news media institutions and others doing journalism because their publishing impacts on power. Any restrictions on media freedom, however, can impact all actors who use this public dimension of the right to freedom of expression. Safeguarding and advancing media freedom is central to achieving a more democratic society.

But internet created a specific problem: where is the truth and where is the public interest of free speech? Because we must defend the liberty of speaking, but are we able to resist to all contain and all different ideas from internet? We are not talking in this article about fake-news[2], but about the mental adaptation for the ocean of information available.

All our history, we was able to control the quantity of information who reach our eyes and ears and we knew that is not possible to read or

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[1]https://www.bloomberg.com/quicktake/great-firewall-of-china, accessed at 22.06.2018.
[2] But we promise we'll talk in one the new articles in this scientific journal.

see more than any human being activity/minute: the brain limited the access to it by hours of activity and for this, the social contract was: we write for you, but only a library in a decade can bring the main information for a person. Internet creation was a library of libraries: the brain should work not for its controlled library, but also for the libraries of other brains in the same time. Everyone can create internet contain – who is able to read all this? What kind of catalogue must be created for a library of libraries?

## CONCLUSION

The freedom of speech is the main liberty to preserve our liberty and our rule of law society. It is not possible to have the rule of law without freedom to speak and freedoms to public complain.

For speech is not important just a theoretical approach, but also an analyse of the press situation: from its legislation to its financial problems and paradigm transformation's too. The freedom of media means freedom of speech, as a part to a full.

The focus on the concept of media freedom emphasizes the importance of examining the role of the state, primarily the relevant legal and statutory environment. This requires the protection of media freedom both in law and in practice. Media freedom includes the existence and implementation of freedom of information and transparency laws, and the absence of disproportionate restrictions for speech, such as exist in the form of criminal (as distinct from civil) defamation laws. This concept of media freedom covers whether media are censored or banned and blocked; and whether other laws are used against media and people producing journalism in order to arbitrarily restrict freedom of expression – that is in ways or for purposes not sanctioned by international standards[1].

[1] UNESCO, *World Trends in Freedom of Expression and Media Development: 2017/2018 Global Report*, (Paris: 2018), 23.

Internet is able today to change not only press and rights from the famous treaties and declarations, but also to change not-trained brains[1]. In such a specific time of daily changes – technological and mental – the law is one or even more steps behind. It is necessary to think a new social framework for humanity. For this the complex social equation will introduce as some of the main elements the freedom of speech and internet: we cannot find the limit of changes today, but for sure we'll act tomorrow as part of those social transformations.

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# BRIEF CONSIDERATIONS ON THE INDEPENDENCE OF LAWYERS

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***Abstract:***

*In a democratic state, the lawyer has the fundamental role in promoting and protecting the human rights, freedoms and legitimate interests*[2]*. The public interest*

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[2] Art 2 Para 2 of the Law No 51/1995 on the organization and functioning of the lawywer's profession republished based on Art 2 of the Law No 25/2017 on the modification and amendment of the Law No 51/1995, published in the Official Gazette of Romania, Part 1, No 210/28 March 2017, renumbering the texts. Law No 51/1995 was republished in the Official Gazette of Romania, Part 1, No 98/7 February 2011 and subsequently re-modified and amended by:
- G.E.O No 10/2011 on the repeal of Art 39 Para 8 of the Law No 51/1995, published in the Official Gazette of Romania, Part 1, No 113/14 February 2011, repealed by the Law No 26/2013, published in the Official Gazette of Romania, Part 1, No 126/7 March 2013;
- Law No 71/2011 for the application of the Law No 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part 1, No 409/10 June 2011, rectified in the Official Gazette of Romania, Part 1, No 489/8 July 2011, with subsequent modifications and amendments;
- Law No 76/2012 for the application of the Law No 134/2010 on the Code of Civil Procedure, published in the Official Gazette of Romania, Part 1, No 365/30 May 2012, with subsequent modifications and amendments;
- Law NO 187/2012 for the application of the Law No 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part 1, No 757/12 November 2012, rectified by the Official Gazette of Romania, Part 1, No 117/1 March 2013, with subsequent modifications and amendments;
- Law No 72/2016 on the pension system and other social security rights of lawyers, published in the Official Gazette of Romania, Part 1, No 342/5 May 2016. Also, see in this regard Art 3 Para 1 of the Romanian Deontological Code of lawyers approved by

*related to the importance of the activity conducted by the lawyer, the proximity to the administration of the act of justice and the indispensable involvement in certain procedures represent as many arguments which have determined the legislator to rule upon the organization and functioning of this profession. According to Law No 51/1995, to the Statute and Deontological Code, the profession of lawyer is subjected, among others, to the principle of independence.*

*The current study aims a brief analysis on the principle of independence for lawyers referring both to the legal provisions in this area, and also to the European regulations and the European Court of Human Rights jurisprudence.*

***Key words:*** *lawyer; independence; Statute; Deontological Code; ECHR jurisprudence*

## INTRODUCTION

The lawyer has the role to insure the protection of the human rights and fundamental freedoms. The functioning of a fair system of justice depends also on the means in which the lawyers perform their profession, independence being a fundamental feature for them.

The fulfillment of this social role also entails a series of obligations for the lawyers, reason for which the legislator has considered as necessary the establishment of guarantees removing all pressure or influences.

The freedom of thinking and expression which always characterized the lawyers has determined the legal literature to analyze the principle of independence together with the principle of freedom[1]. Though the relation between these two principles is obvious, the

the Decision No 268/17 June 2017 by the Council of the National Union of Bars in Romania, in the meeting of 17 June 2017, stating that "The lawyer's mission in the protection, by all means, of the profession, of the clients' rights, freedoms and legitimate interests, in order to find the truth, to perform justice and to comply with the state of law".

[1] Ligia-Alina Dănilă, *Organizarea și exercitarea profesiei de avocat*, (Bucharest: C.H. Beck, 2007), 70-84

principle of independence represents a feature of the profession in relation to the state authorities and the clients.

## THE INDEPENDENCE OF THE PROFESSION AS LAWYER AS SEEN BY THE NATIONAL AND EUROPEAN REGULATIONS

According to Art 1 of the Law No 51/1995 on the organization and functioning of the profession as lawyer, "the lawyer's profession shall be free and independent". The same principle of independence is re-stated in Art 2, according to which "in the exercise of his/her profession, a lawyer shall be independent".

According to Art 6 of the Statute[1], "the freedom and independence of the profession are basic principles, defining the professional status of the lawyer and guaranteeing his professional activity". From the interpretation of these legal provisions it results that the professional independence is specific to the profession as lawyer and results from its nature.

[1] The Statute of the profession as lawyer was adopted by the Decision No 64/2011 of the Council of the National Union of Bars in Romania, published in the Official Gazette of Romania No 898/19 December 2011 and modified and amended by: Decision No 7/2012 on the modification and amendment of the Statute of the profession as lawyer, published in the Official Gazette of Romania No 594/20 August 2012; Decision No 769/2013 on the modification and amendment of the Statute of the profession as lawyer, published in the Official Gazette of Romania No 497/7 August 2013; Decision No 852/2013 on the modification and amendment of the Statute of the profession as lawyer, published in the Official Gazette No 33/16 January 2014; Decision No 1069/2015 on the modification and amendment of the Statute of the profession as lawyer, published in the Official Gazette No 173/1 March 2015; Decision No 13/2015 on the modification and amendment of the Statute of the profession as lawyer, published in the Official Gazette No 649/27 August 2015; Decision No 27/2015 (in the procedure for publication in the Official Gazette, ratified by the Decision of the Congress of Advocates No 7/25-26 March 2016); Decision No 126/2016 (in procedure for publication, ratified by the Decision of the Congress of Advocates No 8/23-25 March 2017)

The importance of the principle of lawyer's independence in the performance of his activity has been recognized internationally, in this meaning the Council of the Bars and Law Societies in Europe (CCBE) has stated in Art 1 of the Charter of core principles of the European legal profession[1] that "The core principles are: a) the independence of the lawyer, and the freedom of the lawyer to pursue the client's case; (...)".

Art 2.1.1 of the Code of Conduct for European lawyers[2] states that "The many duties to which a lawyer is subject require the lawyer's absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his or her independence and be careful not to compromise his or her professional standards in order to please the client, the court or third parties".

The Recommendation Rec (2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer[3] adopted on 25th October 2000 at the 727th meeting of the Ministers' Deputies states as Principle 1 that "All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights".

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[1] Charter of core principles of the European legal profession available at http://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf, visited on 3 June 2018

[2] Code of Conduct for European lawyers adopted on 28 October 1998 and subsequently modified during the Plenary Sessions of the Council of the Bars and Law Societies in Europe (CCBE) on 28 November 1998, 6 December 2002 and 19 May 2006;

[3] Recommendation Rec (2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer adopted on 25th October 2000 at the 727th meeting of the Ministers' Deputies, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804d0fc8, visited on 5 June 2018

## THE CONTENT OF THE PRINCIPLE OF INDEPENDENCE OF LAWYERS

Related to the national and international regulations above mentioned it results that the principle of independence shall be analyzed from a double perspective, namely: in relation to the state authorities and the profession, on the one hand and on the other, in relation to the client.

The functional independence of the profession as lawyer, according to the Charter of core principles of the European legal profession refers to the fact that "a lawyer needs to be free – politically, economically and intellectually – in pursuing his or her activities of advising and representing the client. This means that the lawyer must be independent of the state and other powerful interests, and must not allow his or her independence to be compromised by improper pressure from business associates"[1].

The principle of independence for lawyers in relation to state authorities refers to the following legal guarantees:

- The right of the lawyers to choose their profession;
- The right of the lawyers that through the Council of Lawyers to have their activity legalized;
- The impossibility of the state to perform any form of control over the professional activity of lawyers because the procedure for disciplinary liability is performed through the authorities specific for this profession;
- The lack of any subordination of the lawyer with the courts and prosecutor's offices attached to the courts, by including here the immunity of the speech stated by Art 39 Para 3 of the Law No 51/1995 according to which "A lawyer shall not be criminally liable for statements made orally or in writing, in an adequate form and in compliance with the provisions of Para 2, before courts of law, criminal inquiry bodies or other jurisdictional administrative bodies, only if such statements are in connection

[1] Charter on the core principles of the European legal profession, Section 2 – A commentary on the Charter of core principles of the European legal profession.

with that cause‘s defence and necessary for establishing the truth”.

In this meaning it is relevant the practice of the European Court of Human Rights from Strasbourg who stated in many times the fact that the criminal sanctioning of a lawyer for his statements in front of the court represent a violation of the freedom to speech which is not necessary in a democratic society, being disproportioned[1].

The lawyer’s independence towards the state authorities is also mentioned in the case of *Siałkowska v. Poland*[2] (case file no 8932/05 Para 111-112), in which the ECHR has showed that the independence of the profession as lawyer is important for an effective and fair functioning of the justice. Also, the Court has emphasized that it is the state’s responsibility to insure a necessary balance between the right of every person to enjoy an effective access to justice and the independence of the profession as lawyer, on the other hand.

Regarding the independence of the lawyer in his relations with the client, Art 9 Para 2-3 of the Romanian Deontological Code states that “the lawyer is compelled to perform his duties according to his professional beliefs, free of any influence or pressure, both from third parties, as well as from his own interests. The lawyer must keep his

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[1] See in this regard C.I. Popescu, case *Nikula v. Finland*; the speech of the lawyer during a public hearing; the qualification of the proceedings used by the prosecutor as being illegal and abusive; freedom of speech; interference; proportionality; necessity of a democratic society; violation of Art 10 of the Convention, in Journal of the Court No 6/2003, p.51-57

[2] Case file *Siałkowska v. Poland* available at https://hudoc.echr.coe.int/eng?i=001-79887#{%22itemid%22:[%22001-79887%22]}, visited on 6 June 2018; when analyzing the scope of the responsibility of the State for acts of lawyers appointed under legal aid scheme, the Court must have due regard to the guarantees of such independence. (Para 111-112). In this context, the Court considers that it is not the role of the State to oblige a lawyer, whether appointed under legal scheme or not, to institute any legal proceedings or lodge any legal remedy contrary to his or her opinion regarding the prospects of success of such an action or remedy. It is in the nature of things that such powers of the State would be detrimental to the essential role of an independent legal profession in a democratic society which is founded on trust between lawyers and their clients.

independence away from the pressure groups and even from his current/ future client, if his beliefs do not correspond with the claims and requirements of the person requesting his professional expertise".

Starting from this regulation, it appears that the lawyer is never subordinated to the client, but even more than that he will have to pursue his interests only to the extent that they are legitimate. The professionalism in relation to the client represents a real obligation for the lawyer.

Another aspect of the lawyer's independence derives from the fact that in the fulfillment of his obligations to the client he must remove any constraint which could result from a lawyer's interest or from the persons close to him. In this context, the lawyer shall have the possibility to refuse any case which could endanger the ethics.

## CONCLUSIONS

A liberal profession, such as law, can only function based on principles as legality, independence and freedom to allow the members of its professional body the performance of the social role.

In relation to the national and European regulations above analyzed, it clearly results that the lawyer's independence is absolute, compelling him to perform his profession so that he shall fulfill the mandate received from the client with professionalism, free from any influence or pressure.

The lawyer's independence also represents a pillar for the independence of justice, being one of the arguments for which the state considers the advocacy as of "public interest".

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# DISMISSAL FOR REASONS NOT RELATED TO THE PERSON OF THE EMPLOYEES

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***Abstract:***

*Dismissal is an extreme measure of the employer which consists in termination of the existing labour relation with one of his employees.Dismissal represent the termination of the individual employment contract at the initiative of the employer.The dismissal may be disposed for reasons related to the employee or for reasons not related of his person.*

*Dismissal for reasons not related to the employee is the termination of the individual employment contract due to the termination of the employment occupied by the employee, for one or more reasons unrelated to the person.*

*Abolition of the employment must be effective and have a real and serious cause.*

***Key words:*** *dismissal; reasons; employees*

Dismissal is an extreme measure of the employer which consists in terminating the existing labor relation with one of his employees.As a result, in the future, the employer loses this quality in relation to the dismissed person, and he also does not have the quality of an employee.

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According to the provisions of art. 58 Labor Code, dismissal is the termination of the individual labor contract at the initiative of the employer.

The right to work and freedom of labor is not violated by the dismissal institution. The employee does not enjoy an absolute liberty in this capacity, and the employer's right to dismiss him can not be removed.

In order to protect the employee from possible abuses and to guarantee his rights, the Labor Code expressly and restrictively determines the situations in which the dismissal of the employee may be disposed and the procedure to be followed.

The dismissal may be ordered for reasons related to the employee or for reasons not related to his person.

Dismissal for reasons not related to the employee is the termination of the individual employment contract due to the termination of the employment occupied by the employee, for one or more reasons unrelated to his person.

Abolition of the employment must be effective and have a real and serious cause. The dismissal for reasons not related to the employee's personality has the legal regulation in the provisions of art. 65 of the Labor Code[1].

In the specialized literature[2] it was stated that according to the provisions of art. 65 par. (1) The Labor Code, *the reason for the dismissal, is not inherent to the employee, but outside the employee. There is no question of disciplinary misconduct, of physical or psychological inefficiency, etc., but of an external factor: the abolition of the job, which obviously can not be attributed in any way to the affected employee. The reason for dismissal is in fact of the employer but can not be attributed to him either. It is determined by the objective causes of an organization of unity that require the abolition of a job (jobs), with the consequence of personnel restructuring. Therefore, the employer decides*

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[1] C.Nenu, *Legislația muncii. Culegere de acte normative relevante* (Craiova: Sitech, 2014): 42.

[2] Al. Țiclea, *Concedierea, teorie și practică* (Bucharest: Universul Juridic, 2013), 67.

*to dismiss the job for one of the reasons that do not concern the employee and then dismisss the person who occupies it. Of course, it is, in the employer's view, an inefficient, inefficient work place in its organizational structure.*

The reorganization of the employer's activity is a compulsory stage, preceding the dismissal, the measure terminating the contract finding its basis precisely in the abolition of the employment occupied by the employee, ordered by an act of the competent bodies of the employer.

Redeploy the employer's activity involves changing its internal structure[1] and generally any organizational measures likely to drive performance improvements.The employer is in a position to dispose of redeploy, his legitimate interest in dismissal being dictated by the need for more efficient work, dismissal being the only solution.

Article 65 (2) of the Labor Code requires that the dissolution of the work place must be effective and have a real and serious cause, these aspects being the conditions for the legality of the dismissal for reasons not related to the employee.

In judicial practice[2], *it is noted that abolition is effective when the job is suppressed from the employer's structure, when it is not found in its organizational chart or in the state of affairs.*

*Discontinuation of the post is not effective if its followed by the short time reestablishment of the same job. Neither the change of job title can be considered an actual discontinuation of the job. We can not talk about an effective reorganization if the newly established positions under other names have taken over the duties of the disbanded positions, which leads to the conclusion that, in fact, the removal of employees or their replacement with others is not legal.* [3]

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[1] C. Nenu, *Contractul individual de muncă* (Bucharest: C.H. Beck, 2014), 184.

[2] Appeal Court Ploiești, section of labor and social security conflicts, Decision no. 1003/2007, *Buletinul Curților de Apel* no. 1 (2008): 48, C.H.Beck; in the same sense, Bucharest Court of Appeal, Civil Section VII, for cases concerning labor conflicts and social insurance, Decision no. 2419/R/2005 and Decision no. 3241/R/2007 in Țiclea, *Concedierea*, 71.

[3] Bucharest Court of Appeal, Section VII Civil Division, for cases concerning labor disputes and social security, Decision no. 296/R/2011, in Daniela Georgeta

Regarding the serious cause of the dismissal, it has been observed in the judicial practice[1] *that it is sufficient for the employer to pursue the efficiency of his / her own activity in order to use the maximum yield of human and financial resources and loss reduction.*

*The cause of the abolition of the workplace is real when it is objective, that is, it really exists and does not conceal reality. It may consist, as the case may be, in economic difficulties, in the necessity of reducing expenses, increasing efficiency and benefits, combining structures or compartments, regardless of the person or the behavior of the employee.* [2]

*The cause is serious when the measure taken by the employer only seeks to improve the activity rather and not the employee's.*

*Only suppression or abolition of the post will be considered, not the change of name or his suspension. The reorganization is not real even when the number of posts remains the same after the dismissal of the employee and the duties of the staff employed after the dismissal are the same as those of the applicant, and it is irrelevant that the new employees have fixed-term employment contracts.* [3]

The usefulness of a job in the organizational structure of the employer can be judged strictly by the employer through its competent bodies and not by the court that can not substitute for the employer to decide on the maintenance of certain positions.

On the occasion of litigation settlement to the dismissal decision, the court does not have the competence to analyze the issues of economic efficiency or difficulties of the same nature, the only issues that it analyzes are those strictly related to the lawfulness of the dismissal, namely whether the actual job dissolution, if it is based on an objective,

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Enache and Maria Ceaușescu, *Litigii de muncă. Jurisprudență relevantă a Curții de Apel București pe semestrul I,* 2011: 84-85.

[1] Bucharest Court of Appeal, Section VII Civil Division, for cases concerning labor disputes and social security, Decision no. 2158/R/2012.

[2] Țiclea, *Concedierea*, 72.

[3] Țiclea, *Concedierea*, 77-78.

real and serious cause[1], the opportunity issues being strictly within the employer's discretion.

Case Study :

By decision no. 25 / 08.06.2017, the individual labor contract no. 326 / 30.11.2011, concluded between the parties, ceased with the date of 09.06.2011 for reasons not related to the employee, respectively the abolition of the position of Purchaser Analyst, occupied by the contestants, starting with 09.05.2017

The contestant was employed by S.C. I A S R S.R.L. starting with 01.12.2011 on the position of Purchasing Analyst.

According to the organization chart, the position occupied by the contestants was called the Maintenance Specialist.

We specified that according to the job description, the objector had attributions both in terms of maintenance specialist activity and attributions of purchasing parts.

Since March 1, 2017, the MRO Buyer has been created within the company, which is directly subordinated to the General Manager, a post on which has been appointed Mr. D., having no experience in the field of procurement, formerly employed by the company as a plastic operator within the production department. Starting with March 1, 2017, most of the procurement activity of parts that entered into the job of the challenger was abusively taken over by the person employed as a Procurement Specialist, without a decision of the management of the unit in this sense to be brought to the attention of the objector, but simply by pursuing the same activity as the position occupied by the objector and by preventing it from exercising its service duties.

Moreover, according to the post of Purchasing Specialist, most of the attributions attributable to the objector were also attributed to the person employed on this post, so that both employees carried out the same activities, which created confusion in relation to the external partners and the staff in the unit , even the head of the technical

[1] C. Nenu, *Dreptul muncii. Curs pentru studenții programului frecvență redusă* (Pitesti: Universitatii din Pitesti, 2010): 69.

department asserting that there are practically two employees at the level of the unit doing the same job.

Only through Decision no. 18 / 02.05.2017, communicated to the objector on 03.05.2017 hours 13: 32, the management of the unit decided the way of organizing the purchasing activity at the factory level, most of the procurement activity to be performed by the Purchasing Specialist , the contestant who holds the position of Purchasing Analyst, having only the purchase of spare parts and maintenance services for which there are framework contracts, basically only the receipt of goods in SAP, the creation of necessities, and the purchase of spare parts exchange with old reference.

Subsequently, on May 3, 2017, 14.00 hours, the intimate issued a notice to the objector requesting a point of view on the modification of the duties stipulated in the job description of the post, in order to reduce the attributions of the buyer's spare parts and supplementing the maintenance area activities, which were previously fully fulfilled by the person in charge of the Maintenance Trainee, with the indication that to the extent that the objector will not express a point of view until 05.05.2017 at 12.00, will consider the answer to be negative.

At the time of receiving this communication, in order to express a point of view, the objector requested a deadline of a few days to analyze the consequences that the communication will have on her activity in the company, on her subsequent professional development.

What is to be mentioned is that with the communication, it was not known that, insofar as it would disagree with the employer's proposal, it would be fired in 3 days, as the Purchasing Analyst would be disbanded.

At the same time, we show that against the objector, prior to the termination of the occupied post, a disciplinary investigation procedure was initiated regarding a possible violation of the rules of the group regarding the use of the user name and the password for logging in SAP, although in the Inner Regulation it was not provided that such an act would constitute disciplinary misconduct.

Thus, by convening no. 3768 / 04.05.2017, to the objector was requested to be present on 08.05.2017 at 13.00 at the human resources department of the company in order to carry out disciplinary research.

Although on the same day, according to the information received from the members of the discipline commission, a report was drawn up on the results of the disciplinary research and no deviation was found, at the insistence of the leadership of the unit, the disciplinary research procedure was resumed. Although the objector requested, until the time of the dismissal no response was given to her regarding the results of the disciplinary investigation.

By decision no. 21 / 09.05.2017 communicated to the objector at 15:00 (two hours before the end of the program), the intimate informed it of the abolition of the position of Purchasing / Maintenance Specialist Analyst starting with 09.05.2017 and regarding the establishment of the Mechanical Engineer / Maintenance Engineer, motivated by the establishment of MRO Buyer, which took over most of the procurement tasks and refused to change the job description by the objector.

We specify that the duties of Mechanical Engineer are essentially aimed at the maintenance activity that the objector did in the Purchasing / Maintenance Specialist. We specify that at the time of the dismissal, the employer informed us that the Mechanical Engineer's post is the available job post in the unit but does not fit into the objector's professional training. However, the modification of the job description proposed by the communication dated 03.05.2017 to the complainant, the target precisely attributed the attributions to which the activity of Mechanical Engineer assumed, most of which were successfully fulfilled by the objector as a key user in SAP and a technical staff trainer in the unit.

The contested decision was communicated to the opposing part on 09.06.2017.

Against the dismissal decision, the AC employee filed an appeal that was registrated on the TA roles, being the subject of the file.

The decision dismissed is unlawful.

Taking into account that, prior to dismissal, for several months, the employer has put pressure on the objector to determ her to not

perform her job duties by setting up a post with the same job duties as the occupied post by objector, practically prevented her to exercise the activity, the intention of her employer being to force her to resign, by dragging her on a dead line, harassing her psychologically, all of which followed by a disciplinary investigation for alleged misconduct that the objector had committed, to finally order the dismissal of the objector as a result of the dismissal of the occupied post, entitles us to consider that in fact the dismissal of the objector took place as a result of the fact that it was no longer desired in society: by Decision no. 21 / 09.05.2017, the General Manager of the unit decided to dismiss the post of Purchaser Analyst occupied by the objector and to establish the position of Mechanical Engineer, motivated by the fact that it was set up the MRO Buyer, which took over most of the procurement tasks at the factory level, the attributions previously attributed to the objector and the fact that she refused to modify the job post proposed by the employer, without specifying that she would be fired in the next 3 days.

Thus, through the decision which the position occupied by the objector had been discontinued was not based on objective reasons, as a result of the reorganization, but had purely subjective reasons.

We appreciate that the objector's consent to the amendment of the job description was not necessary; by this way of doing, the employer wanted the terms of the individual employment contract with the objector to be changed in relation to her position in the unit, the employer knowing the position of the objector in that regard, in that it wanted to continue to carry on the same activity as it did in the establishment and for which it had concluded the employment contract. The contestant would have accepted, as ever, any activity assigned in addition to the wage increase.

What is to be emphasized is that the objector has never been informed that, insofar as he does not agree to change the duties contained in the job description, his post will be dismissed and she will be fired.

To the extent that she would knew she was to be fired, since she had a child to care, she would have accepted the employer's proposal until she had found a new job corresponding to her professional training

acquired within the unit and his wishes for development, as well as her financial needs.

Also, by the fact that the objector did not have the opportunity to run for the position of MRO Buyer, even though professional experience recommends it, it is in our opinion a subjective cause of job dismiss, given that it is obvious that the post was occupied by a person agreed by the management of the unit who did not have the training and experience required to fill such a post.

Please note that the dissolution was not effective because the objector's job was not suppressed in the organization chart; on the one hand, the post of MRO Buyer was created, which implies the fulfillment of the same attributions of objector related to the acquisition activity (point 1-7 activity buyer spare parts in the job description and the decision no. 31/ 01.12.2015, point 7 specialist mentenance are fully covered in the job description of Specialist Acquisitions, points 1-6, 8-19 from the activity of maintenance specialist are fully found in the sheet of Mechanical Engineer); on the other hand, with the dismiss of the position occupied by the objector, the Mechanical Engineer/Maintenance Engineer was established, which occupies the same position in the organizational chart, in the same department, assuming the same attributions as those which the objector had regarding the activity of Maintenance Specialist.

During the notice period, at the request of the unit management, the objector handed over all her duties to other colleagues in the department, who would temporarily exercise them until the post of Mechanical Engineer will be occupied.

Please note that there is no serious cause regarding the dismissal of the objector, given that after the dismiss of the position occupied by the objectors, there are virtually two posts in the unit that imply the same tasks that the challenger fulfilled in the occupied post; at the evaluations made within the company, the objector has obtained the highest qualifiers, which means that she has successfully fulfilled her duties.

The cause of dismissal of the position occupied by the objector is not serious because it is not objective, it is not the consequence of the economic difficulties in which the unit is located, it does not result from

the need to reduce the expenses or the efficiency of the activity, but is based on subjective causes, as is clear from the preamble to the decision to abolish the post.

In view of the above, it is obvious that we are not in the situation provided by the provisions of art. 65 The Labor Code, the dismissal of the objector is illegal and ungrounded, the dissolution of the post occupied by her is not effective and has no real and serious cause.

By civil sentence no. 2622/2018 issued by TA, the court admitted the appeal, annulled the decision no.25 of 08.06.2017 issued by the intimate and ordered the reintegration of the objector on the post held prior to the dismissal, compelled the intimate to pay to the objectors an indemnity equal to the indexed salaries, increased and upgraded with the other rights she would have enjoyed from the time of the dismissal until date of effectively reinstated.

## CONCLUSIONS

In summary, the dismissal for reasons not related to the employee's personality is determined by the objective causes of an organization of the unity that require the abolition of a job, with the consequence of staff restructuring.

Abolition of the job must be effective and have a real and serious cause, these aspects being the conditions for the legality of the dismissal for reasons not related to the employee.

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# SOME FEATURES OF THE SYSTEM OF CORRECTION OF CONVICTS IN THE REPUBLIC OF BELARUS: SOCIAL INFLUENCE AS A MEAN OF CORRECTION OF CONVICTS

**Darya IVINSKAYA**[1]

***Abstract:***

*The system of means of correction of convicts in the Republic of Belarus includes five basic means of correction. This article focuses on social influence as one of the means of correcting convicts, which is the least disclosed in the legislation of the Republic of Belarus. In this paper the acts of the Republic of Belarus that regulates the participation of the public in the lives of convicts are given, and also possible forms of public participation in the correction of convicts are described. The author examines various doctrinal approaches to the definition of the concept of this institution. In the conclusions, the author proposes to consolidate the concept of "social influence" in the Penal Enforcement Code of the Republic of Belarus for more effective implementation of this means of correcting convicts, as well as to systematize the activities of subjects that exert social influence on convicts.*

***Key words:*** *system of means of correction of convicts; social influence.*

## INTRODUCTION

The system of means of correction of convicts, in accordance with Art. 7 of the Penal Enforcement Code of the Republic of Belarus as

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means of correction of convicts includes the established procedure for the execution and serving of punishment and other measures of criminal responsibility (regime), educational work, socially useful work, the receipt of education by convicts and social influence. It seems that the cumulative application of all correctional means will allow achieving all the goals of criminal responsibility, namely the correction of convicts and the prevention of the commission of crimes by both convicts and others. All this goals are also described in Penal Enforcement Code of the Republic of Belarus. The above-mentioned goals are the part of the state policy on combating crime and stipulate the use of a comprehensive mechanism of corrective means, however, they are a constant reason for seeking new forms and methods of dealing with convicts.

**1.** According to the statistics of the Ministry of Internal Affairs of the Republic of Belarus for the 1st quarter of 2018, out of 11,752 persons who committed crimes, 4,324 are persons with a criminal record, which is 36.8%[1]. In this case, these statistics do not include persons whose previous conviction is withdrawn or extinguished, and, therefore, the final figure of the persons who committed the crime not for the first time, may significantly differ. In connection with such a situation the question arises: are the goals of criminal responsibility always achieved, or is the system of remedies not fully implemented. If so, can the reason lie in the insufficient regulation of the system of means and the order of their application?

The procedure for the use of such means of correction, as regime, educational work, socially useful work and the receipt of education by convicts are regulated by the penal laws of the Republic of Belarus, while the social influence as a means of correcting of convicts in the penal enforcement legislation is not determined in substance.

In connection with the lack of a provision on social influence in the legislation, the legal literature suggests a different content of this institution. In particular, it is proposed to refer to the institution of social

[1] „General statistics for 2018“, Ministry of Internal Affairs of Republic of Belarus, accessed June 11, 2018, http://mvd.gov.by/main.aspx?guid=319943

influence not only as a direct impact of representatives of society on convicts, but also over control on the activities of the bodies of the criminal executive system, with participation of representatives of the public.

The norms of the Penal Enforcement Code of the Republic of Belarus sufficiently generalize the public participation in the life of convicts. So, article 21 of the Penal Enforcement Code of the Republic of Belarus "Control and participation of public associations in the work of bodies and institutions that carry out punishment and other measures of criminal responsibility" states that, public associations can control the activities of bodies and institutions that execute punishment and other measures of criminal responsibility on the basis and in the manner prescribed by law. Public associations participate in the correction of convicts, as well as assist in the work of bodies and institutions that carry out punishment and other measures of criminal responsibility The watchdog commissions attached to local executive and administrative bodies, and in relation to juvenile convicts - the Commission on Juvenile Affairs participate in the correction of convicts, as well as in the exercise of public control over the activities of bodies and institutions that carry out punishment and other measures of criminal responsibility. The procedure for the activities of watchdog commissions and Commission on Juvenile Affairs is determined by the legislation of the Republic of Belarus.

The main normative acts that regulates activities of these institutions are the Resolution of the Council of Ministers of the Republic of Belarus No. 1220 of September 15th, 2006 “On approval of the Regulation on the procedure for the implementation by public associations of control over the activities of bodies and institutions that carry out punishment and other measures of criminal responsibility” and Resolution of the Ministry of Justice of the Republic of Belarus №85 of December 15th, 2006 “On approval of the Instructions on the procedure of formation and activities of public watchdog commissions personal sheet of the candidate for the commission members”.

The purpose of the activity of public associations is to participate in the correction of convicts, as well as to assist the bodies and

institutions that carry out punishment and other measures of criminal responsibility. The Resolution of the Council of Ministers of the Republic of Belarus № 1220 names two forms of possible participation of public associations in the activities of bodies and institutions that carry out punishment and other measures of criminal responsibility: public monitoring commissions and registered in accordance with the established procedure, public associations that coordinated activities to provide assistance with the administration of bodies and institutions that carry out punishment and other measures of criminal responsibility.

The Penal Enforcement Code also mentions two more forms of work with convicts - this is the guardianship councils and public educators for convicts sentenced to imprisonment. However, in our opinion, the activities of these entities are not sufficiently regulated.

It is worth noting that in the Penal Enforcement Code there is no mention of a number of subjects that influence on convicts, such as the relatives of the convict (who directly serve as a link between the convicted and civil society), religious organizations, psychologists, volunteers. In addition to the subjects directly influencing the convicts, the impact can be rendered indirectly: through literature, the media or public opinion that condemns these or other acts.

The guardianship councils can be created on territorial and republican government bodies for purposes of assisting the administration of correctional institutions in the organization of the correctional process, receipting of general secondary, vocational education and vocational training by convicts, strengthening the material base of the correctional facility the implementation of social protection of convicts, labor employment of people released from correctional institutions, as well as in order to address the issues of social protection of correctional workers, increase their professional level in correctional establishments. The guardianship councils are created on the rights of public associations and are registered in the order established by the legislation of the Republic of Belarus. The guardianship councils may include representatives of state bodies, organizations regardless of ownership, representatives of the media, public associations and religious organizations, scientists and cultural figures, and individual citizens.

Today in the Republic of Belarus as guardianship council works the Public Council at the Ministry of Internal Affairs of the Republic of Belarus. It a republican organization and is regulated by Statute of the Public council at the Ministry of Internal Affairs of the Republic of Belarus No. 115 approved by Resolution of Ministry of Internal Affairs of the Republic of Belarus on March 26th, 2013. Now the Public council includes 36 persons.

The next categories of subjects that can influence on convicts are public educators for the convicts sentenced to the deprivation of liberty. Public educators of convicts are approved by the head of the correctional institution. Public educators of convicts participate in the correction of convicts sentenced to deprivation of liberty, assist in the labor and domestic arrangements of prisoners released from correctional facilities. A public educator can be a representative of state bodies, other organizations, public associations and religious organizations, other persons capable of exerting educational influence on convicts. In our opinion, this category of subjects is also insufficiently disclosed in legislation and is not used in practice.

Having determined all the subjects involved in the correction of convicts, let's return to the notion of social influence. Because the concept of social influence is more comprehensive and includes not only the activities of watchdog commissions, Commission on Juvenile Affairs, public associations, guardianship council, public educators for convicts sentenced to imprisonment. Nowadays we still have no definition of a concept of "social influence" in the legislation of the Republic of Belarus.

E. Popova implies under a social influence the impact of society, public, etc. on the convict, their participation in the process of correction of the convict[1]. V. Matveenko believes that the social influence is a pedagogical process of voluntary, uncompensated influence of charitable

[1] Elena Popova, "The concept of the development of social influence as a means of correcting convicts is an objective necessity of the present", *Collection of abstracts, speeches and reports of participants of III International Prison Forum "Crime, Punishment, Correction",* (November 2017): 211-214.

and religious organizations on convicts with the aim of their correction[1]. Some scientists think that under social influence as one of the main means of convicts correcting, we mean a set of forms and methods for correcting convicts used by subjects of social influence[2].

V. Shabal proposes to understand under social influence, a means of correcting convicts, the activities of public and religious organizations (associations), citizens, aimed at rendering assistance to bodies and institutions that carry out punishment and other measures of criminal responsibility in correcting convicts, their social protection, with the assistance of their social re-socialization in society after their release from penitential establishments[3].

## CONCLUSION(S)

Social influence has an important role in correcting of convicted persons and the process of their re-socialization. This is due to the fact that man, as a social being, mustn't lose touch with the civil society and the world, even at the time of serving the sentence in places of restriction and deprivation of liberty. Insufficient regulation of this institution may entail a loss of interest on by the entities who has the opportunity to exert influence on convicted (public associations, guardianship council, etc.), as well as directly to individuals working in the penitentiary system.

In our opinion, at the present stage of the development of criminal and penal enforcement legislation one of the directions of the criminal-executive policy of the Republic of Belarus should be the formation of

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[1] Vadim Matveenko, "Social influence as a means of correcting juvenile convicts" (PhD diss., Ryazan Institute of Law and Economics of the Ministry of Justice of Russia, 2000), 125.

[2] Nikita Kuznetsov, Azhajan Kumarova, Vaiktor Zhamuldinov., "Social influence in the system of means of correction of convictsin Kazakhstan: concept and content", Materials of the VIII International Student Electronic Scientific Conference "Student Scientific Forum" (June 1, 2017, Moscow).

[3] Siarhey Shabal, "Legal support for the implementation of meansof correction for convicts to deprivation of liberty: theory and practice of application" (PhD diss., Belarussian State University, 2017), 142.

the conceptual apparatus of the institution of social influence on convicts as a means of their correction, as well as a clear definition of subjects of social influence and the consolidation of their forms of activity. An important point will be the legal regulation of the activities of all entities that can have a positive impact on persons serving a sentence, as well as creating incentives for their activities.

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# (NON)DISCRIMINATION WHEN CONCLUDING THE ADOPTION BY SETTING FORTH A MAXIMUM AGE LIMIT FOR THE ADOPTER. ECHR DECISION IN THE SCHWIZGEBEL VS. SWITZERLAND CASE

**Georgeta-Bianca SPÎRCHEZ**[1]
**Carmen-Beatrice ENACHE**[2]

***Abstract:***

*This paper analyzes the solution offered by the ECHR regarding the impossibility to adopt a Swiss citizen based on the adopter's age. A question regarding this solution may occur: is this criterion discriminating or, by contrast, is it beneficial to protect the best interest of the child? In order to determine/develop a series of arguments to establish an answer, it is of utmost importance to discuss along the essay the importance of the adoption, as a civil institution, and also what its pupose is. Furthermore, it is necessary to highlight the manner in which the best interest of the child should be respected in regards to the adoption and to what extent the principle of proportionality is applied or, in other words, is there proportionality between the decision of the Swiss authorities and the respect of the best interest of the child? In order to identify the presence or the absence of discrimination, it is important to define this institution and to analyse what are the potentially discriminating elements in regards to the adoption and to what extent they have occured so far.*

***Key words:*** *adoption; child's best interest; proportionality principle; discrimination.*

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## 1.INTRODUCTORY ASPECTS REGARDING THE IMPORTANCE AND THE PURPOSE OF THE ADOPTION

As it is stated in the doctrine[1], „the adoption is one of the noblest expression through which we may prove our solidarity", the importance of this institution resulting from the purpose it was established upon and that is providing an appropriate environment for the raising of the children lacking protection.

When adoption is the topic of discussion, obviously, two interests are weighed, the one of the adopters and the one of the adoptees. Thus, although the rights and the interests of the adopter shall not be ignored, the best interest of the child will be primarily provided. As such, taking into consideration that the best interest of the child is concretely appreciated being reported to each situation regarded individually, the granting of adoption is susceptible to give birth to some apparently non-unitary practices. In this context we must accept that, although, the fulfillment of the objective conditions is accomplished, however, there might be some situations where the best interest of the child should determine the non-granting of the adoption, in subjective situations for the adopter or the child.

These situations suscitate the interest of the doctrine and represent the foundations which determined even the intimation of the European Court of Human Rights. Analyzing such situations, we notice that the main susceptible matter to offer the opportunity for debates is that through the construction of the best interest of the child the authorities appealed to abusive decisions against the possible adopters and if it might be discusses, in these situations, by a discrimination form.

This paper treats these kinds of problems starting from *the ECHR decision in Schwizgebel vs. Switzerland case*[2]. In this case, the plaintiff, single woman aged 47 years, requested the authorization to receive a second child to be adopted, but all her applications were denied including through the decision ruled ultimately by the Federal County Court in

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[1] Emese Florian, *Dreptul familiei*, 5th edition, (Bucharest: C.H. Beck, 2016), 464.
[2] Judgment from 10 June 2010, final at 10.09.2010 (application no.25762/07)

2006. As a consequence, the plaintiff claimed that she was subjected of a differentiated treatment in comparison to a younger single woman who, in the same circumstances, would have been granted the authorization to adopt the second child, that is, the plaintiff invokes the existence of a discrimination[1] based on age.

Within the present context, the rightful question which may appear is: can we consider the refusal of a law court to grant adoption as being an abusive measure of that kind and could aggravate the fulfillment of this institution role, or we can consider it as an attempt to protect the supreme wellbeing of the child by not allowing him to be in an environment which is not favorable to his raising and development?

By the decision ruled in this case, ECHR established that the art. 14 and art. 8 of the European Convention of Human Rights were not infringed, basing the solution on reasons which focus on the purpose of the adoption, the best interest of the child, as well as the existence of a proportionality between the taken measure and the reasons it based upon. These aspects are due to be developed below, especially because the ECHR decision we make reference to is useful to the authorities in other signatory states of the Convention, states which, although do not expressly regulate a maximum age until a person could adopt, recognize the authorities an appreciation margin regarding the granting of adoptions in cases where the adopters, being of a certain age, are not able to provide the guarantee of the best interest of child on a long term.

[1] According to the *Handbook on European non-discrimination law*, published by the Office for Publications of the European Union, Luxembourg, 2011, (p. 22), the principle of nondiscrimination implies that ”people being in similar situations must benefit from similar treatment and cannot be treated less favorable just because of a ”protected” feature they may have”. Essentially to mention is that the nondiscrimination principle does not have an absolute feature, thus there is the possibility to rule some differentiated decisions in comparison to other similar situations, only if this measure bases on an ”objective and reasonable justification”.

## 2. THE APPRECIATION OF THE BEST INTEREST OF THE CHILD IN THE ADOPTION PROCEDURE

This interest is ”a major imperative which underlie any decision / measure taken regarding the child, which has to be established in each case”[1]. As suggestively is underlined in the specialty literature[2], “the request of the best interest of the child does not benefit from a series of legal criteria concerning the appreciation, taking into consideration the fact that we are in the presence of a notion with variable content, the task for its ascertaining belonging to the law court, competent authorities or any other rightful people”.

The Swiss law courts had based the decisions they ruled on the case subject to our analysis, by observing the best interest of the child principle, however this fundamental principle may be regarded as an objective reason and determinative in taking a decision. This principle was used, subsequently, as a reasoning of the decision for ECHR as well, fact which highlights its importance and the legal force.

But, we have the problem that if, through the refusal to authorize the adoption, the Swiss law courts protected the best interest of the child or, in contradiction, brought damage to this interest by stopping the child to become a member of a family where he could benefit from parental protection? We still appreciate that, as it was established in practice, ”it is possible that due to the old age of the person who wants to adopt, the law court does not authorize the adoption, reasoning that the adopter cannot correctly fulfill the parental rights and obligations resulted from adoption”[3] Or, if the adopter cannot fulfill the parental obligations that are assigned to him it is obvious that the best interest of the child is prejudiced and, moreover, the adoption institution purpose is affected, and that is, the complement of the necessities and the interests of adopted

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[1] Mona-Maria Pivniceru and Cătălin Luca, *Interesul superior al copilului,* (Bucharest: Hamangiu, 2016), 17.

[2] Andreea Drăghici, *Protecția juridică a drepturilor copilului,* (Bucharest: Universul Juridic, 2013), 255

[3] Supreme Court, civil section, Decision no. 2144/1985, *apud* Andreea Drăghici, *op.cit.,* 285.

child. For instance, if we prejudice the institution purpose, we do not only affect what we call the best interest of the child, but we bring the institution in a state of inutility and even producer of negative effects, thus what value might have an institution whose finality is not fulfilled?

## 3. THE MAXIMUM AGE LIMIT OF THE ADOPTER – GUARANTEE IN PROVIDING THE BEST INTEREST OF THE ADOPTED CHILD?

Regarding this aspect, we appreciate as appropriate to bring into discussion our national legislation, having in view to find an answer to the question: is it provided by the Romanian law a maximum age limit for the person who intends to adopt or this fact is for the appreciation of the law courts and the competent authorities which will analyze the elements in order to establish if the adopter's age is advanced?

The Romanian civil code[1] provides in art. 460 para.1 that „the adopter shall be at least 18 years older than the adoptee" indicating that „for strong reasons, the law court may authorize the adoption even if the age difference between the adoptee and the adopters is less than 18 years, but in no situation, less than 16."[2] Regarding the maximum age, after which the authorization of the adoption is impossible, we do not have any clue, but starting from the idea that the adoption must follow the observance of the best interest of the child, it is appreciated that "the age of the adopter, respectively the adopting couple members must be compatible with the adoption purpose, that of providing the protection of the non-patrimonial and patrimonial interests of the adoptee".[3] In other words, the doctrine has justly indicated[4] that "in fact not the advanced

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[1] Adopted by Law no.287/2009 republished in Romania Official Gazette, Part I, no.505/15 iulie 2011.

[2] art.460 par.2 Romania Civil Code

[3] Mugurel Marius Oprescu, Mihaela Adriana Oprescu and Marius Șcheaua, *Noul Cod civil. Comentat și adnotat*, (Bucharest: Rosetti International, 2015), 385.

[4] E. Florian (Annotation on art.460) in Flavius Antoniu Baias, Eugen Chelaru, Rodica Constantinovici and Ioan Macovei, *Noul Cod civil. Comentariu pe articole*, (Bucharest: CH. Beck, 2012), 502

age would be the fact which could refuse the adoption, but the aged corroborated with other factual elements, especially the general, physical and psychological condition of the person and the predictable evolution of these parameters, because the adoption is a measure conceived in the best interest of the child".

The lack of an express provision of the maximum age limit of the adopter is reflected in other legislations as well, such as the French one, which provides in art. 343 Civil code[1] that „the adoption may be requested by both spouses non-separated in fact, married for more than two years, or when at least one of the spouses is older than 28 years. The adoption may be requested as well by any person older than 28 years".

Neither the Swiss legislation (at the general regulation level – Civil Code) provides a maximum age limit of the adopter, but only if a single person may adopt if he or she reached the age of 35. However, in the case Schwizgebel vs. Switzerland, ECHR examining the internal laws in force, refers to the Swiss canton law, being applicable for the case, which provided that in the event the age difference between the adopter and the adoptee is higher than 40 years, the competent authorities should give this aspect a special attention in order to grant or not the adoption.

Regarding this age difference, the plaintiff indicated the Court that at that age women can have biological children and concerning this situation it is obvious that the State does not have any possibility to influence, but we consider that this aspect does not present relevance for this case or at least it is of the kind which might change the situation of the plaintiff given the different contextual elements. Referring to a discrimination possibility of the plaintiff in comparison to other younger single women, there might appear a series of problems because such a difference requires an "objective and reasonable justification", as it appears in the Court motivation. In this situation, not being a maximum age limit, which might be an absolute impediment for granting the adoption, we could consider the decision of the Swiss law courts as being abusive and discriminatory or it is proportional with the purpose of the adoption and follows the protection of the best interest of the child?

[1] Available at: www.legifrance.gouv.fr

## 4. PROPORTIONALITY TEST – OBJECTIVE CRITERIA TO SOLVE THE ABOVE "DILEMMAS"

The proportionality principle was defined in the doctrine[1] as being that "fundamental principle of the consecrated law explicit or inferred from the constitutional, legislative regulations and of international legal instruments, based on the rational law values, of the justice and equity and which expresses the existence of a balanced or adequate report, between the actions, situations, phenomena as well as limiting the measures disposed by the national authorities at what is necessary in order to fulfill a legal purpose, thus guaranteeing the fundamental rights and liberties, and avoiding the right abuse".

As such, the decisions ruled by the law courts or by other authorities must be in a balanced report with the followed purpose, the decision being supported and reasoned through the proposed finality as well. In our case, may we consider that the decision of the Swiss authorities and that is, the refusal to grant the adoption, is proportional with the observation of the best interest of the child which represents, in fact, the purpose itself of the adoption? Proving that because of the advanced age, the adopter is not able to appropriately fulfill all the parental obligations, the Swiss authorities prove that the adoptee's interest are prejudiced and thus the institution is affected in its utility and efficiency. Even if the adoption of a child represents, usually, a benefit for the adoptee, in the moment the provision of observing the best interest of the child is jeopardized, this benefit will be inexistent, leading to child rights infringements.

## CONCLUSIONS

In the *case Schwizgebel vs. Switzerland*, the European Court of the Human Rights decided that we cannot talk about discrimination or

[1]Marius Andreescu, "Principiul proporționalității.Contribuții ale filosofiei și doctrinei juridice", *Pandectele Române*, no.8 (2015), article consulted in www.idrept.ro database, at 20.04.2018.

about an infringement of art. 8 of the Conventions and as well, it established a series of very important aspects, and that is the fact the States have the possibility to appreciate to what extent the age of the adopter may affect the purpose of the adoption and to decide appropriately and that the application of a differentiate treatment which is based on a series of well-founded reasons is not a discrimination. Concretely, the Court decided that the decision of the Swiss law courts of not granting the adoption to a person of 47 years, is proportional to the purpose followed and does not constitute a discriminatory treatment against the plaintiff.

We appreciate that, in this case, the non-granting of the adoption is at the border between the infringement of the plaintiff's right to adopt and the observance of the best interest of the child, the delimitation being made just through an objective justification, which shall pass the proportionality test. We must take into consideration that the best interest of the child is appreciated from one case to another, as it might be, there may be cases apparently similar, in one case the adoption might be granted and in other it might be denied, without bringing into discussion the discrimination of one person. In other words, the adoption should not be granted at any cost, but when the observance and the protection of the best interest of the child is effectively provided.

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# LEGAL PROTECTION OF PRIVATE LIFE IN THE CONTEXT OF RIGHT TO INFORMATION

**Alina V. POPESCU** [1]

***Abstract:***

*The right to information is a fundamental right, a founding stone of all other rights, as only properly informed individuals can knowingly exercise their other rights and freedoms. At the same time, a properly informed individual is able to request authorities and other social actors to observe his/her rights, to defend his/her own rights and freedoms against abuses or excessive exercises by third parties.*

*In the context of this study, it is our belief that an individual should be aware of how his/her right to privacy is guaranteed and protected, so as to be safe from unwanted interference, in the name of "freedom of expression" or "right to information". In this case, authorities play a part in terms of informing citizens, of making them aware of the risks they are exposed to be disclosing aspects from their private life. At the same time, citizens should be informed on the rights they have and on the means available to protect their private life and act against those infringing such rights. Moreover, various legal regulations include this obligation of authorities to inform citizens on their rights. The media could also play a more active part in educating citizens on their private life.*

*As it is only natural in terms of rights and freedoms, a proper balance should be ensured in the exercise of a person's rights and freedoms, without affecting the same for other persons, and legal institutions should evolve with the society, in order to meet the new challenges.*

***Key words:*** *right to information; freedom of expression; private life; legal protection*

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## GENERAL CONSIDERATIONS THE CONCEPT OF PRIVACY

Information has become a legal concept, both in terms of access thereto and in terms of access limitation. In this context, the relevant legal framework should reflect the "ofte contradictory values"[1] it must reconcile and the law should cover the legitimate use of information, as well as the consequences of its insidious use.

Pierre Trudel has an interesting approach and talks of "rights on information" " referring to the individuals' powers and prerogatives regarding information", including such rights as: the right on the medium information is located on, authorship rights, non-asset-related rights, intellectual property rights, the right to family and personal life, the right to reputation, the right to an image. We may conclude that the right to privacy is an individual's right on the information on him/her and the individual is the only one who must decide whether s/he wants to make it public or not.

In one of the first studies on the right to privacy[2], authors define this right as the "right to be let alone", and protection from the society must come mainly by recognizing the individual's rights and only secondarily by enforcing punishments. The authors argue that remedies against unjustified intrusion in private life must be subject to an action for criminal liability, resulting in the award of compensations (both for material and moral damage) and, in serious cases, even in the enforcement of prohibitions for those who have infringed such right.

The right to information and freedom of expression represent collective social values, as well as individual and fundamental human rights. Most often, they come into conflict with the right to privacy of other individuals. Specialists agree that the concept of private life is hard

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[1] Trudel Pierre, "*Le droit de l'information: une introduction*", 3, http://pierretrudel.openum.ca/files/sites/6/2017/07/DroitdelinformationINTRO.pdf

[2] Brandeis D. Louis and Warren D. Samuel, "The right to privacy", originally published in the *Harvard Law Review*, V. IV, No. 5 Boston (December 1890), http://faculty.uml.edu/sgallagher/Brandeisprivacy.htm

to define, since its scope includes subjective, intimate issues; however, most opinions converge towards the essence to protect it, i.e. An individual's private life must be protected from "indiscreet and curious people, rumours and calumnies"[1]. The scope of privacy differs from one individual to another; some choose to publicly expose aspects of their private life, from their own will, which, for others, is a forbidden interference in their life. The fact that the right to privacy confers protection in front of authorities, public opinion and other individuals is of essence; the scope of this concept includes: an individual's origin; home privacy; state of health; anatomy and body privacy; marital and intimate/love life; political, philosophical or religious opinions, etc.

Of course, the concept of privacy in itself has witnessed an evolution; with the enhanced complexity of social life, some aspects of life have involuntarily become more transparent and, hence, they need distinct legal protection. Means of legal protection should also develop in accordance with social requirements.

Depending on the context, information on the private life of a person may become public information, as the border is very fragile and limits are subjective. It is important for all social actors to become aware of the need to protect such values, since, once the interference or the disclosure of such private information has already taken place, the prejudice can hardly be repaired (irrespective of the compensations that may be established through legal means). A relevant recent example is that of the British singer Cliff Richard[2], who stated that he felt "forever tainted "[3] because a British TV station had aired the registration of his house by the police, on live television. In my opinion, this is a forbidden interference of the media in private life, with no justification, even though BBC defended itself invoking freedom of expression and the fact that the disclosure obeyed a "legitimate public interest", observing the

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[1] *Revue Internationale de Science sociale*, vol. XXIV no 3 (1972): 438 http://unesdoc.unesco.org/images/0000/000025/002559fo.pdf

[2] "Cliff Richard: I feel tainted by BBC's coverage of raid on my home", https://www.theguardian.com/uk-news/2018/apr/13/cliff-richard-high-court-dispute-bbc-coverage-of-police-raid

[3] "forever tainted"

concept of presumed innocence and with an objective description of the facts. Hence, the following question: in the analysed case, wouldn't the public interest have only been satisfied if information had been disclosed along with images from the scene? Was it necessary to air a judicial procedure on live television, by virtue of public interest? Of course, in my opinion, this is an abuse of the television company, which damaged the right to privacy of an individual, no matter whether he was a popular person, in the name of right to information and freedom of expression.

In this context, I would like to put forward some objections to the study of Brandeis and Warren[1]. They drew up certain criteria which, in their opinion, would represent possible limitations of the right to privacy, i.e.: the right to privacy cannot be invoked in order to forbid the publication of issues of public or general interest; the right to privacy cannot forbid the communication of any issue, though having a private nature, when publication is made under justifiable circumstances (in front of a court, a legislative or administrative forum, etc.); the right to private life ends after the facts have been published by the individual or with his/her approval; the impossibility to challenge the interference in private life when it has caused no damage; the published truth does not allow for a defence and the absence of "maliciousness" of the one publishing an aspect of private life does not allow for defence.

While the first three limitations are actual and are found in contemporary rules, i.e. public interest, the individual consent and justifiable circumstances, the other limitations, in my opinion, are not justified to limit the right to private life, i.e. the fact that no damage has been produced (as moral damage is hard to quantify for the individual whose rights are infringed), invocation of truth to justify interference (a fact or an event may be true, but this does not mean that they no longer refer to an individual's private life and may be made public), as well as the absence of bad intentions (of course, interference is not always the result of malicious conduct, but this does not justify it). The authors' opinion may have been influenced by the trend existing in the Anglo-

[1] Trudel, "*Le droit de l'information*", 3, http://pierretrudel.openum.ca/files/sites/6/2017/07/DroitdelinformationINTRO.pdf

Saxon rule of law, whereby freedom of expression is thought to be intangible. Social and legal reality have resulted in establishing clearly determined limits to the right to private life, as for the right to information and freedom of expression.

From the oldest times, focus has been placed on the protection of privacy, as most law systems include provisions guaranteeing the protection of this social value. In 1970, UNESCO commissioned a comparative study[1] on the protection of the right to privacy, to the International Commission of Jurists. The analysis dealt both with states enforcing Anglo-Saxon law (common law)[2], and countries following French-German civil law[3].

The authors argue that threats to private life are mainly due to technological development, and the two dimensions have to be reconciled in social evolution: general interest and the individual's private space.

In 1967, the Stockholm Congress[4] of the International Commission of Jurists - nordic section, attended by legal experts from various regions of the world, adopted a generic definition of the concept of privacy: "The right of the individual to lead his own life protected against: (a) interference with his private, family and home life; (b) interference with his physical or mental integrity or his moral or intellectual freedom; (c) attacks on his honour and reputation; (d) being placed in a false light; (e) the disclosure of irrelevant embarrassing facts relating to his private life; (f) the use of his name, identity or likeness; (g) spying, prying, watching and besetting; (h) interference with his correspondence; (i) misuse of his private communications, written or oral; (j) disclosure of information given or received by him in circumstances of professional confidence."

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[1] Published in the *International Journal of Social Science*, volume XXIV (1972), issue 3, Revue trimestrielle publiée par l'Unesco, Paris, http://unesdoc.unesco.org/images/0000/000025/002559fo.pdf

[2] Great Britain and the United States.

[3] Argentina, Brazil, Switzerland, France, Germany, Mexico, Sweden, Venezuela.

[4] Nordic Conference on the Right to Privacy, https://www.icj.org/wp-content/uploads/2013/06/Right-to-privacy-seminar-report-conclusions-1967-eng.pdf

As for public interest, jurists have concluded that it refers to providing the authorities with the competence of interfering with an individual's private life, higher than in case of "intervention of private persons or groups". I share this opinion and I consider that privacy intrusions invoked by the media most often do not relate to public interest, in the meaning of information of public interest, but to public interest in the meaning of public curiosity and rating or the chase for audience. Interferences with an individual's private life should only be based on properly delimited and internationally established exceptions: national safety, public safety, protection of health or moral, protection of the rights and freedoms of others.

Of course, we start from the assumption that the right to information and freedom of expression are of public interest themselves; however, a separation should be made between an individual's public affairs and his/her private life, no matter whether he holds a public charge or not. Legal specialists have concluded that it cannot be merely established that: "private life should end where public life begins"[1], and public persons can only be subject to interference when public life influences public events.

Intrusion into private life, in the name of the right to information and freedom of expression, is not acceptable under the justification of "being in the news". As legal specialists have stated in the conclusions to the UNESCO Report[2], "the proof of veracity of a statement that is an intrusion in private life should not be, in itself, a defence. The truth should be the defence only when it can be proved that the statement was justified by a specific public interest recognized by the law". The benchmark defining the ratio between the right to private life and the right to information is "public interest", the only issue that can justify interference in private life.

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[1] Conference Conclusions, Nordic Conference on the Right to Privacy: 6, https://www.icj.org/wp-content/uploads/2013/06/Right-to-privacy-seminar-report-conclusions-1967-eng.pdf

[2] Point 5 of the Conclusions: 612, *Revue Internationale de Science sociale*, vol. XXIV no 3, (1972): 438, http://unesdoc.unesco.org/images/0000/000025/002559fo.pdf

A case with outstanding practical implications is the Decision of the European Court of Human Rights, in case no. 59320/00, von Hannover c. Allemagne[1], stating that the publication of purely private photographs of Caroline von Hannover (a popular person, but who does not hold any public charge) is an unjustified interference with her private life. The Court has held that "the public has no legitimate interest" in this case and, even though it may have an interest, as the media also has a commercial interest, the popular individual "should have benefitted from a legitimate expectation to protection of her private life, given the circumstances of the case".

Lately, the concerns of specialists have focused on the confidentiality of data on social media platforms (which was generated by the evolution of information technology or, in the words of professor Trudel, by the fact that "information is persistent and circulates in the world of networks"[2]), no longer showing the same concern for other potential forms of interference with private life, i.e. intrusion of the media in private life.

On the other hand, a different approach also exists[3], i.e. insufficient protection of private life may result in an infringement of freedom of expression, especially when the state is allowed to interfere with an individual's private communications and this may result in the enforcement of sanctions (especially in states where freedom of expression is frequently limited).

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[1] Cour Européenne des Droits de l'Homme, Communiqué du Greffier, arrêt de Chambre dans l'affaire *von Hannover c. Allemagne* (requête no 59320/00), http://hudoc.echr.coe.int/eng-press?i=003-1033260-1068932

[2] Trudel Pierre, " *Améliorer la protection de la vie privée dans l'administration électronique: pistes afin d'ajuster le droit aux réalités de l'État en réseau*", https://www.institutions-democratiques.gouv.qc.ca/acces-information/documents/Rapport_Me_Pierre_Trudel.pdf

[3] Mendel Toby, Puddephatt Andrew, Wagner Ben, Hawtin Dixie and Torres Natalia – "*Etude mondiale sur le respect de la vie privée sur l'internet et la liberté d'expression*", Collection UNESCO sur la liberté de l'internet, Publié en 2013 par L'Organisation des Nations Unies pour l'éducation, la science et la culture, 7 place de Fontenoy, 75352 Paris 07 SP, France, (UNESCO 2013): 109 – 110, http://unesdoc.unesco.org/images/0021/002196/219698F.pdf

## THE RIGHT TO PRIVATE LIFE ESTABLISHED IN INTERNATIONAL LEGAL DOCUMENTS

The right to information, freedom of expression and right to privacy are "inherent in the existence of a society governed by the law"[1].

Article 12 of the Universal Declaration of Human Rights[2] includes a provision stating that: "No one shall be subjected to arbitrary interference with his privacy, family,home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Likewise, the International Pact on civil and political rights[3] includes, under art. 17, a provision that "1. "No one shall be subjected to arbitrary or illegal interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."

At a European level, the Convention for the Protection of Human Rights and Fundamental Freedoms[4] has explicitly established, under art. 8, "Right to respect for private and family life: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority

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[1] Trudel Pierre, "*Le rôle de la loi, de la déontologie et des décisions judiciaires dans l'articulation du droit à la vie privée et de la liberté de presse*", https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/59/0006.pdf?sequence=1&isAllowed=y

[2] The Universal Declaration of Human Rights, adopted by Resolution no. 217 A (III) of 10 December 1948 of the General Assembly of the United Nations, signed by Romania on 14 December 1955, when, by Resolution no. 955 (X) of the General Assembly of the United Nations, it was admitted as a member state, http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf

[3] Decree no. 212 of 31 October 1974 on the ratification of the International Pact on economic, social and cultural rights and the International Pact on civil and political rights, of the State Council of the Socialist Republic of Romania, published in: The Official Gazette, issue 146 of 20 November 1974

[4] Adopted by the member states of the Council of Europe in Rome, on 4 November 1950, hereinafter referred to as ECHR.

with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." We can already observe that the ECHR also lists, in a specific and limitative manner, under paragraph 2, the cases when such right may be subject to limitations or interferences. According to opinions[1] I share, public interest in terms of limitation of the right to private life is defined by article 8 paragraph (2), and the legitimacy of the interference should be considered from this point of view.

The Charter of Fundamental Rights of the European Union[2], stipulates under article 7, Respect for private and family life, that "Everyone has the right to respect for his or her private and family life, home and communications". We can see that the text of the Charter does not include regulations on the limits to this freedom[3], but, according to article 6 TFEU[4] (former article 6 TEU), "(2) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. (3) Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the

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[1] Kilkelly Ursula, "Le droit au respect de la vie privée et familiale – Un guide sur la mise en œuvre de l'article 8 de la Convention européenne des Droits de l'Homme", Direction générale des droits de l'homme Conseil de l'Europe F-67075 Strasbourg Cedex, © Conseil de l'Europe, 2003, Première impression (Mars 2003, Imprimé en Allemagne): 6, https://rm.coe.int/168007ff5a

[2] Republished in: Official Journal C 202 of 07 June 2016, pp. 389. This text reproduces and adapts the Charter proclaimed on 7 December 2000 and replaces it starting 1 December 2009, the date when the Lisbon Treaty comes into force. Based on article 6 paragraph (1) first subparagraph of the Treaty on the European Union, the 2007 Charter has a legal value equal to the treaties.

[3] Title II of the Charter is named "Freedoms" and it includes article 7 "Respect for private and family life".

[4] Consolidated version of the Treaty on the Functioning of the European Union – TFEU – published in the Official Journal C 326 of 26.10.2012. pp. 47-390

constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

In her study[1], presented in the fourth World Forum on Human Rights, Estelle de Marco[2] concluded that the possible solutions to rebalance freedoms (right to information, freedom of expression and right to private life) are as follows: "personal filtering" (management of information provided to others); "pedagogy" (parent education campaigns for guiding children in the online environment, as well as information campaigns on the interest to protect private life - awareness, distinction between private life and transparency); "transparency of services" (data protection rules, data sharing rules, potential drawbacks of protection measures, cloud protection); "observance of rules on personal data protection"; "evolution of legal guidelines in the context of new issues related to cloud computing" (with reference to Directive 2009/136/EC[3]).

International, regional and national legal instruments provide efficient legal protection, but it is hard to stipulate in normative acts all the situations where the exercise of one or other of the two rights (the right to information and the right to private life) prevails.

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[1] Marco Estelle De, "Réseaux sociaux – Les (nouveaux) défis de la protection de la vie privée et de la liberté d'expression", 4 ème *Forum mondial des droits de l'Homme* (Mercredi, 30 juin 2010), https://juriscom.net/wp-content/documents/vieprivee20100802.pdf

[2] Investigator, founder of Inthemis - centre for research and training, specialized in the law and ethics of information and communication technology, http://www.inthemis.fr/index.html

[3] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Text with EEA relevance), published in OJ L 337 of 9 18.12.2009, pp. 11 – 36, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0136&from=EN

## THE LEGAL PROTECTION OF PRIVATE LIFE IN ROMANIAN LEGISLATION

As previously seen, a comprehensive definition of private life is hard to give, but legal protection should cover a wider and wider scope of the concept, depending on social evolution, as well as a range of factors (social and political context, cultural development, position of the person in the social life, evolution of security factors, etc.).

The Romanian Constitution[1] establishes the right to "Intimate, family and private life" under chapter 2, "Fundamental rights and freedoms", art. 26, where it stipulates that "(1) Public authorities shall respect and protect intimate, family and private life. (2) Natural persons are entitled to decide for themselves, if this does not infringe the rights and freedoms of others, public order or good habits". I am of the opinion that the same idea, of guaranteeing the protection of private life, also covers provisions regarding "residence inviolability" (art. 27) and "mail secrecy" (art. 28).

Legislative provisions on the protection of private life have also been adopted in the new Civil and Criminal Codes (some provisions were also available in the previous forms of the codes). Thus, under Title II - Natural persons, the Civil Code[2] defines the right to private life as a right of personality - art. 58 (along with the right to life, to health, to physical and psychological integrity, to dignity, to one's own image and other rights of the kind).

Chapter II, title II - "Respect for human beings and their inherent rights" includes section 3, "Respect for the private life and dignity of human beings", with several articles on guaranteeing and protecting private life. Art. 71 regulates on the "right to private life": (1) All individuals are entitled to have their private rights respected. (2) No one can be subjected to interference in his/her intimate, personal or family

[1] Republished, published in: The Official Gazette of Romania, issue 767 of 31 October 2003

[2] Law no. 287/2009 of 17 July 2009 on the Civil Code, republished in the Official Gazette of Romania, Part I, issue 505 of 15 July 2011

life or his/her residence or correspondence, without his/her consent or without complying with the limits stipulated under art. 75. (3) It is also forbidden to make any use of the correspondence, manuscripts or other personal documents, as well as information in the private life of a person, without his/her approval or without complying with the limits stipulated under art. 75"

The Civil Code also protects the "right to dignity" (art. 72) and the "right to one's own image" (art. 73). Likewise, the Code defines under art. 74 what qualifies as an act against private life, as follows:

a) "entering or staying, without any right, in a home or taking any object from it, without the approval of the person legally occupying it;

b) the interception of a private call, made by any technical means, or the use in full awareness of such an interception, without having the right to do so;

c) taking or using the image or the voice of a person in a private space, without his/her consent;

d) broadcasting images presenting inside snapshots of a private space, without the agreement of the person legally occupying it;

e) keeping private life under observation, by any means, except when explicitly provided by the law;

f) broadcasting news, debates, surveys or written or audiovisual stories on intimate, private or family life, without the agreement of the concerned individual;

g) broadcasting materials with images regarding a person undergoing treatment in medical assistance units, as well as personal data on his/her state of health, diagnostic issues, prognosis, treatment, sickness-related circumstances and other facts, including autopsy results, without the consent of the concerned individual and, if s/he is dead, without the consent of his/her family or entitled persons;

h) the use of names, images, voices or resemblances to other persons, in ill faith;

i) the dissemination or use of correspondence, manuscripts or other personal documents, including dates on the residence, as well as the phone numbers of a person or of the members of his/her family, without

the approval of the person they belong to or who is entitled to dispose of them, as the case may be".

At the same time, the Code regulates the limits of the right to private life, i.e. the enforcement of legislation, international pacts and conventions allowing for certain interferences does not represent an infringement of the citizens' rights and freedoms.

The Criminal Code[1] also incriminates some infringements against private life, as chapter IX is dedicated to "Crimes against residence and private life". "Residence violation", "professional headquarters violation", "violation of private life" are punished according to the law (art. 224-226). Moreover, the "disclosure of mail secrecy" (according to the law) is considered to be a crime, as per art. 302.

## CONCLUSIONS

The right to private life comes into conflict with the right to information and freedom of expression, but this does not justify the decreased protection standards for privacy, but a proportionality in their exercise should be ensured by means of combined efforts, according to the circumstances, when they are in opposition. A special part is played by the observance of professional deontology by the media, by the establishment of one's own rules (self-regulation), as well as the firm enforcement of (criminal, civil or administrative) sanctions in case of serious infringements of the right to private life, which may have a preventive role.

Likewise, the self-protection of individuals, enhanced care for their private life and the data they provide[2], especially in the electronic

[1] Law no. 286 of 17 July 2009 on the Criminal Code, published in: The Official Gazette, issue 510 of 24 July 2009

[2] "In March 2001, Junkbuster, a non-governmental organisation in the United States dedicated to private life protection, asked the leaders of the main companies collecting and exploiting personal to provide information on their private life, "for commercial use". None of the leaders agreed to provide information on his/her level of education, criminal record, marital status, political or religious beliefs, details on the websites s/he visited, IP address, queries usually sent to search engines or past or future purchases.

environment, an enhanced attention when they agree for aspects in their life to be made public, all this may have a significant contribution in applying and enforcing their right to private life. If we talk about the protection of private life in the virtual environment, a special part is held by extra-judicial means of protection: encryption, special software, technical mens of protection in general. The lack of technical knowledge, the unawareness of laws providing protection are factors that favour self-victimisation in terms of privte life.

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However, all this data is processed on a daily basis by the companies whose directors were surveyed. What is remarkable is that several leaders said they were "appalled" by that kind of intrusion." Alexandre Maitrot de la Motte. "*Le droit au respect de la vie privée*", 350, https://www.asmp.fr/travaux/gpw/internetvieprivee/rapport3/chapitr17.pdf

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# CONSIDERATIONS ON THE IMPORTANCE OF THE PRINCIPLE OF PROPORTIONALITY IN THE CONTEXT OF EMPLOYMENT LAW

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***Abstract:***

*Art. 40 para. 1 of the Labour Code establishes that the employer has the right to lay down the organization and operation of the unit and to exert control over the performance of each employee' tasks. This right is called in theory "management prerogative". By definition, the power of management gives employers a legal ascendancy of power over the employee who has the correlative obligations of subordination and loyalty to the employer. On the other hand, the employee is also a citizen, and thus he is not giving up his rights and fundamental freedoms while at work, in order to "regain" them at the end of the working day. Or, given the prerogative of management being formulated in general terms in the legal text and in addition, the economic dependence of the employee to the employer, it becomes fundamental, in terms of democratic requirements, to answer to the question: how to reconcile the obligation of subordination of employee to his freedom as a citizen? The jurisprudence has shown that the answer to this question is not so simple.*

*This article aims to underline with arguments the fundamental importance that the principle of proportionality acquires in the context of individual employment relations.*

***Key words:*** *employer; employee; labour; management prerogative; proportionality; rights; freedoms.*

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Amongst the rights and obligations that are constellating the content of the employment relationship, labour law establishes in the employer's benefit a number of interrelated rights that are specific to the employer management prerogative within his own company.[1]These rights can be found in Art. 40 para. 1 of the Labour Code, which states that: *"The employer has mainly the following rights: a) to lay down the organization and operation of the unit; b) to establish the corresponding tasks of each employee, under the terms of the law; c) to issue orders with a compulsory character for the employee, subject to their legality; d) to exert control over the performance of the tasks; e) to assess the disciplinary offences and apply the corresponding penalties, according to the law, the applicable collective labour agreement and the rules of procedure; f)to establish the individual performance objectives and the evaluation criteria of their attainment."*

As shown in theory[2], these rights underline three hypostasis of management prerogative: leading power, control power and disciplinary power.[3] This triple power is to some extent natural and necessary in the context of the financial and material resources belonging to the employer who assumes the risk of his business, and of the requirements of economic freedom that allow him to set his objectives and business strategies.[4] The employee, has, in return, *the obligation to subordinate* and *to be loyal to the company*. But this power is not absolute and it must be exercised within the law, respecting employee's rights and employer's legal obligations.[5]

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[1]Ovidiu Ținca, „Poziția angajatorului în raport cu salariatul său în cadrul contractului individual de muncă", *Revista Română de Dreptul Muncii* no. 2 (2004): 48-55.

[2]Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii* (Bucharest: Universul Juridic, 2014): 318.

[3]In French literature there are three management preogatives: the right to regulate, the right to discipline, and the right to direct (Pascal Lokiec, „*La* sanction disciplinaire déguisée", *Revue International du Travail* no. 3 (2012), *apud.* Al. Țiclea, *Tratat de dreptul muncii* (Bucharest: Universul Juridic, 2016): 476.

[4]Ștefănescu., *Tratat teoretic,* 320, Țiclea, *Tratat de dreptul muncii,* 476.

[5]Ștefănescu, *Tratat teoretic*, 320.

But, as the legal text underlines[1], the management prerogative is formulated in general terms, "legality" being the only limit of mandatory provisions - a rather generic specification in the context of a relationship of subordination that is so atypical in relation to democratic requirements. So, what happens when the law itself fails to draw explicit boundaries regarding the management prerogative?

It is true that, frequently, employer's obligations are strictly outlined by the legal provisions that does not leave space to the arbitrary decisions and constitute themselves as a "natural boundary" of the management prerogative - such as, for example, employer's obligation to pay wages, to respect employee's rights regarding working time, as it is legally established in Title III of the Labour Code, or the annual leave. But the same is not true when it comes to a number of other legally regulated situations that gives concrete manifestation to the generally formulated management prerogative of Art. 40 para. 1.

For example, Art. 42 of the Labour Code allows the employer to modify unilaterally, at any time during the employment contract and without any warning or prior consultation with the employee, one of the employment contract's essential elements: the workplace. Though the legislator establishes a limitation of this right (the delegation cannot be ordered for more than 60 days without the employee's consent), if one considers the effects that the change of the workplace, for two months, in other locality (for example) can have on the private life of a person, the pression that is put on the employee's constitutional right for private and family life becomes obvious. Another example: Art. 151 par. 2 of the Labour Code allows the employer to ask the employee to return to work even if he is in his annual leave *"in case of force majeure or urgent interests which require the presence of the employee at work"*. Even if the employer must bear the costs generated by such a demand *"and any other damage"* suffered by the employee by the interruption of his vacation, it is equally true that such damage (very likely) that affects the

[1]Management prerogative is not just a feature specific to Romanian labour law, but also expresses the traditional approach of the labor law theory - Ștefănescu, *Tratat teoretic*, 320.

family life of the employee (hence the*„core”* of his private life), and indirectly his family members, his health and need for rest and recuperation (the right to health) can hardly be covered effectively. In addition, as long as "urgent interests" do not amount to force majeure, there is a situation where the law itself allows the employer to put above the interests of business one of the employee's fundamental rights.

We see, therefore, that the management prerogative, enunciated in general terms by the Art. 40, either is limited by legal provisions that demarcate rigorously and firmly employee's rights (such as those concerning wages, working time etc.) or, on the contrary, finds its full expression in others that allows the employer to put, implicitly but clearly, the company interests above the interests of the employee. In these latter cases, the only legal limit is drawn by the principle of good faith. But when the law itself makes a primary goal out of the business interest, can one claim the employer's bad faith when he does nothing else but to pursue this goal?

Therefore, what matters in terms of judicial approach in order to protect fundamental rights and freedoms of the employee is the manner of managing those situations where the law allows the employer, based on his management prerogative, to take a number of decisions that may violate those rights and freedoms.

Two consequent questions are raised from the perspective of protection of the fundamental rights of citizens:

1.When the labour law allows employer, due to his right to lead the company, to take certain decisions that harm employee's fundamental rights and freedoms, without providing in a concrete way their limits, how can we draw these limits so the management prerogative does not remain insubstantial and, yet, the employee does not find himself deprived of his civil rights in the workplace? Specifically, where it ends the right of the employer to lead the company and where it begins the employee's individual liberty?

For instance, Art. 241 of the Labour Code gives the employer the right to draw up the internal rules, after consulting the employees, and Art. 242 requires establishing within the internal rules the *"regulations regarding the discipline in the workplace"* or *"workplace misbehavior"*.

In this context, for example, the fact that the employer can ban visible religious symbols (like a cross necklace) in the workplace can be considered to be normal as a managament prerogative or can be seen as a violation of freedom of thought, conscience, religion or belief, as it is written in Art. 9 para. 1[1]of the European Convention on Human Rights?[2]

2. When the employee' duty of loyalty collides with one of his fundamental rights, which of the two has priority? For instance, the employee's duty of loyalty to his employer can prevent the employee to criticize, by virtue of its right to free speech[3], his employer on a social network or outside the workplace?

The answer to these questions is not so simple, even if, apparently, within the conflict between a fundamental, constitutional right and other right that is regulated by an ordinary or organic law, the first seems to prevail.

A first observation that is required in this stage of the analysis is that not all the rights and freedoms belonging to the employee are threatened by managerial prerogative or relativized by his own duty of loyalty. If we refer to the list of rights and fundamental freedoms stated by the European Convention on Human Rights, it can be seen that, from the analyzed perspective, three categories of rights can be identified:

1. there are rights that have not the ability to conflict nor with the prerogative of management, nor with the duty of loyalty, because they

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[1]*„ Everyone has the right to freedom of conscience and of religion. This includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs either individually or together with others, in public or in private.* According to Art.20 para. 2 from the Constitution of Romania, „*Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.”*

[2]See, the solution of the European Court of Human Rights *Eweida others v United Kingdom* - 4842/10, 59842/10, 51671/10, 36516/10 (the second applicant).

[3] Art. 10 from the European Convention of Human Rights and Art. 30 from the Constitution of Romania

are unrelated with the employment relationship (rights of litigants, provided in Art. 5, 6 and 7 of the Convention [1]);
2. there are rights that have the potential to be compromised in the employment relationship, but their legal protection is firm and unequivocal as belonging to the category of so-called "primary rights"[2], hence no manifestation of management prerogative can justify their violation (right to life - Art. 2, prohibition of torture - Art. 3, prohibition of slavery and forced labour - Art. 4 of the Convention). Furthermore, all labour regulations set clear obligations for the employer, designed to ensure the protection of these rights of employees, that could be harmed as a result of working conditions. Thus, labour freedom is a fundamental principle of labour law provided by the first articles of the Labour Code (Art. 3) and the prohibition of forced labour is a corollary of this principle, both provided in the Constitution and the provisions of Art. 4 of the Labour Code. Also, Art. 175 of the Labour Code requires the employer the obligation to ensure the safety and health of employees "in all regards related to work".
3. there are rights that have the potential to enter into direct conflict with the management prerogative or the employees' duty of loyalty. These are the so-called "conditional rights "[3]: the right to private and family life (Art. 8), the freedom of thought, conscience and religion (Art. 9), the freedom of expression (Art. 10) and the freedom of assembly and association (Art. 11). Among them, the latter, given the importance of freedom of association in the labour law, is provided by distinct regulations of labour law and thus is protected by an abusive exercise of management prerogative.

Therefore, when it comes to interactions between management prerogative and fundamental rights and freedoms of the employee, enshrined in the Convention[4], we can observe the ambiguity of legislative

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[1] „Right to liberty and security" (Art. 5), „right to a fair trial" (Art. 6) and „no punishment without law" (Art. 7).
[2] Jean-François Renucci, *Tratat de drept european al drepturilor omului* (Bucharest: Hamangiu, 2009), 87.
[3] Renucci, *Tratat de drept european* , 169.
[4] and also in the Romanian Constitution

protection for three of them: the right to private and family life; freedom of expression and freedom of thought, conscience and religion.[1] Labour an employment law practice before national courts or European regional courts demonstrated, in turn, that such collisions and interferences occur frequently in the dynamics of employment relations, and their manifestations can be very different, especially in relation to technological developments that allowed broadening of the private life inclusively in the workplace. Mention so, as some examples:

- *the right to the private life* of the employee is under pressure due to the monitoring in the workplace of his person, of his telecommunications or internet traffic through web, email, instant messaging, and other data traffic use. Delegation and detachment both represent stressors on the right to private life of the employee. Dismissal of a doorman due to the fact that, during his sick leave, had an altercation with one of the tenants of the building that he supervised and where he himself lived, damaging therefore the image of the employer, was considered by the French court as being an abusive interference of the employer in the private life of the employee.[2] On the other hand, the employee's duty of loyalty prevents him to work or to carry out a traineeship to a competitor during his leave, and the dismissal for serious professional misconduct is in this case justified even if it is an interference in the private life of the employee.[3]

- *the freedom of expression* was violated by the dismissal of a journalist from public television station, due to the publication of an article wherethrough she criticized the employer's decision to eliminate classical music broadcast from the TV program schedule, deploring the erosion of the cultural level of TV programs, or by the dismissal of the manager of the Press Services of the Prosecutor General's Office because he had brought to the attention of the media two letters that proved the

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[1]On the disposition of the Convention, see F. Sudre, J.-P. Marguénaud, J. Andriantsimbazovina, A. Gouttenoire, M. Levinet, *Marile hotărâri ale Curții Europene a Drepturilor Omului* (Bucharest: Rosetti International, 2011): 21. The three rights are provided in the new Civil Code.

[2] The Court of Cassation, Cam. Soc., Dec. 94-45.473/14 mai 1997

[3] The Court of Cassation, Cam. Soc., Dec. 99-40.584/10 mai 2001

interference of some senior officials in the general prosecutor activity[1]. On the other hand, it is expected an *obligation of reserve* in criticizing public institutions from those civil servants employed in a public sector where political neutrality is a primary obligation.[2]

- as regards *the freedom of conscience, thought and religion*, the Strasbourg Court found a violation of Art. 9 of the Convention by the German state by dismissing a high school French and German teacher who was a member of the German Communist Party, based on the prohibition of political extremism by German Constitution, given the fact that the claimer never expressed any anti-constitutional point of view, or had any kind of attitude in this respect.[3] Also, the dismissal of an employee of British Airways on grounds of violation neutrality policy of the company by wearing a cross necklace was considered a violation of Art. 9 of the Convention. On the other hand, it was admitted that it is proper for a politician to hire his/her personal secretary considering her/his political views.[4]

The examples from the practice before the European courts are much more numerous and, as it can be seen, the solutions are different from case to case. We can easily imagine different other pressures, if we consider the employer's right to establish rules on discipline in the workplace. For instance, the obligation of the employee to participate on specific protocol events, outside working hours, may be considered as being a legitimate interference in the private life of the employee? Also, other personal rights may be under pressure, as „the right to dispose of himself", provided by Art. 60 of the NCC (New Romanian Civil Code). It is, therefore, legitimate to impose to the employee to wear a specific outfit in order to maintain discipline in the workplace, or, the employee's right to dispose of himself has priority?

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[1]*Guja c. Moldovei*, CEDO, cer. nr. 14227/04

[2]*Wille c. Liechtenstein, apud.* Sudre, Margu*énaud,* Andriantsimbazovina, Gouttenoire and Levinet, *Marile hotărâri,* 512.

[3]*Vogt c. Germaniei* , CEDO, cer. nr. 17851/91.

[20]Tr. civ. de Seine, *apud.* G. Dale, *La liberté d'opinion et de conscience en droit comparé du travail* (Paris: LGDJ)*:* 101

The European legislator (EU) understood to intervene through recommendations or even through additional regulations in some such situations - such as, for example, employee monitoring in the workplace[1]or the ban on discrimination in the workplace on grounds of belief.[2] However, the extensive range and highly varied interactions of these opposing rights, as they were revealed by the case law, does not allow framing them in rigorous regulatory texts, but requiers the identification of a flexible, yet firmly principled algorithm for solving these situations, designed to serve the employer itself as a reference when he intends to take measures that may affect the individual rights and freedoms of the employee.

This algorithm lies in the very text of the Convention which enshrines the three rights that represents the subject of this study. Thus, second paragraphs of Art. 8, 9 and 10 of the European Convention on Human Rights clearly established that any of these rights / freedoms can be restricted only if those restrictions fulfill the following conditions:

1. they are laid down in the national law;
2. they pursue a legitimate aim of public interest (safety, public order, health and morals, etc.[3]) or particular interest, consisting of rights and freedoms of others;
3. they are necessary to achieve the legitimate aim pursued. The necessity is assessed *in concreto,* from case to case, on *the principle of proportionality*.

Analyzing the prerogative of management as a restriction of rights and freedoms, in relation to this algorithm, it can be seen that the first two conditions are met: the management prerogative is provided by

[1]For instance, *Working document on the surveillance of electronic communications in the workplace* developed as a recommendation by the EU Consultative Working Group under Art. 29 of the former *Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data* (WP29).
[2]*Directive 2000/78 / EC establishing a general framework for equal treatment in employment and occupation,* transposed in Romania by GO no. 137/2000.
[3]Protected public values may differ in the three texts

an affordable and predictable legal text (the Labour Code)[1] and is a part of legitimate purposes that protect the rights and freedoms of others. As regards the third condition – the necessity - it is assessed from case to case, on the base of the proportionality test.

The principle of proportionality is traditionally enshrined in multiple human rights legal instruments, as to limit their restrictions[2], and can be found in many national Constitutions[3]and has many applications in various law fields.[4] The Court of Justice of the European Union uses also the principle of proportionality on several levels: a) the Union's competences in relation to those of the Member States; b) implementation of EU law by its institutions, and respect for the fundamental rights of individuals; c) the way the national measures affect EU nationals.

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[1]The Court has repeatedly stressed that the mere statutory regulation into national law is not sufficient, because the legal text itself is being subject to requirements of *"quality of law"*, which implies the following requirements: a) *accessibility*; b) *predictability (clarity).*

[2]For example: Art. 29 para. 2 and 3 of the Universal Declaration of Human Rights, art. 4 and 5 of the International Covenant on Economic, Social and Cultural Rights, art. 5 para. 1, art. 12 para. 3, art. 18, art. 19 para. 3 of the International Covenant on Civil and Political Rights, art. G (Part V) of the European Social Charter (Revised).

[3]Constitutions of the Republic of Austria, Switzerland, Germany, the Italian Republic, Spain, Romania; for more details, see Marius Andreescu, "Contribuții ale doctrinei juridice române la fundamentarea principiului proporționalității", *Dreptul* no. 10 (2014).

[4]Listed as examples: administrative law (first scope of this principle in law), as a technique to limit the discretion of the administrative authorities; constitutional law and international human rights law, as a technique to limit the possible restrictions of the fundamental rights and freedoms; criminal law, as a criterion of individualization of penalties and sanctions; EU law, as the limit of Community; civil law, to assess the lesion as a vice of the consent, or to assess the non compete clauses and the exclusivity clauses etc.; for details on the applicability of the law of the principle of proportionality, see: Andreescu, „Contributii...", Iulian Teodoriu and Simona Maya Teodoriu, „Legalitatea oportunității și principiul constituțional al proporționalității", *Dreptul* no. 7 (1996), Isabelle Cornesse, *La proportionalité en droit du travail* (Paris: Litéc, 2008): 12-20.

European case law has practiced this algorithm in order to approach conditioning of rights and freedoms[1] and to reconcile conflicts between rights or between rights and freedoms [2] (e.g., freedom of expression in conflict with the right to privacy). As stressed in the doctrine, the principle of proportionality applies when "the premise is an asymmetry of interests at stake".[3]

National courts also apply the test of proportionality whenever the employee' rights and fundamental freedoms are touched within the employment relationship. In countries such as Germany, Greece, Spain and France, assessing the proportionality of the interference in the private life of the employee it is a long established technique at both the jurisprudential and doctrinal discourse level.

On the application of the principle of proportionality in the dynamics of individual employment relations, we consider it necessary to underline several aspects:

1) The requirements of proportionality requires not only an opportunity analysis of the measures taken by the employer - such analysis is providing only the answer to the necessity test - but also examining all alternative measures.[4] The algorithm of proportionality requires therefore examining alternative sanctions or measures, in search of an answer to the several questions: was there needed this kind of measure in order to achieve the employer's goals? Would have been possible to achieve this goal through less drastic measures? Such an

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[1]This algorithm is *„the classical technique for freedoms' limitation"* - Frédéric Sudre, *Les conflit de droits. Cadre général d'approche dans la jurisprudence de la CourEuropéenne des droits de l'homme, vol. La conciliation des droits et libértés dans les ordres juridiques européens, dir. Laurence Potvin-Solis* (Bruxelles: Bruylant, 2012): 251.

[2]The principle of proportionality is „*the very technique of reconciling the rights and freedoms in Europe"* - David Szymczak, *Le principe de proportionnalité comme technique de conciliation des droits et libertés en droit européen. À propos d'une technique de gestion, vol.La conciliation des droits etlibertés dans les ordres juridiques européens,* dir. Laurence Potvin-Solis (Bruxelles: Bruylant, 2012): 460.

[3] Sudre, *Les conflit de droits,* 251

[4]J. Pélissier, A. Lyon-Caen, A. Jeammaud and E. Dockès, *Les grands arrêts du droit du travail, ed. 3* (Paris: Dalloz, 2004): 251.

approach requires a thorough analysis of the specific circumstances of the case, beyond appearances, and a careful investigation of all the factors invoked by the employee in support of his request.

2) Proportionality does not only concern the conflict between employee fundamental rights and freedoms, on the one hand, and the rights of the employer, on the other hand, but includes, under his protection, all employee rights, including also his ordinary rights.[1] Moreover, applications of the principle of proportionality can be found in the Labour Code. For example, it results indirectly from the provisions of Art. 250 concerning the criteria to be considered in applying the disciplinary sanctions. Also, regarding to the dismissal for reasons not related to the person of the employee, based on Art. 65, the analysis of *the seriousness* of this cause requires also the analysis of *the opportunity* of the measure of dismissal.[2] The regulation of the conditions of collective redundancies is based also on limitation of the restrictions brought upon the right to stable employment, which is actually another application of the concept of proportionality. In the French labour juriprudence, the principle of proportionality is largely applied (e.g., in the assessment of the clauses of enterprises' internal regulations, or of the vocational conversion measures in the cases of dismissal for poor work performance).

3) Moreover, in some cases, French jurisprudence applies another algorithm for solving the interactions between the management prerogative and the employer's rights, the proportionality test being considered insufficient for a fair balancing of the conflicting interests of the parties. This algorithm is based on the so-called *theory of the balance sheet* that is not limited to examining the appropriateness between means and purpose (business interest), but also weighs the ratio of costs and

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[1] Pélissier, Lyon-Caen, Jeammaud and Dockès, *Les grands arrêts du droit du travail*, 250. For instance, the right to dispose of himself or the rights provided by Art. 39 of the Labour Code.

[2]For a detailed analysis of the doctrinaire and jurisprudential approaches of the seriousness of the case in the application of Art. 65 of the Labour Code, see Cristina Sâmboan, *Demnitatea în muncă* (Bucharest: C.H. Beck, 2017), 344-350.

benefits.[1] Thus, the interests of the company can justify moving an employee who has been in business for 14 years in Bordeaux Lille, given the lack of business opportunities in the south-west of France. But the effect that this transfer has on the family life of the employee justifies his refusal to be transfered and thus, his subsequent dismissal becomes illegal. It is also interesting to note that the balance-sheet theory is applied by the French courts even when assessing the way *the mobility clauses* are executed, although these clauses are negotiated and involve the assumption by the employee of the risk of constantly changing the workplace.[2]

4) The proportionality test exceeds, also the assesment of *the abuse of right*. It is true that being a right governed in a relatively (not absolutely) "open", discretionary manner, the management prerogative can easily become abusively exercised. However, the finding of abuse of right is insufficient to assess the measures taken by the employer by virtue of its management rights. The analysis of abuse of right requires answering several questions: was the management prerogative been exercised with or without bad faith, and in order to achieve the goal for which it was established by law? According to the French doctrine and case law, the proportionality test is not limited to analysis of the right in relation to its purpose, as many times the social purpose of the right "defines itself the prerogative when it comes to power-rights"[3], therefore it is not relevant, and the employer's bad faith is also irrelevant when it comes to restricting the rights of the employee. The reticence of French doctrine on the abuse of right theory is based mainly on the fact that "the

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[1] Cornesse, *La proportionalité en droit du travail*, 185-195.

[2] Cornesse, *La proportionalité en droit du travail*, 193. In the French law case, when the employee's right to privacy cames into play, the more the interference is closer to the "core" of it (such as family life), the more the proportionality requirements become stricter and the measure has to be more justified - Cédric Jacquelet, *La vie privée à l'épreuve du salar des relations de travail* (Marseille: Presses Universitaires d'Aix Marseille, 2008), 246.

[3]Cornesse, *La proportionalité en droit du travail*, 257.

right itself is selfish, and it is pointless to scrutinize its purpose".[1] Yet, the assessment of the abuse of right may be valuable when it comes *subsidiary* to the test of proportionality. Thus, a measure that meets the requirements of proportionality can be taken in abusive conditions.[2]

## CONCLUSIONS

Regarding the fundamental human rights and freedoms, the employment relationship provides a mixed picture: on the one hand, it is strong legally regulated by a developed normative system designed to protect the employee, but on the other hand it is the depositary of a right which, in the context of the economic imbalance between employer and employee, may become favourable ground for misconduct against the employee rights and freedoms: the management prerogative. Employment case law often underlines the various and oppressive forms that such behaviors can take - exploitation until exhaustion, orwellian surveillance, imposition of excessive tasks, the devaluation of work and of the employee's person, exorbitant demands of robotic perfection, abusive delegations and dismissals etc.. In this context, the principle of proportionality has the advantage to provide the judge and the employer also, a flexible and effective algorithm which, on the one hand, deters any employers' authoritarian relapse and, on the other hand, succeeds to manage successfully, from case to case, the impressive diversity by which the employment relationship constantly challenges the law practitioner, lawyer or judge.

The decisive importance of the principle of proportionality in the labour law, dominated, in fact, by the management prerogative is established, *inter alia*, by the fact that the French law-maker, in order to avoid any inconsistencies of the case-law, felt the urge to provide it explicitely in Art. L 1121-1 of the French Labour Code (*Code du travail*), according to which: *"Nobody can impose restrictions to human*

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[1]B.Starck, H. Roland, and L. Boyer *apud.* Cornesse, *La proportionalité en droit du travail*, 258

[2]Cornesse, *La proportionalité en droit du travail*, 269-270.

*rights and individual and collective freedoms that cannot be justified by the tasks to be performed and which are not proportionate to the intended purpose."*[1] French doctrine itself admits the judicial key role of Art. L 1121-1 in the labour law field.[2]

We appreciate, *de lege ferenda*, that inserting a similar provision in the Romanian Labour Code would be one of the most effective legislative approaches of prevention and dissuasion of the abuses that are carried out, with or without bad faith, by the employers on Romanian employees.

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[1] „*Nul ne peut apporter aux droits des personnes et aux libertés individuelles et collectives de restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché."*

[2] „Si pour les civilistes, l'article le plus important reste le 1134 du Code Civil, pour les travaillistes que nous sommes l'article L 1121-1 du Code du Travail n'a d'égal que lui même."
(http://www.legavox.fr/blog/slampion/article-1121-code-travail-7171.htm#.VaUh8fntmko )

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# CONFLICT MEDIATION IN ROMANIAN HIGHSCHOOLS

**Daniela Geta RĂDUCANU**[1]

***Abstract:***

*In this article address the issue of school mediation. It is analyzed the situation regarding the types of conflicts in school. The argument is the idea that not so concerned about the number of school conflicts, how to approach them. In fact it will be organized knowledge and understanding of the conflict at all stages of maturation of the child depends on his luggage that will come in adult life. Conflict can be seen as the initiator of change and can become a source of education, an opportunity to be strengthened in school. And because this really going to happen, it would be like to be a school environment. They argue for school mediation. We propose ways to enter mediation in schools. Bring examples of best practices for implementing mediation programs in schools.*[2]

***Key words:*** *mediation; school mediation; conflict; school conflict.*

Conflict is a natural part of everyday life, a reality of everyday life, specific human relationships. Conflict can be treated positively or negatively. Approached by positive thinking, it can have creative results, it can be a positive force for personal growth and social change.

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[2] Mihai Şleahtiţchi and Maria Vîrlan, „Pledoarie pentru mediere şcolară“, *Psihologie. Pedagogie specială. Asistenţa socială* 33-rd. (2013): 114-122, State Pedagogical University „Ion Creangă” from Chişinău

Approached by negative thinking, the conflict can have destructive forms both emotionally, spiritually and physically. Conflict management capabilities can be learned. Through practice, we can improve communication, negotiation and conflict mediation. Conflict helps mental and individual health, discovering its own values and beliefs, and can also be a source of maturation.

Mediation in school is a new concept in Romania, but many European countries are using mediation in school communities very successfully. The existence of conflicts in the school environment is a reality that is increasingly concerned with those involved in creating an atmosphere that makes learning efficient. School is the first space of mediation, a space between family and society, between itself and the other, between its own vision of the world and the vision of others. The 'intermediary' space of mediation reflects the need for child safety. By attending school, the child is experiencing the first major social attempt in his life, because he is increasingly detached from the model of his parents to let himself be modeled by school, an institution with an important role. Children, who in the family learn social codes and form secure attachments, will benefit from this education throughout their lives. Conflict counseling and management activity involves new models of teachers' work, new requirements to address divergences from all those involved in interrelation, and new patterns of student behavior. We can cohabit and collaborate without hurting, offending us, taking advantage of the inattention or the impossibility of the people next to us. We can collaborate, help, and be helped by those around us because the basic idea of society is the complexity of a product that is the result of thinking more minds and therefore the product with the greatest chance of being near the ideal and perfection[1]

[1] Gherman Cornelia, *Medierea conflictelor in şcoală* (Bucharest: Rovimed Publishers, 2010)

School mediation has been a regulated activity since 2007[1] and has provided a wide range of activities and attributions for the school mediator. School mediation consists in facilitating school-family-community dialogue, improving image and trust in educational institutions, monitoring children with regard to school inclusion, implementing and developing school inclusion programs, developing reports concerning the disadvantaged children in order to identify optimal solutions to ensure equal access to education for children, informing responsible authorities about possible violations of children's rights and supporting their efforts to resolve the situation, etc.

Taking into account the things written above, school mediation and school mediation services as provided for in education legislation[2] are forms of school and social inclusion and they address local communities regarding the risk of dropping out, ethnic differences, disadvantaged families.

School conflicts can arise between pupils in an educational institution, between pupils and teachers, between pupils and other auxiliary teaching staff (it is possible to have a conflict with the school mediator), even among teachers, and these conflicts could disturb the activity in and / or during the school curriculum. School conflicts have always existed. Each of us can remember a colleague's pushing, a dispute with a teacher, a fight with a colleague, etc. School conflicts have different dimensions and values. A conflict about a misunderstanding with a desk mate, a misunderstanding that passes on until the next pause, is totally different from a misunderstanding that remains in the mind of the schoolboy, to which are added other and other dissatisfactions and misunderstandings and which amplify the tendency to an aggressiveness and verbal and then physically unwanted violence with disastrous effects for those involved in that conflict but also for that educational institution. MassMedia and

[1] Order no. 1539 of the Ministry of Education, Research and Youth published in the Official Journal, Part I no. 670 of October 1, 2007

[2] The Law of National Education, no. 1/2011, published in Official Journal, I Part no. 18 from January 10, 2011

NewMedia (the Internet) show serious school conflicts involving teachers and students. Films in which these conflicts are recorded, in which students aggress each other, or aggress teachers, are in prime time for days when they happen.

Mediation of school conflicts is required where conflicts take a particular magnitude and effectiveness in other conflicts. In everyday misunderstandings, the "service mediator" is every teacher or supervisor. Besides the remedial function of school mediation, the preventive function becomes more consistent in mediating a school conflict. Especially in the primary and secondary school, but also in the highschool, the power of the example for pupils is very high. Ending the school conflict in an amiable way and find a peaceful solution in a mediation process has a resonant echo among the peers of the conflict parties, but also across the educational institution. A successful mediation in such conflicts brings students to the field of cooperation, understanding, communication, relationship, dialogue, being a true example of collegiality and cohabitation during school time[1].

Mediation of conflicts can take place at the request of the mediator by the conflicting parties. Mediation of school conflicts can be requested by the parties (students, teachers, other persons) in the conflict, and if the parties to the conflict are minor students, mediation can be requested by their parents or by the director of the institution, with the consent of the parents. Requesting the mediator to solve school conflicts does not involve the mediation process. The mediator is present at the school where the conflict occurred, and only after having gone through a mediation meeting with the parties to the conflict, the parties may decide whether to continue the mediation[2].

In many European countries, but especially in the US, mediation of school conflicts is promoted by local and regional education institutions, but also by central legislative institutions. Thus, there are large-scale programs on mediation in schools, programs aimed at educating students in the spirit of amicable settlement of disputes and conflicts between them.

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[1] *Revista de note şi studii juridice* from January 1, 2015
[2] www.juridice.ro

Sometimes they resort to simulated mediation in educational institutions, so students can see how they can resolve a misunderstanding.

A civic culture that follow practical methods of amicable, peaceful and beneficial conflict resolution is a civic culture of a healthy, modern and prosperous society. Such a culture must be enshrined in the early education of future citizens, so that they know what ADR methods are, what constitutes a mediation process, and what benefits an amicable solution brings to a dispute in their relationship with others. It is really important to know from the time spent in school the benefits of dialogue, open communication, finding and choosing their own solution in the conflicts that are of human nature.

## CONCLUSIONS

School conflicts are produced between students, teachers, managers. Conflict states are heavily influenced by the degree of communication and co-operation, conflict-related individuals with theoretical knowledge and modest practical skills to resolve conflicts. Many students admit that they rarely solve or can not solve the conflicts they are involved in. Teachers' support comes rarely or not, although students would like to receive more support from teachers[1].

Organizing mediation programs in school is a good opportunity for mutual knowledge and self-knowledge, thus overcoming certain barriers of status and role.

This is our chance as counselors and teachers to teach today's students to form the tomorrow's performance team[2].

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[1] Mihai and Vîrlan, „*Psihologie. Pedagogie specială. Asistenţa socială*" , 122

[2] Bazu Petru, *Negocierea conflictelor într-o instituţie de învăţământ* (Bucharest: Rovimed Publishers , 2010)

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# THE ENGAGEMENT. EVOLUTION AND LEGAL EFFECTS

**Liliana GOLOGAN** [1]

***Abstract:***

*Life begins when we are born, next thing we know is that when we grow up we make friends,we go to school and just like that life gets started.*

*The other important moment in life is the one when we get married with the person we love, but the marriage doesn't happen in a second, there are many steps until the couple is 'Happily Married', one of those steps is represented by the engagement. Nothing is more exciting than the moment when the two persons decide to live their life together and start planning the wedding of their dreams.*

*But what is the engagement? Is it a simple promise? Is there any legal reglementation in this domain?Those are the questions that we are going to answer in this current paper.*

***Key words:*** *engagement; evolution; legal effects*

The birth, the marriage and the entering the void are the moments which define life.It is told that *when you were born, you cried and the others were glad, but you should live your life in such a manner that when you will die you will be the one smiling and the others around you crying*, taking that into account life must be lived beside people that you love and enjoy being around them. This is a fact you should consider

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when you are making a important step in your life such as marrying someone.

First of all, the family is a complex social fenomenon created as a surviving and development strategy of human groups; through its force and respectability it won it's place as "fundamental and natural element of the society – the bound between individ and society. The family has been- and surely will remain- one of the most major reflection subject of human spirituality.

A pragmatic approach of this subject- family- through a predilect perspectiv of research, with specifical means which customizes each of scient disciplines- sociology, psihology, history, law and so on, family distinguish through some specifical things.

The family is, according to jurists, a biological reality, through union between man and woman, as well as by procreation; is a social reality because it represents the framework of the community of life and the interest of those who compose it, united by the moral essence of marriage and descending into a unique model of human solidarity; it is a legal reality, being recognized and protected by law.[1]

The family is created through marrying. The theme of our paper is represented by the period before marrying, named: engagement.

## THE EVOLUTION OF ENGAGEMENT

### The Symbolism of the Ring in Roman Empire Period

The Romans did not regard marriage as a particular event in time, but rather as a process that could last for quite a long time. Maybe that's why we have no clear evidence that the Romanians celebrated the wedding. The marriage took place on several stages, namely the sponsorship when the dow was established and the marriage itself, and this was the moment when the wedding ceremony took place.

Sponsalia was a form of legal engagement. Usually it was arranged by parents or legal guardians. It should also be known that these engagements could take several years because of various problems that

[1]Emese Florian, *Dreptul Familiei, Editia a IV-a* (Bucharest: C.H. Beck, 2011), 1.

could have arised such as the poor spouse's health, the death of one of the parents or guardians.

At the beginning, sponsalia was a formal act with promises that could bring sanctions in case of violation. In the meantime, sponsalia was legalized as a stage in the marriage process, but in the Imperial Age the sanctions for breaking the promise were removed from the law on the grounds that marriage should be free.

It didn't matter lot if the sponsalia was arranged by the parties involved in their physical presence or by messenger or by letter, or by someone else. Very often the terms of engagement were set by intermediaries.

Sponsalia was a formal type of engagement. Florentinus and Ulpian have defined sponsalia as a mutual request and promise of a future marriage. It seems that the term s*ponsalia* derives from an older word, namely *sponsiones* that means the exchange of formal promises.

A marriage could not take place in the absence of the bride, but an engagement could. This was due to the marriage conditions of the engagement. In the case of a marriage, we must have the consent of the two future spouses and also the presence of several witnesses. All of these things are not necessary for an engagement because the arrangement is made between intermediaries. One interesting thing is that the Romans used to offer a ring as a symbol and confirmation of the engagement.

The parties involved in engagement must agree in need to take place. In the case of these texts, it is suggested that the daughter in power might agree or even refuse, the refusal being rather a privilege whichshe could use in exceptional cases. As far as the minimum age is concerned, there may indeed be certain limits, but not always. Sometimes the girls could be promised, engaged in an engagement right from birth.

As for the marriage in the Romanian world, there is an extremely important aspect, namely, the endowment. The endow was a kind of donation equivalent to the dowry nowadays that was offered by the bride and her family to the future husband for the purpose of giving the matrimonial support (to support the duties of marriage). The endow was

usually established during the *sponsalia*(engagement) and could take various forms.

Also, the endow did not have a legal limit, so considerable amounts could be reached, which had both disadvantages and advantages. That amount was established during the *sponsalia* period when also were established three fixed installments in which the entire endow must be paid.[1]

The Engagement Ring

The first rings were used in Ancient Egypt and they were regarded as symbols of power. Of course, they did not have the same design as today's rings, but they had seals that were used by pharaohs and people with authority. The royal authority can be transferred to another person by offering the ring with a seal that gives the power to issue orders. Also, the rings with seals were held by those who had the right to issue orders and laws.

Still, the transformation of the ring with seal into an ornament also produced in Egypt: it was discovered that the rich Egyptitons wore gold rings on all their fingers. Rings could wear even less rich Egypten, but they were made of cheaper materials than gold: silver, bronze, glass or clay, covered with a siliceous glaze colored blue or green.

In history Egyptian was the first civilization to see marriage as a legal relationship. The ancient laws recognized the marriage institution, regulating the husband's rights and obligations. Over time, many marriage contracts dating back to the pharaonic period have been discovered, which have been recorded and certified by three officials. The ancient laws give both spouses the right to divorce, and give wives a special respect.

The Romans are the ones who developed this art and gave other meanings of ring wearing. The Romanian citizens had the right to wear iron rings, but the slaves were forbidden to wear any kind of ring. Then gold rings were made, but they could only be worn by ambassadors, senators, consuls, and official state officials.

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[1]Alexandra Butnaru, „Institutia Casatoriei in Societatea Romana“, *Historia.ro*

Over time, various Roman emperors have issued laws that establish who can wear rings and what types of rings can be worn. Therefore, those who possessed the property were the first to bear the rings. Then this right extends to soldiers and free citizens.

The Romans are the ones who invented the engagement ring that had almost the same meaning as today. Starting from the rings worn by people in purpose to link them to their social class, they believed that a ring could also bind marriage partners. For them, the engagement ceremony was more important than marriage because the fiance gave a simple iron ring to the girls's family as a symbol of commitment and financial capacity. Marriage was just a fulfillment of an engagement promise.

*Antiquity, ring and symbol of the social class* - at this time, the ring becomes a symbol of the social class. People with fortunes wore rings with precious stones, gold objects showing considerable wealth. On the other hand, slaves were allowed to be just iron rings, which symbolized the fact that they were free.

*Rings and Christianity* - the first mentions of ring wearing were made in the Bible, when all the engagement rings with a seal were brought into discussion, being a symbol of dignity and authority. The custom of engagement ring was taken over by Roman Christians. At the engagement ceremony the bridegroom has to offer to bridea sum of money or an object, and this object has become, over time, the engagement ring.

*The purpose of the engagement ring was a practical and protective one*. Practically because the woman used the seal ring to seal those things her husband gave her to keep in the house. If a slave runs away with something in the house, the seal can expose him and the owner can recover the lost thing.

*The superstitious "vena amoris"* - probably the most well-known explanation of the fact that the engagement ring and wedding ring is kept on the left hand ring is the "vena amoris". He believed or still believes that just this is crossed by an artery that leads directly to the heart and symbolizes the pure love of the two partners. On the basis of this

superstition, it was customary for these symbols of love to be worn on this palace.

## THE ENGAGEMENT. A PROMISE OR A REAL CONTRACT?

Essentially, engagement is a solemn covenant of two people of different sexes to marry in the future.

In the old French Law, engagement is considered a contract that generates the "obligation to do", that is, the marriage. Failure to comply with this obligation entails liability of the culprit, who must pay damages.

In the Calimach Code,the engagement was obligatory; it must be followed within two to four years of marriage. In certain cases, the dissolution of engagement was accepted. Logodna was therefore a premarital legal status of marriage.

Modern legislation, with some exceptions, no longer gives legal engagement value, which means that it is a simple state of affairs, a "marriage project" that can be proven by any means of proof.

Currently, engagement is regulated in the Anglo-Saxon system, in Switzerland and other countries.From a sociological point of view, engagement is the significance of going from single to married.

In the old system of Civil Code - 1864, it was considered that the engagement had no legal effect on the one hand, due to the solemn nature of marriage, from which results that the consent of the spouses can only be valid expressed in front of the civil status officer,on the other hand, due to the nature of the engagement, which is intended to give the couple the opportunity to know each other, which implies for them the right to withdraw if the outcome of knowledge does not satisfy.

We appreciate that in the current engagement, the engagement keeps the same meaning, as it does not create an obligation of the fiancée to marry.

The Romanian Civil Code devotes to engagement the Chapter I of Book II (About the Family), Title II (Marriage).Under the purview of older regulations, engagement was defined in the scientifical literature as "a reciprocal deal between two people to marry" or "the mutual promise of two people to marry in the future."

In essence, both definitions capture the same elements, namely the manifestation of will, consisting in the mutual promise, the bilateral character of the agreement, the object of the will, the conclusion of marriage in the future.

The Civil Code uses the following wording: "Engagement is the mutual promise to close a marriage." The same normative act defines the marriage as a freely consented union between a man and a woman, concluded under the law.

By comparing the two texts of law, it can be observed that, while in the case of engagement, the agreement of "will" is exclusively emphasized, the emphasis on marriage falls on the legal status of the expression of *consent*.

Is this differentiation justified?

In our opinion, the negative answer is necessary, since both institutions come from a legal act and generate a legal status, a statute regulated by the law, which can not be ignored.Therefore, the engagement term has a dual meaning: legal act and status.The legal act of engagement is the prior understanding of future husbands, to be completed by marriage.

The fact that the legislator operates with the terms of mutual promise can lead us to the idea of a convention, more precisely antecontract. Moreover, from this perspective, the relevance and the bilateral character of the understanding are relevant.

Can all this be legitimate to the conclusion that we are in the presence of a contract? In our opinion, it does not, because there are many differences between engagement and contract, regarding: the quality of the parties; the aim pursued; how to determine the legal effects; the possibility of affecting ways; cases of nullity and the regim nullity, etc.

In fact, it is a *legal act* of family law, or in other terms, a legal act *sui generis*, which attracts a certain legal status for engaged persons.

We observe that the legal definition of marriage also fits perfectly in the case of engagement, which is essentially a union (in the sense of association, the connection between two persons for a common purpose) freely consumed between a man and a woman, concluded under the law .

What differentiates them, however, is mainly the goal: by ending the engagement, the marriage is completed, which, in turn, aims at establishing a family. In other words, engagement is just a marriage project; it may be the antecedent of marriage and subsequently family.

It should be emphasized that marriage is not conditioned by the engagement, as engagement does not automatically turn into marriage. Ending engagement does not create the obligation to close marriage.

Contemplate these aspects, we define engagement as the optional legal status that precedes marriage, stemming from the mutual promise, under the law, between a man and a woman to close marriage

## LEGAL CHARACTERS OF ENGAGEMENT

*The engagement is a union between two persons* – the legal act of engagement suppose an association between two persons that have the same aim: marrying each other.

*The engagement must be made between a woman and a man* – it is a prior marriage state of beeing therefore the engagement borrows this essensial feature, beeing forbitten to marry a person of the same sex. On the other hand the marriage is dominated by the principle of monogamy, as a consecuence of the fact that marriage should be dominated by pure love, so too the engaged ones can't close another engagement,as long as the previous one still exist(*latu sensu*).

*The engagement is freely consented* – thus, nothing can hold those persons to promise each other a future marriage.

*The engagemen is consensual* – according to art. 266 alin. (3) Thesis I Civil Cod: *the closure of engagement is not guvernated by any formality.* Therefore, is not required the intervention of any kind of authorities to certify the closure of engagement, parties having free hand in choosing their consent.

*The engagement must be close before marriage* – according to our old lagislation, the engagement must be followed by marriage in a term of two years. According to our current reglementation, nowadays does not exist such a term in which marriage should be close. Through this perspective, parties may choose, with the occasion of engagement,

the date of marriage (in the limits of the law), as they have the freedom to not establish anything in these matter. However is the choice, the length of engagement can not cross the moment of marriage.

*The engagement is founded on rights and obligation equality between parties*- the equality between man and woman exist in all social areas. From perspectiv of engagement, this equality refers to both condition of engagement and the relation between parties.

*The engagement is close in the purpose of marriage*- the mutual promise between parties targets the purpose of marriage, therefore the purpose of founding a family. In other words, through engagement is not created a family, but an eventual prerequisite of one.[1]

## BACKGROUND CONDITIONS OF ENGAGEMENT

The positive conditions of engagement

According to the provisions of art. 266 par. (2) C.civ., *The provisions on the background conditions for the marriage are applicable, with the exception of the medical opinion and the authorization of the guardianship court.* Therefore, the provisions of Art. 271-277 C. Civ., Engagement being considered valid closed if the conditions for marriage are met, except for the medical opinion and authorization of the guardianship court and if there are no impediments to marriage, which are also a hindrance to the valid engagement.

1. The legal consent of engagement is the manifestation of the will of the man and the woman in order to close the engagement, by realizing an agreement of will with its own juridical physiognomy, different from both the request in marriage and the acceptance of this request, due to the way in which this can be expressed, as well as the fact that the law does not require any formalities.

In order to be valid, legal consent of engagement must meet the following conditions:

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[1]Dan Lupascu and Cristiana Mihaela Craciunescu, *Dreptul Familiei* (Bucharest: Universul Juridic, 2012), 37-40.

It comes from a person with judgement**,** lack of judgement attracting the relative nullity of the engagement. If the lack of discernment is due to alienation or mental debility, we are in the presence of a impediment of the marriage and therefore also of engagement, the sanction being absolute nullity.

Consent must be expressed personally by the man and woman who wish to bind, is not accepted the engagement by representation.

Freely expressed, in the sense that there should be no obstacle in choosing the fiancée, such as caste, racial, religious, legal limitations, etc., and must not be affected by vices of consent or modalities.

To be expressed indisputably.

The exteriorization of the consent for the engagement may take place verbally, in writing or even tacitly through gestures or convincing facts such as the wearing of the wedding rings, offering and accepting the engagement ring that leaves no doubt about the intention to marry.

To be serious, expressed, with the intent to produce legal effects.

2. The age required for engagement - the man and the woman can get engaged if they are 18 years old, an exception being in case of a 16-year-old minor which has the permission of the parents or the guardian, as the case may be, but only if there are well-founded reasons, which the legislator does not explain. Admission of engagement by legal guardians is a component of parental protection, and in case of refusal or divergence between parents, the guardianship court is to decide in this regard, considering the minor's best interests

3. Differentiation of sex - as in the case of marriage, engagement can only be concluded between a man and a woman. The sex of each person is specified in the birth certificate and is also found in the act that is presented to the civil status officer at the time of filing the marriage declaration. If some people with medical problems want to marry and their sex is uncertain they can promote an act of sex change or sex establishment.

Negative background conditions

Just as with the background conditions required for the marriage, common with what is required to fulfilled the engagement's validity, the lack of impediments to marriage, namely engagement, is required:

1. The status of a married or engaged person - 273 C. Civ. Regulates bigamia as an impediment to the marriage to the provisions of art. 266 par. (2) C. Civ., Referring to the similar application of the provisions regarding the background conditions of the marriage, we can interpret that one person can not engage both with a person who is married or a person who is engaged.

2. Natural and civil kinship - In relation ofkinship, it is forbidden to engage the man and woman who are linked to each other through a natural or civil kinship resulting from adoption, in a straight or descending lineage, regardless of degree, as well as in the collateral line up to the IVth grade inclusive.

We mention that according to art. 274 C. Civ. The man and the woman who are relatives of the fourth grade may be engaged, and may be married only with the permission of the court of guardianship of their marriage, if there are good reasons and in the basis of a medical opinion issued in this matter.

Regarding the civil kinship that is born through adoption, the engagement is stopped between the adopted and his relatives in the adoption under the same conditions as among the natural relatives, as appropriate to art. 451 C. Civ.,: *Adoption is the legal operation that establishes the link between the adopted and the adopter, as well as the relationship between the adopted and the adopter's relatives*.

3. Guardianship - the marriage between the guardian and the minor under his guardianship is stopped, which means that in the light of this reglementation, the engagement between persons guardian-minor relationship is also stopped.

4. Insanity and mental debility - according to art. 276 C. Civ. It is forbidden to marry a person with mental insanity and mental debilitation, so those who suffer from alienation or mental debility can not engage, whether they are or are not under a court ban, even when they are in a moment of lucidity.

## FORMALITY CONDITION OF THE ENGAGEMENT

According to art. 266 C. Civ. The closing of the engagement does not require any formalities, since the concordant meeting of the two consent is sufficient, and can be proven by any proof.

Even if no formalities are required for engagement, nothing stops the parties from closing the engagement in a solemn form, such as an act authenticated by a public notary, thus registering the promise of marriage in writing, in which case the public notary will check whether the background conditions for engagement are met, with the exception of the medical opinion and authorization of the guardianship court.

The proof of engagement can be done by any evidence allowed by law, taking into account that there are no formalities required. However there are situations where the proof of engagement will be simplified by the existence of inscriptions, as if fiances were submitted to the declaration of marriage, simply filling in and submission it is considered a promise of marriage, as an prenuptial agreement before marriage it is worth a promise of marriage.[1]

## THE EFFECTS OF ENGAGEMENT

The engagement may end when the purpose with which it was concluded is reached, namely the conclusion of the marriage, and when the marriage project was not carried out in different ways:

The engagement breaks out when one of the fianchee dies, the engagement breaks out when the fiancée by mutual consent decides so, the engagement breaks when one of the fiancées no longer wishes to close the marriage, the engagement is abolished when the background conditions have not been met at the end of the engagement and when have existed impediments to marriage, engagement being null and void in both cases.[2]

The effects of unexpected breakage of engagement

Article 266 requires that engagement must be a mutual promise to close marriage and ends in observance of the marital conditions provided

[1]Adina R. Motica, *Dreptul civil al familiei* (Bucharest: Universul Juridic, 2017), 24-29
[2]Motica, *Dreptul civil al familiei*, 30

for marriage, but without any form condition. Engagement is not mandatory.

The fiance who breaks the engagement can not be forced to marriage. The criminal clause stipulated for breakage of engagement is considered unwritten.

Breaking engagement, as well as closing it, is not subject to any formalities and can be proven by any proof. In the case of engagement breaks, the gifts that the fiancee have received in consideration of the engagement or, during this period, for the marriage, except for the usual gifts (Article 268 Civil Code), are the subject to restitution.

The party who abusively breaks engagement may be liable for damages for expenses incurred or contracted for marriage, to the extent that they were appropriate for the circumstances and for any other damage caused. The right to compensation and return of the gifts is prescribed one year after the engagement break.[1]

*Example:*

By the action filed in the Strehaia Court on 20.05.2014, the applicant T.I.C. requested in conflict with the par. C.G.N. ordering him to pay the sum of 2800 lei representing damages for the expenses incurred for the marriage of the two; obliging the party to 4,000 lei moral damages and 3,000 lei representing the improvements made to the property property of the parent's parents.

In fact, the applicant showed that she and thedefendant intended to marry, the petitioner requesting her husband in June 2013. In view of marriage, the applicant bought her bridal dress with an amount of 870 lei, shoes of 100 lei, wedding rings of 1500 lei and spices for food, spending a total of 2800 lei. At the same time, it contributed with the sum of 3000 lei for the building of some rooms at the property of the parents of the parent, in order to store the wedding food. Relations between the parties have deteriorated because of money talks and reproaches, as well as the violent behavior of the defendant against her and including the

[1]Alexandru Bacaci, Viorica-Claudia Dumitrache, and Cristina Codruta Hageanu. *Dreptul familiei* (Bucharest: C.H. Beck, 2012),19, 20.

applicant's mother. Due to the failure of this relationship, the applicant suffered a mental depression and was considerably weakened.

The petitioner's parents filed an application for main intervention requesting the applicant to pay the sum of 5,670 MDL representing the expenses they incurred for the wedding that has not taken place, due to the applicant's fault.

The respondents appreciated that the applicant was guilty of breaking the relationship because she remained with her parents and did not want to resume convience with their son. In law, the request was based on disp. Art.269 C.civ. and art. 62 C.p.civ.

The applicant responded to the application for leave to intervene, claiming that the request for action was rejected as unreasonable.

Taking into consideration the evidence from the file and by reference to the relevant legal provisions in the case, by civil judgment no. X The Session of the Court of First Instance partially upheld the applicant's action for the following reasons:

According to art. 266 C. civ., Engagement is the mutual promise to marriage without being subjected to any formality. The provisions regarding the substantive conditions for the conclusion of the marriage are applicable, with the exception of the medical opinion and the authorization of the guardianship court. Engagement can be proven by any means of proof. In this case, the applicant and the other party promised each other that they would marry. This was supported by the two and resulted both from the introductory actions and from the interrogation responses given by them.

According to art. 269 C.civ., The abusive part of the engagement may be liable for damages for expenses incurred or contracted for marriage, to the extent that they were appropriate for the circumstances and for any other damage caused. The right to action is prescribed one year after the engagement break.

A first problem to be clarified is to establish the part that abusively broke engagement. The parties' submissions, including their background findings, showed that the applicant was the one who broke the engagement and no longer wanted to marry the defendant. It is,

however, necessary to analyze whether it abruptly broke the engagement or if the applicant's engagement with the engagement was justified.

In addition to the statements of the witnesses proposed by the applicant, in the replies given to the questionnaire, the applicant stated some indications that converge to the behavioral mistakes of the defendant : the applicant showed that the parrot called her to reconcile herself; had been offended by the family of the paraty and of him; shewent with the police to take her personal belongings from the common home because the defendant refuses to return them. The applicant was not directly asked about these issues, and his additions came spontaneously. This circumstance creates a strong presumption that the applicant has told the truth. It can also be presumed that the applicant and her mother have appealed to the police, and because the May 2014 episode had already taken place, when the applicant claimed that her mother was beaten by the defendant. The final separation of the parties occurred after the incident that took place at the beginning of May 2014 in L.B. , acknowledged by both parties, but presented differently. It is very likely that the defendant has hit the applicant's mother, and this deed has caused the applicant to interrupt her relationship with the man.

Consequently, since the applicant did not abruptly engage in abusive but justified engagement because of his behavior, she can not be required to pay damages for the expenses incurred or contracted for marriage, by the party and the main interveners, or to cover the damage the morality that the defendant asked for. Regarding this injury, the court found that the this party (defendant) allegedly referred to an image damage rather than a real inner suffering. He was disturbed by the fact that the applicant and his mother came along with police representatives at his place of work and that he had to explain to those she invited to the wedding, why the wedding won’t take place anymore. Unlike the petitioner, the applicant invoked an inner suffering caused by the failure of the relationship with the couple, with whom she wanted to start a family.

As we have seen, the mutual promise for marriage is, indeed, a promise in the common sense of the term, not endowed with the power of a legal obligation of outcome. Consequently, each of them or their

mutual partners are free to quit the marriage project until the marriage is celebrated. Not without consequences, of patrimonial nature. In itself, breaking the engagement has nothing wrong with it, it is a hypostasis of exercising the right and the fundamental freedom of the person to marry, expressed in its negative form: the right not to marry. Only this right can not be abused, under the sanction of liability for the prejudice caused to the other fiancée.[1]

Breaking the engagement does not imply any particular formality, as the engagement end does not have a form required, so it can be proven by any means of proof.

On the other hand, prefiguring the character of intuit personae of marriage, the engagement ceases with the death of one of the spouses.

The distortion between engagement's dissolution and termination is forbidden, since only engagement breakage can generate patrimonial obligations as a sanction for not fulfilling the promise of marriage.

There are two categories of patrimonial effects of engagement breakup, namely *the obligation to return the* gifts (I) and *the responsibility for the abusive rupture* or, as the case may be, for the culpable determination of the engagement break (II), stating that they can be cumulated.

*The obligation to restitute gifts*–if there is any cause for the failure of the marriage project, or the rupture is agreed by both fiancées, or is reprehensible to only one of them; it is understandable that the discussion of the restitution obligation is irrelevant if the parties have married (between them). Also, there is no such obligation if the engagement ends through the death of one of the fiancées.

They are subject to the restitution of the gifts the fiends have received in consideration of the engagement or, during this period, for the marriage, except for the usual gifts, in short, the gifts made by the engagement *latu sensu* - we underline, regardless of whether the gifts are made by the fiancée to each other or received by them or one of them

[1]Tribunalul Mehedinti, Civil Section, Decision No. 79/A/MF.

from third parties - except for ordinary gifts. Donations having a alien cause to the promise of marriage are not the subject of this text.

*Liability for breaking the engagement* - according to art. 269 NCC (1) *The party who abusively breaks engagement may be liable for damages, for expenses incurred or contracted for marriage, to the extent that they were appropriate for the circumstances and for any other damage caused. Or in a culpable manner, determined the other to break the engagement may be subject to compensation under the conditions of par. (1).* As can be seen from this text of the law, there are two situations in which liability can be committed, namely in the case of abusive denunciation of engagement, as well as in the case of a guilty determination of engagement to end by splitting-up of the parties.

In terms of responses, it is interesting to see the circumstances in which the rupture occurred, and not the rupture itself - this ensures the context of responsibility - it is not important from this point of view, which of the fianchee has ended the engagement, but who is in fault.

The key element is the existence of a deed or suite of deeds, for which the maintenance of the marriage promise has become undesirable. By way of example, inspiring us from the French court's solutions, the marriage of the fiancee with another person after the promise made to the fiancée has been repeatedly reaffirmed in public, or the brutal rupture, the spontaneity of the gesture made in the absence of any prior dialogue , or it may be related to the timing, that is, only a few days before the planned marriage celebration - or a suite of acts imputable to one of the fiancées, such as its unacceptable behavior denoted by humiliating, insulting behavior towards the other.

Whether we are talking about committing an abuse - the incurable rupture of engagement or the guilty conduct - which has led the other fiance to give up, the result is the same, namely the birth of the right to indemnity in favor of the fiancée victim, as opposed to the fiancé guilty of breaking the engagement.

As compensation, costs incurred or contracted for marriage may be claimed, but only to the extent that they were appropriate for the circumstances and for any other damage caused. For example, the expenses made or contracted to celebrate the marriage, but equally we

could discuss the damage related to the purchase and / or preparation of the marital home - for example, a home, given the surface, the place where it is located etc., would not have been acquired in the absence of the prospect of marriage.

We believe that whenever engagement is united to common living, factual coexistence, especially in terms of duration, can provide factual elements that amplify both the material and moral component of the damage sought.[1]

According to art. 269 C. Civ, it results that damages are granted for material damages, such as expenses incurred or contracted for marriage and moral damages, such as anger, shattered hopes, overhead plans, gossip, even health problems, of honor, etc. Therefore, damages in the case of abusive burdens of engagement, for expenses incurred or contracted for marriage, are granted only by the court and are based on the idea of fault, respectively the attributable character of the rupture, to the extent that by the way ending the engagement caused injury to the innocent fiancée of rupture.

We conclude that the right to indemnity damages are granted if: there is a moral and / or material injury, the fiancé who broke the engagement has abusively done it, and the fledgling fiancée has had no fault of breaking the engagement.

Broken engagement is not abusive as long as there are good reasons for this action.[2]

## CONCLUSIONS

In conclusion, engagement is not a simple promise unrelated to any legal consequences. The engagement is a legal act of the Family Law, and although it is not an obligation to close marriage, it still produces legal effects of patrimonial nature on the part of the fiancé guilty of breaking the engagement, and even when the engagement is broken through the mutual agreement of the *former "future spouses"*(in

[1]Emese, *Dreptul Familiei*, 16-18.
[2] Motica, *Dreptul civil al familiei*, 36.

terms of restitution of the money/object/goods offered for the closure of the engagement).

I believe that the engagement should not give rise to the obligation to close the marriage, precisely because of the sentimental considerations for which it is concluded. Such an obligation is likely to diminish the affection relationship between future husbands, since marriage must exist from love and for the purpose of establishing a family, not of obligation or material reason.

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# LAW, TRADITION AND NON-DISCRIMINATION. THE OPPORTUNENESS OF MODIFYING ARTICLE 48 OF THE ROMANIAN CONSTITUTION

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***Abstract:***

*This paper proposes a short analysis, both of the revision project of The Romanian Constitution regarding the way the institution of the family is defined, and of the legal project regarding the civil partnership, which was developed as an answer to the problems rose by said revision. The purpose of this analysis is to evaluate the opportuneness of these projects in the social and economic context in contemporary Romania, focusing our attention on the reasoning behind them.*

***Key words:*** *law; tradition; non-discrimination; revision; Constitution; civil partnership.*

## INTRODUCTORY ISSUES

The institutions of marriage and family have been the subjects of countless international controversies during the past few years. The reason behind these controversies is, usually, the problem of legalising the same-sex marriages. While some countries, such as The United States of America, on grounds of equality and non-discrimination changed their legislation in the sense of approving to this union, in some other states

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the problem raised a long chain of debates and contradictions. Romania is part of the latter category.

Unlike other states, where the problem was raised upon the question of the opportuneness of legalising same-sex marriages, in our country the point of view was shifted, the debates surrounding the opportuneness of permanently outlawing these unions. Moreover, the proposed method for the complete banishment of these marriages is modifying article 48 of The Romanian Constitution which regulates the institution of family as part of the fundamental rights and liberties of Romanian citizens.

The revision proposal came from "Coaliția pentru familie" ("The Coalition for Family" (sic!)[1]), a laic, formal alliance, composed of civil society organisations. Among the composing factors of the Coalition are: child protection organizations, parents' organizations, organizations protecting the disabled and the hospitalized, rehabilitations organizations for the former detainees, advocacy and media organizations, juridical organizations, organizations promoting tradition, organizations of various religious worships' laity.

This Coalition submitted in 2016 a legislative proposal constituted in a citizens' initiative of Constitutional revision. The subject matter proposed, amongst other changes, was that the text of article 48 of the Romanian Constitution be changed from "The family is founded upon the marriage freely consented by the spouses (…)" to "The family is founded upon the marriage freely consented by a man and a woman", and the organizing of a referendum in order to consult the Romanian people regarding this issue.

The Constitutional Court of Romania decided that the citizens' initiative submitted by The Coalition for Family does meet the legal conditions. The President of The Constitutional Court of Romania, Valer Dorneanu, explained that, in this case, the judges did not pronounce upon the opportuneness of these changes, as "it is not CCR's place to establish if the changes should be made, but to pronounce upon the

[1]The official English addaptation of the organization's name, as found on their official website: http://coalitiapentrufamilie.ro/english/

constitutionality of the revision proposal, and from this point of view we had to verify the requirements established by articles 150 and 152 of the Romanian Constitution".[1]

Valer Dorneanu added that "the right to marriage, as of yet, is not constitutionally consecrated in Romania as a fundamental right. The European legislation regarding this issue advises a liberality of the states, giving them the freedom to decide from themselves whether or not they approve the marriage of same-sex couples. Furthermore, we cannot discuss a breach of the right to a private life either, as this concept is larger than the field of marriage, concerning the relationships with children and kin, defining their obligations and kinship. [2]

The representatives of The Coalition for Family and the International Association "Alliance Defending Freedom" stated during a conference that took place at The Parliament that the changes regarding the definition of marriage in the Romanian Constitution are a democratic approach and that they aim to protect the institution of family.[3]

The aforementioned conference brought together parliamentarians, representatives of religious worships and various NGO-s that underlined the necessity of organising a referendum in order to modify the Constitution as to defining the family as "founded upon the marriage between a man and a woman".[4]

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[1]F. Drăgan, "România, un pas mai a proape de interzicerea căsătoriilor între persoanele de același sex. Cum putem "citi" deciziile date de CCR miercuri", romanialibera.ro, available at URL http://www.romanialibera.ro/politica/institutii/cele-doua-cazuri-care-ar-putea-schimba-legislatia-privind-familia--cum-putem--citi--deciziile-date-de-ccr-miercuri--423417, accessed at April 05, 2018.

[2]Drăgan, România, un pas mai aproape. http://www.romanialibera.ro/politica/institutii/cele-doua-cazuri-care-ar-putea-schimba-legislatia-privind-familia--cum-putem--citi--deciziile-date-de-ccr-miercuri--423417, accessed at April 05, 2018.

[3]R. Rădulescu "Schimbarea definiției căsătoriei în Constituție urmăreste apărarea familiei", Romania-actualitati.ro, available at URL: http://www.romania-actualitati.ro/schimbarea_definitiei_casatoriei_in_constitutie_urmareste_apararea_familiei-102021, accessed at April 05, 2018.

[4]Rădulescu, *Schimbarea definiției*

Various political parties stated their approval towards the proposed changes. However, the referendum that should have taken place at the same time as the Parliamentary Elections in 2016 was delayed, even though the revision project had already been discussed in the Parliament.

The main argument sustained by the supporters of this legislative initiative is the "protection of the traditional Romanian family". In order to analyse the validity of this argument as opposed to some that could dispute the opportuneness of the constitutional changes, we need to firstly understand the notion of "tradition" and its eventual applications in a law system.

## THE NOTION OF "TRADITION" AND THE LAW SOURCES

The "tradition" is an "assembly of conceptions, customs and beliefs that historically settle in social or national groups and that are being verbally perpetuated from a generation to the other, becoming, for each social group, its specific trait."[1]

The tradition or "custom" makes its presence known in our law system and is used as a law source whenever the lawmaker makes a direct reference to it.

The custom is the oldest formal law source. As a renowned law sociologist points out, before the existence of laws and expressly decreed organising norms, the custom and tradition were the only terms used in this domain.[2]

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http://www.romania-actualitati.ro/schimbarea_definitiei_casatoriei_in_constitutie_urmareste_apararea_familiei-102021, accessed at April 05, 2018.

[1] dexonline.ro, available at URL: https://dexonline.ro/definitie/tradi%C8%9Bie, accessed at April 18, 2018.

[2] L.F Labo, "Câteva consideraţii cu privire la rolul cutumei ca izvor de drept", *Universitatea Creştină „Dimitrie Cantemir" from Bucharest*: 2, available at URL: http://www.humanistica.ro/anuare/2005/anuare%202005/art17Labo_L.pdf, accessed at April 18, 2018.

Customary norms are norms by which a behaviour is determined as being mandatory by custom. If people who live in the same society behave, during a certain period, in certain similar conditions, in a certain way, individuals start wishing to behave in a similar way to the majority. The subjective meaning of the actions that form habitude is not, at first, that of an obligation. Only after these actions develop during a certain period of time, the idea of having to behave in a similar way to the other members of the community starts to form, as well as the wish that other members of the same community behave accordingly. A moment of major importance is when, if a member of the society does not behave in a similar way to the others, his behaviour is condemned. In this way, the state of habitude becomes a collective will whose subjective meaning is an obligation and the failure to observe becomes punishable. Habitude can be interpreted as an objectively valid rule only when its value as such is endorsed by the power. Habitude can create moral rules, as well as rules of law. The rules of law can be created by habitude if a superior rule, expressed by the power, establishes that habitude, particularly a certain qualified customary behaviour represents law-producing state of affairs.[1]

That is to say that a customary rule, becomes, as mentioned, a source of law, only when this quality is endorsed by the law-maker, and not before.

Consequently, we can translate the phrase "the traditional family" to "the family that conforms to the custom". The institution of family is, nonetheless, strictly regulated by the Romanian law-maker, not only in The Constitution, but also in the Civil Code and the special laws regarding the subject. None of these mention, however, the custom in the process of defining the institution, or in regulating its components. Thus, we can conclude that the customary rules are not, in this case, a source of law.

Even when unendorsed by the lawmaker, the traditional values are, yet, important for a community, more often than not being observed

[1] Labo, *Câteva consideraţii cu privire la rolul cutumei ca izvor de drept*, 3

by the members of that community with priority before the law. Even though this type of behaviour can lead, in time, to adopting a new customary law as part of the legislation of the state in question, before deciding whether the regulation of a tradition is propitious or not, its opportuneness must be analysed, from the point of view of the moment of this regulation, as well as in comparison with the other laws and law principles that are the foundation of the society in question.

Therefore, we may deduce that not all the customs that have taken place during an extended period of time represent a reason for a new regulation, given the fact that they can come in contradiction with the other laws. An example of such a tradition whose regulation has proven inopportune is The Festival of Dog Meat, in Yulin, China. Even though initially the dog meat trade was accepted as legal, given the fact that it had become a tradition and it was a symbol of certain values promoted by a socio-cultural segment, the trade was forbidden in 2017 as a result of countless demands coming from animal protection organizations, as well as from the citizens of Yulin.

Our country can also provide examples of traditions that, if turned into laws, could prove harmful. Thus, even though, in Romania, there is an ethnical segment whose traditions encourage the marriage of minors younger than 16, not only did the lawmaker not concur to the customary law, but also ruled that such unions should be considered inexistent in the eyes of law, as they come into contradiction with important law concepts regarding the age of consent and the principle of the best interests of the minor.

We can, thereby, conclude, that not every tradition must become law, and not every law must observe tradition. Thus, we deem the support of any legislative change, especially a constitutional one, grounded strictly upon the idea of observing or protecting tradition as unfounded. Moreover, in our opinion, such changes are, at this point in time, redundant, considering the fact that the Romanian Civil Code already regulates, in article 259, paragraph (1), the marriage as being “the legally concluded union, freely consented upon by a man and a woman.”. It is, consequently, wanted to protect an institution that is not, at the moment, in any danger.

## THE OPPORTUNENESS OF THE CONSTITUTIONAL MODIFICATION IN QUESTION

The Romanian Constitution states, in article 150, paragraphs (1) and (2) the following: "The revision of The Constitution can be initiated by The President of Romania, as proposed by The Government, by at least one fourth of the deputies or senators, as well as by at least 500 000 voting citizens The citizens that initiate the revision must come from at least ½ of the counties in the country, and in each of these counties or in the city of Bucharest at least 20 000 signatures supporting this initiative must be recorded. These conditions regarding the legality of this legal initiative have been analysed, and their observance confirmed by the Constitutional Court of Romania, as stated above. The only problem to be discussed, is, hence, the one of the necessity and opportuneness of such changes.

We already stated our point of view regarding the necessity of the Constitutional changes in the sense of defining the institution of family as being founded upon "the freely consented marriage of a man and a woman", viewing it as redundant, given that the notion in question is already regulated. Against this, the supporters of the initiative brought up the argument that the object of the revision is ensuring the security of this principle against eventual legislative changes. We are of the opinion that such an argument is founded upon the premise that the Romanian lawmaker is acting in ill-faith, as this organ is the only one entitled to change the legislation. "In the states with vast territories and a numerous population it is practically impossible for the entire people to gather in an assembly in order to decide and legislate. This is why, from a political and juridical standpoint it is necessary for the citizens to exercise their attribute of power in an indirect manner, by means of representative organs.[1] In Romania, the legislative component of the power is entrusted to the Parliament as a representative. Consequently, we can deduce that at least on a theoretical level, the Romanian lawmaker does nothing more

[1] M. Andreescu and A. Puran, *Drept constituțional. Teoria generala a statului* (Bucharest: C.H. Beck, 2014), 108

than expressing, by form of normative acts, the will of its people. Thus, the argument of the Constitutional changes being a necessity in order to ensure an increased level of security against legislation changes is nothing but a demonstration of fear of the actions taken by our own representatives.

Furthermore, at this point, the principle of gender differentiation in spouses is regulated by the Civil Code, hence, by an organic law. "Formally organic laws differ from ordinary ones, as they are enacted, modified or abolished with a superior majority. That is to say, ordinary laws are enacted with the vote of the majority of the members in each Chamber of Parliament, hence, with an absolute majority. As far as organic laws are concerned, they can only be enacted by a qualified majority. Moreover, legislative delegation cannot be employed in fields that are the object of organic laws."[1] In other words, the law regulating the notion in question already benefits from a special procedure regarding its enactment and modifying.

Concerning the procedure of revising the Romanian Constitution, the project or revision proposal must be enacted by the Chambers of Parliament with a majority of at least two thirds of the members of each Chamber. If an accord cannot be reached by this procedure, the Chambers decide, in a joint session, with the votes of at least three fourths of the deputies and senators. The revision becomes final after its approval by referendum that has to be organised in maximum 30 days starting from the day when the revision project or proposal was enacted. [The Romanian Constitution, article 151, paragraphs (1), (2) and (3)]. Thus, the only supplementary warranty offered by such a regulation is the necessity of organising a referendum.

In conclusion, the supporters of this argument consider that the legislative designated by the Romanian people is not reliable enough in order to be intrusted with taking decisions regarding the institution of family without consulting the ones who designated them in the first place (consultancy that, as stated before, should lead to the same results as the decisions made by the lawmaker as a consequence of the fact that the

[1] Andreescu and Puran, *Drept constitutional,* 144

latter is nothing more but a representation of people's interests). Such an argumentation of the necessity of Constitutional changes leads, unavoidably, to the question if the root of the problem is not, perhaps, the level of trust the Romanian people have in their own representatives, and if the answer to this question is affirmative, it is our opinion that focusing our attention and material resources in this direction would be significantly more beneficial for the evolution of Romania as a state, than enacting excessive regulations.

Even though the legal initiative is regulated by The Constitution, we consider that an observation regarding the facility of this process must be made. The fact that 2% of the Romanian population, structured in organisations can, in a relatively short time span, initiate a process of Constitutional revision is a two-edged sword. On the one hand, it proves the fact that the citizens can, directly request the change of the Fundamental Law of the state, which can represent a warranty of democracy and. On the other hand, however, 2% is not quite a representative sample, which can cause confusion and concern. This is an even bigger issue, when we take into consideration the fact that the voting attendance in Romania is, in itself, concerning (39.5% according to statistics made by The Central Electoral Office in 2016) and the threshold for a referendum to be considered valid is 30%. Hence, if we are too keep the same sceptical approach that the supporters of the aforementioned argument adopt, we should also enquire how representing of the Romanian people's beliefs are the measures enacted by a potential Constitutional Change, initiated by this procedure.

Regarding strictly the legal initiative in question, the public opinion, materialized in articles, either published or shared online through personal blogs or social networks, states that it could even represent a dangerous precedent and an attack on the laity of the state. Even though The Coalition for Family is, theoretically, a laic alliance, the fact that the majority of its components consist of the laity of various religious worships was an argument supporting the opinion that this initiative is allegedly based on religious beliefs, and not on the best interests of the Romanian people seen as a complex whole made up by individuals with different beliefs and principles.

Finally, to the redundancy of this regulation and the conflicts of opinion it has spurred, we can also add the financial aspect of these changes that require, as stated, a referendum. According to Mediafax, the referendum organised in 2012 regarding the dismissal of the Romanian President at the time, cost Romania approximately 95 000 000 RON. Hence, a similar amount is to be used in order to over-regulate an institution.

Considering the arguments stated above, regarding redundancy, the public tumult, the concerns expressed by the Romanian people and the costs of this procedure, we are of the opinion that this revision, for which is soon to be organised a referendum, was not opportune taking into account the socio-political and economical state in Romania at this moment.

## THE CIVIL UNION: NON-DISCRIMINATION AND CONCILIATION

Given the fact that this study follows a strictly juridical approach, and not one of a moral or religious nature, it is our wish to also discuss the opportuneness of this revision from the point of view of the fundamental rights and liberties.

The Romanian Constitution regulates, in article 26, the right to an intimate, family and private life: "The public authorities respect and protect the intimate, familial and private life. The individual has the right to dispose of oneself, as long as they do not infringe upon the rights and liberties of others, the public order or good manners". Given that any restraint of fundamental rights bust "be applied in a non-discriminatory manner and without infringing upon the existence of the right or liberty" [The Romanian Constitution, art. 53, paragraph (2)], we consider that any citizen, regardless of their sexual orientation, has this right. The supporters of the legal initiative stated that this right is not infringed upon, since the sphere of familial relations is larger than the ones founded upon marriage.

Even though it is technically correct, this argument did not stop the LGBTQ+ community in Romania from being disappointed by this

legal initiative that can only lead to one more obstacle in the way of attaining rights equal to the other Romanian citizens'.

In order to solve both problems, so that same-sex couples can have equal rights to their fellow citizens', without breaking the existing laws or "endangering the institution of the traditional family", a law project regarding the civil union has been proposed in the Romanian Parliament.

"According to the law project, the civil union would be officiated by the city halls, through a simple procedure and without supplementary costs for those who wish to officialise their relationship. The partners in a civil union must have the right to goods protection, to the access to medical services and representation in case of losing the capacity of deciding upon one's own health, habitation rights, succession rights, and others – civil rights that stem from The Romanian Constitution and the existing laws, as well as from the Romania's statute as a member of the European Union and part to international treaties and structures."[1]

In our opinion such a regulation is the polar opposite of revising the Constitution as intended, as it brings a valuable contribution to the existing legislation, without contradicting it. Thus, we consider that regulating the civil union would, indeed, be opportune, as it could offer to the same-sex couples the rights and obligations that they request, without breaching the law, and without forcing them to sign various contracts and authentic legal acts that is a costly and lengthy process that does not solve all the problems that the civil union could solve. Such a regulation could also be the solution for criminal law problems that these couples are facing at the moment. While spouses are exempted, according to criminal law, from testifying against each other, this exemption does not apply to the couples living in a consensual union (concubinage). As they cannot marry, nor sing any contract regarding the

[1] V. Postelnicu, "Proiect privind parteneriatul civil, în Parlament: Se va oficia la Primărie iar partenerii au dreptul la moștenirea bunurilor", libertatea.ro, available at URL: https://www.libertatea.ro/stiri/proiect-privind-partaneriatul-civil-parlament-2197113, accessed at April 18, 2018.

matter, a discrepancy between the rights of same-sex couples and the rights of their fellow-citizens is thus formed.

Moreover, the regulation of the civil union could be made through an organic law, without the necessity of organising a referendum, saving time and financial resources. However, since the referendum regarding the constitutional changes discussed in this paper is already taking place, it has been proposed that the population still be consulted regarding the matter of the civil union, in the same referendum. We consider this approach proper, as long as on the voting-paper there will be two distinct questions, one regarding the revision of The Constitution in the sense of redefining the institution of family, and one in order to consult the population concerning the matter of the civil union.

The regulation of the civil union could, in our opinion, bring Romania among the countries that accept and support all their citizens, without discriminating, hence being a step forward for our country and a way of complying the legislation with the era we live in.

## CONCLUSIONS

To conclude this study we can state the following: a revision of The Constitution in the sense of changing the definition of the family is, at this moment, in the contemporary Romanian society, inopportune, costly and redundant, doing nothing but reiterating what is already regulated and proving the lack of trust the Romanian people manifest towards their own representatives.

Moreover, we strongly believe that in this era, when the human rights and equality are an important subject of discussion in all the important forums, Romania needs regulations that support these rights for all its citizens, regardless of sexual orientation, ethnicity, gender, religious beliefs or other such criteria, and not ones that deepen the already existing gaps.

In this regard, we are of the opinion that regulating the civil union or a similar institution that offers to the minority the same rights as the majority without creating controversies that the Romanian society

clearly cannot face at this moment (such as the ones a potential legalisation of the same-sex marriages would create) is not only opportune, but necessary and desired, not only by the citizens in the LGBTQ+ community, but also by a vast number of Romanian citizens who understand the indispensability of equality and the need of acceptance and mutual aid in a society that is so beautifully diverse.

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# THE LEBENSBORN EXPERIMENT.TRACES OF AN UNFULFILLED IDEOLOGY

**Valentina Alexandra NICOLAE** [1]

***Abstract:***

*We live in a world where the degree of development of each society is recognized by the way they accept diversity, whether we're talking about religion, culture or ethnicity.Unfortunately, the world has not always been so open to diversity.*

*Even though today there are areas where we face racial discrimination and terrorist attacks made in the name of religion nothing has managed to match the insanity of a man who has marked world history in his attempt to exterminate millions of people for racial reasons in order to "clean the world of impurities" and to give birth to a new superior race, the Aryan race.*

***Key words:*** *racial discrimination; religion; new race*

## INTRODUCTION

The international painting of the 21st century is painted in different shades, which blends in a delicate manner, thus being a symbol of civilization and the evolution of life and international relations, in which most states of the world accept the differences of people and recognises their fundamental rights and freedoms, differences that do not

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prejudice in any way the equality of rights and the dignity of the human being, regardless of religion, race or sex. This recognition of fundamental rights and freedoms, the dignity inherent to the human being and the equality of individuals is the basis of a peaceful international climate, the foundation of justice, freedom and worldwide peace.

An important year in history is the year 1945, the year in which, after many atrocities that mankind had witnessed, United Nations was created, an organization that had the mission to ensure world peace, international cooperation but most important respect for human rights, all of them made on the basis of a legal framework designed to organize, regulate interhuman and inter-State relations at international level.

Until the establishment of this organization, during World War II, was written one of the darkest chapters in the history of the world, a chapter whose main protagonist was Germany, under the leadership of Adolf Hitler.

**1.** Hitler's coming to Germany is one shrouded in the occult, just like most of his life. The childhood spent in the terror created by his own father, whose sadistic habits made him mistreat his son, who was only ten years old, under the terrified gaze of his wife, slowly and certainly made the path to a bleak future for all mankind. Seeing the satisfaction in torturer's eyes when his own progeny was suffering, the young man decided not to give him that pleasure and stop crying, saying later that from that moment "count the blows in silence". The fragile heroism of the child made torturer cease his abuses, but the evil had already been produced, "in him had roots an indestructible desire for vengeance." Because of his abuses, Alois had turn his son into a monster[1].

It is not known when Adolf learned that his father was half Jewish but his hatred became "universal, irrational and utterly absurd". In his childhood met no Israelite except Dr. Bloch, old friend of the family, "he hated the Jews more than he had nothing to reproach."[2]

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[1] Jean Prieur, *Hitler. The Magician of Darkness. The black occult and the new Aryan race, in the third Reich*, (Bucharest: Pro), 262.
[2] Prieur, *Hitler. The Magician of Darkness*, 262-263

After his mother's death in 1907, young Adolf departs from February 1908 to Vienna where he will frequent the occultist and anti-Semitic environments until 1913, during which he lived modestly from the paintings he painted[1]. This orientation to the occult will amplify and will remaine rooted in his mind and heart, being the cause of the slaughter of millions of people considered by this killer as the "scum of the Earth" that he had to escape.

Professor Jean Prieur reports in his work "Hitler. The Magician of Darkness" that Hitler's coming to Germany was one "programmed on the heavenly computer" taking place a series of unexplained events that led to the birth of this "dragon with Ten heads. "Hitler's appearance in the political arena has been announced since the year 1824, in the most clear way, by Anne-Catherine Emmerich[2].

So, his coming was nothing incidentally, he managed to escape the clutches of death miraculously four times during the First World War and twice, once in 1917 following the explosion of a shell and the second time in 1929 due to a bomb placed under the bridge at Sportpalast, while his comrades were killed[3].

In power, Hitler became a member of the Thule Society, a society whose purpose was to eradicate Christianity and all that meant righteous faith and acceptance. Thulegesellschaft was founded by the astrologer Sebottendorf and was the emblem of swastika, met not only in northern Europe, but also in China, in Tibet, with great Powers, as well as in Japan, considered to be the "noble Country of Honor Aryans"[4].

Hitler was known as a worshipper of Wotan, a god of the Nordic peoples, the god of Knowledge, war and death. The Thule Society promotes the supremacy of a chosen race, a supreme race with Nordic traits called the Aryan race, in whose conception was the only worthy to rule the world. He also believed in a thousand-year reign in the coming

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[1]Prieur, *Hitler. The Magician of Darkness*, 275

[2]Anne-Catherine Emmerich (1774-1824), mistic of german nationality, beatified by Pope John-Paul II in October 2004.

[3] Prieur, *Hitler. The Magician of Darkness*,5-6.

[4] Idem, 46

of a northern Messiah and other crazy ideas[1]. Hitler believed that there could not be two chosen peoples and that the Germans had to exterminate the Jewish people in order to escape the Earth from impurities and to create a new and thriving Germany, he was convinced that a supreme force was there for him and that it was his duty to Bring Germany to the heights of glory: "While I was lying, desperate, in my bed, I heard a voice that ordered me to save Germany and make it a great country. At that moment a new miracle occurred, a new light appeared before my dead eyes: I saw! I swore immediately that I would become a politician and that I would fully consecrate my life to this task. " [2]

In his work „the Myth of the twentieth century", Rosenberg wrote in this regard: "Today a new faith arises, the myth of Blood, the faith to defend, with the blood, the divine essence of Man in general; Faith makes the body common with the clearest science. Nordic blood is the mystery that has replaced and surpassed the Holy Mysteries of the old times"[3].

The ideas taken by Corporal Hitler from different thinkers came down to: tall Aryans , blond, supple, athletic, complex and light-skinned eyes, which constituted the chosen race, "the real bearers destined to reign over the world".

One curious thing is that a Frenchman gave the Germans the pure-bred patent. "The Germans-wrote Gobineau-are the purest of the Aryans "and the followers of the Thule society believed it was their duty to eliminate the Jews and dominate the Slavs and other inferior races[4]. This existence and sick thinking was founded on mith, on the basis of so-called Aryans of Hiperborean origin from the Arktogaa or ARCTOGEEA regions, forced to emigrate to south due to a sudden deviation of the terrestrial axis[5].

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[1] Prieur, *Hitler. The Magician of Darkness,* 41
[2] Idem, 35
[3] Idem, 42-43
[4] Idem, 50
[5] Idem, 50

Georg Lanz von Liebenfels, a crazy racist character, publishes Ostara magazine, a highly acclaimed review by Hitler, proclaiming: "Without Judea, without Rome, we will build Germany, Heil! We will develop the race of the seniors, to avoid the decay of Aryan Europe. For the Jews we have foreseen not the total elimination that it deserves, but a deportation to the North Pole or the South Pole, in the Kerguelen Islands, in Madagascar[1], in the Gobi desert and even in Palestine"[2]. The pictures of this magazine were showing "Pure and blondes Aryan supporting the lubrice assaults of dark men, with appearance of a monkey, hairy with big lips..."[3].

Hitler's precursor prophesied that "people are gods who ignore themselves...." which because of their bodies were "omnipresent and Omniscient", gods who "will have to be awakened from sleep and removed from their coffins, by selection and controlled growth." "Selection and controlled growth" envisaged Lanz.... another precursor of those Lebensborn or fountains of life[4].

Two days after Hidenburd named Hitler Chancellor, he received a hard and lucid letter from Ludendorff, saying it as follows: "You have given to the country one of the greatest demagogues of all time. I predict that this fatal man will draw our Reich into the abyss, and it will be the cause of unimaginable misfortunes for our nation. For this judgment, future generations will curse you in the grave[5]. „At the basis of this ascension of Hitler were Hess, Hoffmann, Hermann, Hanussen, Heyde, Heydrich, and in particular Himmler, whose contribution to Thule and Lebensborn was a significant one.

But what do you suppose this experiment called so poetic means: Lebensborn (Fountain of Life)? What did they want to achieve? The answer is given by the history. To achieve his "great dream" of creating an imposing German, Hitler needed strong soldiers, Aryan Warriors,

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[1] In 1936,in Munchen, I saw in all good libraries a work on this subject, apud Jean Prieur, *Hitler. The Magician of Darkness*, 54.
[2] Idem, 54
[3] Idem, 55
[4] Idem, 55
[5] Idem, 69

educated in the spirit and in Nazi ideology, able to kneel all the people of the world but the First World War brought Germany in an extremely delicate demographic situation. The war reduced considerably the number of young and available men and women were often pregnant without being married, which at the time had serious social consequences so that most women chose to discontinue the pregnancy "wasting the precious Aryan blood "[1].

What seemed at first sight a social program meant to help young women to give up the idea of abortion has proved to be a huge demographic project of racial purification. This project was set up in the year 1935 by SS leader Heinrich Himmler, Hitler's right hand, and was not limited to help offered to young women who risked compromising their reputation.

Hitler's army consisted of SS officers, pure Aryans who were stimulated to have adventures with young blondes, encouraged in turn to maintain such relationships. Only children with pure blood were accepted in Lebensborn, so the SS soldiers were encouraged to leave behind them as many Aryan descendants, this was a "national obligation" that had to remain secret.

Pregnant young women usually go to special houses where they get the necessary care. At the entrance of the house, they had to prove their Aryan origin but also that of the child's father. In Germany there were 10 such houses and such centers existed in both Poland and Norway. After birth, the fresh mothers were forced to abandon their children in orphanages, where they were bred in Nazi spirit and ideology or were adopted in the wealthy families of some German officers, from birth they became the property of the SS.

The birth certificates were falsified making it impossible to find true parents and those who had the misfortune of being sick or disabled were killed or sent to the extermination camps.

Following the experiment in Germany were born 8000 children and in Norway 12 000, Norwegian women being the perfect example of

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[1]http://www.descopera.ro/cultura/13490396-lebensborn-experimentul-prin-care-nazistii-au-vrut-sa-creeze-o-rasa-superioara. Site accessed on 22 April 2018.

pure race, mostly tall and blondes. Ironically, the two great leaders, initiators of racial purification, did not satisfy the standards they were imposing, which didn't prevent the SS head from taking part in the experiment, becoming the father of two children.

In addition to these measures, mass sterilizations were carried out by individuals who did not satisfy the conditions imposed to be part of the pure race, of inferior individuals with genetic diseases, which, according to the Nazi conception, had no right to reproduce.. Also, all German families who had no child were fined, the ideal number was 4 children in each family, and heroine mothers were rewarded with special cards that gave them certain rights.

By 1939, the program did not produce the results that Himmler hoped for. He issued a direct order to all SS officers to become fathers of as many children as possible to compensate the victims of war. The order created controversy. Many Germans felt that accepting unmarried mothers encouraged immorality[1].

As the number of children was not enough, the Nazis passed to the next stage and began to kidnap children from the families of the occupied countries, justifying the abductions through the necessity of pure blood. Only from Poland were abducted more than 200 000 children, who then passed through an intense process of germanium in which their identity was deleted, the identity documents being replaced with some false. After the war, only 4000 of the 200 000 were able to reunite with their families[2].

Still small, children were indoctrinated into the Nazi spirit and were educated to be as active and as aggressive as possible. From the age of 10 years the boys were to be enrolled in the Hitler Youth organization and the girls in the league of German girls. In 1930, the organization already had 25,000 teenagers for over 14 years. Children were trained

[1] http://www.jewishvirtuallibrary.org/the-quot-lebensborn-quot-program. Site accessed on 22 April 2018.

[2] http://www.descopera.ro/cultura/13490396-lebensborn-experimentul-prin-care-nazistii-au-vrut-sa-creeze-o-rasa-superioara. Site accessed on 22 April 2018.

daily with the purpose of forming the future soldiers of the third Reich, where they learned assault techniques and combat tactics.

In the case of girls, the focus was on maintaining a good physical condition through sport and dance to become good spouses for young Aryans. The Nazi regime encouraged the girls to get married as quickly as possible to make as many children, and their main duty was to raise and educate children, even if they chose to have a career[1].

After the suicide of Hitler and his wife, Eva Brown on 30 April 1945 followed the surrender of Germany on 8 May of the same year, and with it the liberation from the inferno of millions of souls.

After this nightmare from which mankind "awakened", traces of a new beginning emerge in the future of Germany. After millions of people fled to England to escape the madness of Nazi fanatics, occupied countries finally emerge from the rule of Germany. From this moment on, the true drama of The 2nd World War children begins.

Humiliated, isolated and blamed by society, these children were forced to endure years of physical and mental abuse, paying without guilt for the sins of their criminal parents.

The year 1948 marks the adoption by the United Nations General Assembly on 10 September of the Universal Declaration of Human Rights, intended to protect fundamental human rights and freedoms and to put an end to Racial discrimination was followed on 4 November 1950 by the European Convention on Human Rights, drafted by the Council of Europe and signed in Rome, which entered into force on 3 September 1953.

Today, this nasty episode of human history is remembered with pain from the victims of the dark thinking of some idealistic maniacs, whose ideologies have destroyed the lives of millions of people and cut off the wings of thousands of children, let them collect for them and Their sins, the manifestations of hatred of other grieving souls.

In 2005, in town Wernigerode of Germany `30 Children "Lebensborn" laid the foundations of a group called "Traces of life" to

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[1] http://www.descopera.ro/cultura/13490396-lebensborn-experimentul-prin-care-nazistii-au-vrut-sa-creeze-o-rasa-superioara. Site accessed on 22 April 2018.

support each other, to tell the world their sad story and also to learn the truth about this experiment .

Children included Guntram Weber, 63 years old, creative writing teacher in Berlin who, in search of the truth about his father, studied numerous history books and photographs hoping to find the true identity of his father. Only at the age of 58 he learned that his father was a former SS general, war criminal, sentenced to death by a Polish court in 1949, but who managed to escape and flee to Argentina, where he lived until the year 1970[1].

His case is still a happy one. In Norway, Belgium, the Netherlands, Poland and France were established special clinics for Lebensborn children to prevent them from multiply and carry on the German genes.

In many cases, fathers were married members of the SS, who obeyed Himmler's instructions to spread his Aryan seed even out of wedlock.

Gisela Heidenreich, born in a Lebensborn clinic in the Norwegian capital, Oslo in 1943, realized that something was wrong when at the age of only 3-4 years he heard people referring to her as "the SS bastard."

Her mother, a secretary in the Lebensborn project, became pregnant after an affair with a married SS officer and travelled from Bavaria to Oslo to secretly birth her at a Lebensborn clinic. She refused to answer her daughter's questions about her natural father, the girl didn't found the identity of her father until adulthood.

Her reaction to the father's sight helped her to understand why so many Germans lived with the crimes and cruelty of the Nazi regime, she said. "When I first met him was on a station platform. I ran into his arms and all I thought was that I finally got a father. Heidenreich, strikingly tall, with eyes of a clear blue and blond hair, said: "I accuse myself of shouting who my father was. I never asked him what he did.

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[1] http://www.spiegel.de/international/nazi-program-to-breed-master-race-lebensborn-children-break-silence-a-446978.html. Site accessed on 22 April 2018.

My reaction helped me understand how people of those days closed their eyes and ignored the terrible things that were happening"[1].

Hitler believed that the Aryan race was destined to rule the Earth but many Lebensborn children lived tormenting and yearning for their parents, thinking in fear that their father was a murderer and with the shame that they were illegitimate children, without being able to enjoy parental love, surrounded by people with cold, sharp eyes.

Volker Roder, aged 62, confessed that his life was a torment until the age of 50 when he met his wife. Given for adoption by his mother, he was taken from a Lebensborn house in 1945 by adoptive parents. They only wanted a child to help them through the Russian lines to the west, Röder said. They then abandoned him to another children's home. In 2001, his wife encouraged him to travel to Wernigerode and find his real mother.

I immediately found out that she lived in an old house in that town. I went and the first thing she said was, "Here you are! I waited for you! "." I'm speechless. I visit her occasionally, but she still avoids talking about that moment. I'm full of bitterness and anger because of this, but my wife helped me manage that. At least I found out my father wasn't a war criminal, it was a relief. He was a policeman and even joined the Social Democratic Party in 1936, the unusual thing"[2].

## CONCLUSION(S)

The period in which Hitler, a crazy idealist, without even having German nationality "took lover" a country to which he swore glory by any means and became a parent of chaos, of the Holocaust in which millions of souls were killed, destroyed millions of families and destinies, marked and mourned an entire chapter of world history, shaded innocent blood for the satisfaction of so-called gods and for the political and religious interests of unshareded individuals.

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[1]http://www.spiegel.de/international/nazi-program-to-breed-master-race-lebensborn-children-break-silence-a-446978.html, site accessed on 22 April 2018.
[2] Idem

This Nazi ideology stole thousands of children from their families in an attempt to transform them into soldiers without identity, ideology that faded with its followers, leaving behind only the suffering from which these children fought to reborn as the Phoenix bird from his own ashes, to start over, to recover what was stolen, to live.

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# SPECIAL CONSIDERATIONS CONCERNING PRIVATE LIFE, OPERATIONAL CONCEPTS, CONTROVERSAL ASPECTS AND COMPARATIVE ELEMENTS

**Andrei-Mihai STAN**[1]

***Abstract:***

*The following work contains a close up look at the field of private life and the elements that revolve around this fundamental and essentially human right. Correlatively, we will also refer to imperative and necessary obligations on a legal, material and ideative level that secures and guarantee the existence and proper exercise of the right under consideration.*

*Regarding the existence and evolution of the concepts with the help of which we will build our paper, we will also make a leap in the jurisprudence related to the content of our work, in the same time trying to highlight a multitude of controversial situations and case elements which we consider to be extremely influencial and how they shaped the evolution of the right and correlative obligations.*

*The theoretical material we are presenting also aims to address, at least at a doctrinar level, some of the most tense situations born on the global scene in the field of reference and which viciously and irreparably affect the essence and the features of immutability and intangibility that orbit around the operational concepts examined.*

*Given these points, as shown above, our intention is to provide a compendium of new possible necessary regulations and additions to the current legislation, using the lege ferenda initiative, all being harmonized and aligned with international documents, current doctrinal opinions, and most importantly with the needs of nowadays society.*

***Key words:*** *privacy; international legislation; general obligations; Lege ferenda*

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## A FEW LIMINAL ASPECTS

The general[1] obligations related to the imposed impunity and to the necessity of the security[2] that encompasses the right to intimate life, as a fundamental right guaranteed both by the national and the international legislation thus representing essential elements which make a precious synthesis of art. 12 of the Universal Declaration of Human Rights, art. 17 of the Universal Covenant on Civil and Political Rights, art. 8 of the European Convention[3] on Human Rights (ECHR) and, but not limited to, art. 26, art. 27, art. 28, art. 29 and art. 30 of the Romanian Constitution, will form the primary subject of the following paper.

## I. PRELIMINARY ISSUES

### 1. *CONCEPTS, REGULATIONS AND EXISTENTIAL FRAMEWORK*

We can affirm that any person is granted the right to his private and family life, his domicile and his correspondence to be respected, this way ensuring that no one will never be subjected to any arbitrary or illegal interference regarding his privacy, thus respecting the obligations established for this purpose.

For a more comprehensive[4] view of the right analysed, of the subsidiaries attached and perhaps most important of the negative and positive *erga omnes* obligations, based on the jurisprudence[5] of the European Court of Human Rights, through rulings (Van Oosterwijk v. Belgium, Schüssel v. Austria, Von Hannover c. Germany, Petrina v. Romania); we assert as enunciating statements the following operational

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[1] Eugen Chelaru, *Civil law. Persons* (Bucharest: C.H. Beck, 2016), 54-55.
[2] Marius Andreescu and Andra Puran, *Constitutional Law. The general theory and constitutional institutions* (Bucharest: C.H. Beck, 2016), 79
[3] Corneliu Bîrsan, *E.C.H.R. Comment on articles*, second edition (Bucharest: C.H. Beck, 2010), 402-404.
[4] Chelaru, *Civil law. Persons*, 61.
[5] www.oaic.gov.au, site accessed on April 15th, 2018, at 15:30.

interpretations: the right to respect for private life is the right to privacy, the right to live as you wish, protected from advertising. The notion of private life includes elements that relate to the identity of a person, such as his name, photograph, physical and moral integrity. The guarantee provided in art. 8 of the Convention is intended, in essence, to ensure the development, without external interference, of the privacy of each individual related to his circles and beyond, aspects reinforced by the obligations taken under analysis.

In order to avoid confusion[1], we should mention that art. 8 of the ECHR (which guarantees the right to intimate life) has a horizontal nature, meaning that it protects the individual not only from the arbitrary interference of public authorities, but states also that will be held accountable for violations any private individuals (aspect that emphasise the purpose and effect of the general duties). Thus, states can take some measures that aim at respecting privacy even with regard to relationships between individuals. This also applies to the protection of the right to for image against abuse by third parties (Schüssel v. Austria, no. 42409/98 of 21 February 2002). As regards the photographs, the ECHR stated that a person's image is one of the main attributes of his personality, since he expresses his originality and allows him to differentiate himself from others.

The right[2] of the person to protect his image is one of the essential conditions FOR a person`s development (this mainly involves the possession of the image of the individual, which includes in particular the possibility of refusing to publish it).

Regarding[3] the same set of concepts which build the field of study for this paper, we can refer in more details to the obligation which is imposed to the state, but also to the individuals, a general obligation that allows no interfering, that is *erga omnes*, which branches: according to

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[1] Corneliu Bîrsan, *E.C.H.R. Comment on articles*, second edition (Bucharest: C.H. Beck, 2010), 427.

[2] John Oberdiek, *Philosophical Foundations of the Law of Torts* (London: OUP Oxford, 2014), 89.

[3] Liviu Pop, Ionuț Florin-Popa and Stelian Ioan Vidu, *Civil Law Course. Obligations* (Bucharest: Universul Juridic, 2015), 63-64.

an individual it has a negative nature if viewed from a private perspective (all the recipients of the law are kept and abstain from any interference in the private life of any person) and, at the same time, a positive side when referring to the state framework( the State undertakes that the means and levers which it has at its disposal ensure the order and the unitary application of the regulations in such a way that the fundamental rights, so-called guarantees, will suffer no deformation or even eradication).

The Constitution of Romania[1], the Civil Code[2] as a general law and a multitude of special laws form guardians of this fundamental right indissolubly linked to the human being, as inalienable, and also constitutes the normative framework by which the above mentioned general obligation becomes the essence of the guarantee of private life and intimacy, while creating an environment conducive to sanctioning any misconduct and interference. International documents such as, and perhaps most important, but not limited to, the European Convention on Human Rights clearly state the need to maintain and secure the real and legal framework through clear, rigid and unambiguous regulations precisely to give such a right completely related to the intrinsic construction of the human being, just the necessary security and guarantees.

## 2. *CONNECTIONS, GUARANTEES AND ALTERNATIVE POSSIBILITIES*

Classical legal theories[3] focusing on legal objectivism and existentialist aetiology supported the birth of this right as a result of the new ideas issued, and then as a result of materialization of the concept of state. Thus, the connection between a democratic society, a rule of law where the constitutional principles of the rule of law and the supremacy

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[1] Marius Andreescu and Andra Puran, *Constitutional Law. The general theory and constitutional institutions* (Bucharest: C.H. Beck, 2016), 75.

[2] Law 287/2009 (The New Civil Code), updated for 2018, republished in the Official Monitor of Romania no. 505/2011, applicable from 1st of October 2011

[3] Liviu Pop, Ionuț Florin-Popa and Stelian Ioan Vidu, *Civil Law Course. Obligations* (Bucharest: Universul Juridic, 2015), 89.

of the Constitution clearly define the sphere of liberties and purely personal rights by the category of guarantee or fundamental rights that can be said to have succeeded in becoming autonomous to the person to whom they are guaranteed and on which they are born, becoming true general rights and unanimously recognized as inviolable, whose existence and security is necessary and constantly defended by the state, a guarantor of legality and equality.

As constitutional texts as well as international treaties maintain, this general duty of the right to private life is a clear expression of normativism and of the compendium of safeguards necessary for a person, regarded singularly but also in relation to the entire society as a whole, precisely to ensure a normative and legal framework in which, with priority, these fundamental rights can also be exploited, guaranteed and enforced not only at the level of each state but also globally.

We can also focus on the diversity of situations that fall under[1] art. 8 of E.C.H.R. and of the others international subsidiary regulations that clearly mark a very wide sphere of this right, clearly secured by the sui generis obligation. Thus, the purpose of the above-mentioned regulations refers but is not limited to: reputation, physical integrity, life, identity, sexual orientation. In fact, the jurisprudence provides an abundance of cases, which demonstrate the need for such a guarantee, and further reinforces the idea that this right, by its very existence, humanises and enhances aspects considered detachable by the human person (there were also situations in which some "moral persons" could benefit the recognition and protection of the right to private life), which is also one of the basic reasons for which legislation and doctrine have been categorizing them in the internal environment as non-patrimonial personal rights.

We can observe in cases[2] such as Roman Zakharov v. Russia where violations of Article 8 of the Convention have been declared by

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[1] Corneliu Bîrsan, *E.C.H.R. Comment on articles*, second edition (Bucharest: C.H. Beck, 2010), 451.

[2] www.echr.coe.int/Documents.eu, site accessed on April 15th, 2018, at 21:45

the European Court of Human Rights, such interference that may also attack other rights such as freedom of opinion, freedom of the press, citizens' right to information, all culminating dangerous threathen for the entire state apparatus and the entire legal system. Tretter ABS Others v. Austria is another resounding case in which, thanks to an amendment to the Police Powers Act, discretionary powers were conferred on police officers and bodies of civil control, which would disrupt and create numerous serious interference thus destabilizing the exercise of this right.

Perhaps one of the most well-known cases[1] involving leaked intelligence and direct violation[2] of the right in case, so subsequently disturbing[3] the general negative obligation to abstain is represented[4] by Big Brother Watch and Others v. The United Kingdom (58170/13), Bureau of Investigative Journalism and Alice Ross v. The United Kingdom (No. 62322/14), 10 Human Rights Organization and Others v. The United Kingdom (No 24960/15).

Applications submitted to the UK Government on January 9, 2014, January 5, 2015, and November 24, 2015, where complaints in these three cases triggered by information leaks by Edward Snowden on the electronic surveillance programs used by the United States and the UK while trying to intercept block communications and share data as well as intercepted talks between the two states. The applicants in all three cases consider that, due to the sensitive nature of their activities, their communications could have been intercepted either by the United Kingdom or by the United States intelligence services(with the highest degree of clarity we can include this situation in the category of violation of the right to private life, the more severe the information was subsequently leaked and made public).

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[1] www.uk.practicallaw.thomsonreuters.com, site visited on April 15, 2018, 18:30

[2] Mortimer Sellers and Stephan Kirste, *Encyclopedia of the Philosophy of Law and Social Philosophy*(Amsterdam: Springer, 2017), 67-69, 91,92.

[3] The International Covenant on Civil and Political Rights of 16th December 1966, ratified and published in the Official Monitor of Romania no. 146/1974

[4] www.oaic.gov.au, site accessed on April 15, 2018, at 15:30

## II. THE NATIONAL LEVEL

### *1. THE NORMATIVE FRAMEWORK AND THE JURISPRUDENCE*

In our legislation[1] non-patrimonial personal rights are regulated[2] in the Civil Code between Art. 70 and Art. 75, the right to private life being legislated at Article 70 with applications also in Art.75; also there are express provisions in the Romanian Constitution[3] at Art. 26, all these together with some provisions in special laws create a rather inappropriate and insufficient normative framework for the importance of this immutable right.

We can also refer to the jurisprudence in this case inter alia, to the case[4] , of Bărbulescu v. Romania (the decision of a commercial company to dismiss an employee - the complainant - after he monitored his electronic communications and accessed their content).

The complainant suggested that his employer's decision was based on a breach of his right to privacy, and also noted that the national courts had failed to protect his right to respect for privacy and correspondence. Here we can see not only a clear violation of the general negative obligation for individuals, but also the impossibility of national courts to censure such behaviour (this way affecting the positive side of the *erga omnes* obligation), issues directly related to a fundamental right and which necessarily require perpetual and accountable security and defence.

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[1] Marius Andreescu and Andra Puran, *Constitutional Law. The general theory and constitutional institutions* (Bucharest: C.H. Beck, 2016), 97-98

[2] Law 287/2009 (The New Civil Code), updated for 2018, republished in the Official Monitor of Romania no. 505/2011, applicable from 1st of October 2011

[3] The Romanian Constitution of 21 November 1991 republished in the Official of Romania no. 767 of 31 October 2003

[4] Liviu Pop, Ionuț Florin-Popa, Stelian Ioan Vidu, Civil Law Course. Obligations(Bucharest: Universul Juridic, 2015), 76.77.

They have also been highlighted in the jurisprudence[1] (www.e-justice.europa.eu, site accesat in dara de 16 aprilie 2018, ora 13:15) of E.C.H.R. the following cases: Haralambie v. Romania; Jarnea v. Romania; Anthony Tudor v. Romania, all representing an alarming signal regarding the poor regulation and the lack of leverage the judiciary is facing in dealing with such cases, the more so since we refer to an extremely sensitive issue and which is it is necessary to have a stronger legal focus precisely to create a normative framework and to give the judiciary system the possibility to guarantee and secure personal intimate values related to each person.

## 2. *LEGISLATIVE NEEDS, PROPOSALS AND INITIATIVES*

Starting[2] from the provisions of Article 17 of the International Convention on Civil and Political Rights of U.N.[3] that dictates: "No one shall be subjected to arbitrary or unlawful interference with respect to his private life, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to protection of the law against such interference or attack ", we will try to make some proposals worth considering in order to regulate a new legislation as well as complementing the existing one in the case domain, in order to provide more guarantees and a more comprehensive framework precisely to defend and watch the fulfilment of the subsequent general obligation, also aiming at harmonizing these proposals with the international treaties and conventions which apply in the present case.

Given the extremely limited nature of the current legislation in relation to the substantive issues in. case, we can suggest the urgent need

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[1] www.e-justice.europa.eu, site accessed on April 16th, 2018, at 13:15

[2] Radu Chiriţă, Ioana Seuche, Roxana Maris, Otilia Bordea, Bianca Pantea, Romina Florina David, Alina Gaje and Mircea Farcau, *Right to private and family life. E.C.H.R. Jurisprudence* (Bucharest: Hamangiu, 2013), 89-90.

[3] The International Covenant on Civil and Political Rights of 16th December 1966, ratified and published in the Official Monitor of Romania no. 146/1974

for a large-scale additions to the legislative framework in line with international instruments that offer the solutions and safeguards necessary for this fundamental right.

We will consider the European Convention on Human Rights, Regulation no. 679 of 27 April 2016 repealing Directive[1] 95/46 / EC. concerning data protection which recognized the prerogative of national data protection authorities and called for all member States to comply with universal standards of privacy and the Article 17 of the International Covenant on Civil and Political Rights(we do not limit ourselves to these in terms of trying to suggest possible regulation in the field).

For *lege ferenda* we consider that it is necessary to align Romania among the democratic states that adopt special legislation in the field, since the first point would be the necessity to adopt the "Law on Security and Protection of the private life and intimacy " which will encompass a set of regulations already existing in general and special laws but that will adapt to the current situation of the society and which will also be in line with the foreign legislation. It is necessary to adopt a new set of rules that will prohibit any activity, such as a prejudice or a deliberate interference in the abovementioned right of any other breaches of the general obligation to abstain.

Regarding the alarming situation and the obvious times we live in where the technique and procedures for detection of possible offenses have been hijacked, interceptions and case studies are being made using personal data, it is necessary to provide in the rules and penalties applicable in such cases as and rigorous preventive measures. There should also be regulated a gradual and diversified first system that provides for the degree of interference, the gravity of the violation, the affected interest, punishments that are all applicable for a more effective

[1] Regulation no. 679 of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, repealing Directive 95/46 / EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data in respect of the processing of personal data and the free movement of such data, Chapter 13, Volume 017, 10-29.

fight against and eradication of theft of private data and interference in the privacy of a person.

Although the entire exposure is related to the *erga omnes*[1] obligation which carries an absolute, inalienable, guarantee, even these categories which are vital can be subjected to some exceptions for a fair cohabitation and to ensure global stability and security.

In this regard, we suggest the creation of a technical system engaged in the service of justice and controlled by the police to supervise the external environment, which is made up of surveillance cameras equipped with multiple sensors that guarantee a decrease in the rate of crime and any other activities that may disrupt peace of mind, public order, good morals, or even timely alert to prevent the committing of acts punishable by law (see substantial rules and the applicability of the permanent supervision measure proposed in UK legislation).

## III. CONTROVERSY AND THE FIGHT AGAINST THE PHENOMENON

### 1. *EVENTS, PROGRESS VS. REGRESSION, MEASURES AND MECHANISMS*

Due to its particularities[2], the right to private life and intimacy and the consequently obligation *erga omnes* necessitated numerous regulations precisely to create the incipient and favourable conditions for exercise in optimal conditions.

In contrast to the general situation, the issue of maintaining national and global security emerged, discussing the mechanisms, regulations, technical means and any other leverage considered necessary

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[1] Mortimer Sellers and Stephan Kirste, *Encyclopedia of the Philosophy of Law and Social Philosophy* (Amsterdam: Springer, 2017), 157-158.

[2] Radu Chiriță, Ioana Seuche, Roxana Maris, Otilia Bordea, Bianca Pantea, Romina Florina David, Alina Gaje and Mircea Farcau, *Right to private and family life. E.C.H.R. Jurisprudence* (Bucharest: Hamangiu, 2013), 107.

to facilitate not the most efficient control at a level often exceeded the threshold imposed by the sui generis obligation in this case, therefor appeared numerous interferences and even annihilations of privacy, personal data and even elements closely related to a person (name, identity, multilateral existence, and even the most intimate thoughts and concepts ).

There are situations where public authorities may interfere with non-patrimonial personal rights regarding respect for private and family life, domicile and correspondence. This is only allowed if the authority can demonstrate that its action is legal, necessary and proportionate to:

-protecting national security
-protecting public safety
-protecting the economy
-protecting health or good morals and public order
-to prevent disturbances or crimes
-protecting the rights and freedoms of others.

The action is proportionate when it is appropriate and no more than necessary to address the issue in question. In this way, a series of standards designed to give the prerogative state a direct control over the sovereignty ceded by Citizens, creating a complex systems that also tried to establish patterns and create predictability to facilitate securing and the guarantee of fundamental human rights and freedoms and a systematic undermining through the different techniques and methods of both intrinsic and extrinsic masses in order to establish and maintain a sustainable and effective control over the respective population (in most cases it was invoked even the need for the defence and security of that population, precisely to conceal the true aims pursued).

In this case, we can refer directly to the situation[1] of Great Britain where, in 2015, the Investigatory Powers Bill[2] (the powers that security

[1] www.uk.practicallaw.thomsonreuters.com, site accesed on April 15, 2018, 18:30

[2] The Investigatory Powers Act, passed in 2016, that comprehensively sets out and in limited respects expands the electronic surveillance powers of the UK Intelligence Community and police and also aims to improve the safeguards on the exercise of those powers

agencies and the police have been using for years without telling the population or the parliament). In October, the court for investigatory powers, the only court to hold complaints against MI6, MI5 and GCHQ, decided that illegal massive collection of personal confidential data was created without proper supervision for 17 years. This was one of the most tense[1] moments in the topic in question.

One of the negative aspects of the legislation is that it does not provide adequate protection for the journalists, which could discourage free expression of the press. One of the few positive points in the legislation is that it clearly establishes for the first time the supervisory powers available to intelligence services and the police. It legalizes hacking by security agencies of computers and mobile phones, and allows them access to stored personal data masses, even if the person under control is not suspected of any illegality (similar to our legislation).

However, although the security[2] and general protection of the majority have been invoked as a purpose of these practices, although their imminent nature cannot be denied, the entire freedom and privacy of not only those investigated but also society as a whole, especially in the case of a massive leak of information, as happened in the US, democratic states have condemned this practice, and it has been clearly stated in international documents that there is a particular rigor in collecting, storing and interfering with privacy at an individual or/and general level, thus violating the general obligation, even if we relate to the limits and exceptions unanimously accepted by internal and external regulations.

[1] www.uk.practicallaw.thomsonreuters.com, site accesed on 15 April 2018, 18:30

[2] Radu Chiriţă, Ioana Seuche, Roxana Maris, Otilia Bordea, Bianca Pantea, Romina Florina David, Alina Gaje and Mircea Farcau, *Right to private and family life. E.C.H.R. Jurisprudence* (Bucharest: Hamangiu, 2013), 136-137, 149-151

## 2. *THE BIG BROTHER PROJECT*

The Big Brother program[1] was first issued and put into service in America with the primary purpose of assessing potentially dangerous situations for the state and its residents. Subsequent to the various leaks and disclosures, the government's intention to establish a control mechanism of the population, concealed as a general security guard, was also unveiled. The system has been highly criticized and has undergone numerous reforms by reducing its rigidity and capacity to violate privacy.

After initially the purpose and means used were criticized by U.N. and the European Union, as a result of events related to global terrorism, mass hacking and the many threats to the state and even at the world's security, similar legislation has been adopted in several states, invoking the need to protect people as a whole (similar regulations you were adopting in the UK, France, the Nordic countries but also in Romania).

The Law on Personal Data Processing and the Protection of Privacy in the Electronic Communications Sector, the so-called Big Brother Law, Law no. 235/2015 states that the access to the data can be done within a precisely defined framework, by the court or with the prior authorization issued by a judge. The law also states that when submitted electronically, requests and replies are signed with an extended electronic signature based on a qualified certificate issued by an accredited certification service provider to ensure data integrity.

The most important and contested provision establishes that at the request of the courts of law or at the request of the criminal prosecution bodies or of the state bodies with duties in the field of defense and national security, with the prior authorization of the judge established according to the law, the providers of public electronic communication networks for the population Could make available to them immediately, but not later than 48 hours, traffic data, equipment identification data and

[1] Law no. 235/2015 for amending and completing the Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector, published in the Official Gazette of Romania, no. 767/2015

location data in accordance with the provisions on the protection of personal data.

The Constitutional Court of Romania has been notified with two exceptions of posterior unconstitutionality over the law, which it subsequently rejected as unfounded, but subsequently in following years when two more draft laws exacerbated the system of data control and retrieval in the case, the court intervened and declared it unconstitutional motivating that violates the rights and freedoms of the individual.

In spite of the escalation of a tendency of continuing uncertainty over global security, justice does not allow any kind of interference or even actual cancellation of any legally recognized fundamental right or freedom, which is still apparatus and regulation security that, despite the situation, current laws do not lead to a legal, constitutional, ethical and legal decline, but limitations, as well as exceptions for each fundamental category guaranteed under strict legal interpretation, are retained.

## IV. COMPARATIVE ELEMENTS

### 1. *UNITED STATES OF AMERICA*

Privacy[1] laws, private life, and general correlative obligations in the United States refer to several different legal concepts. One refers to the invasion of privacy, an illegal act based on a common law, which allows an injured party to initiate proceedings against a person illegally entering his private business, disclosing his or her personal information, publishing it or portraying it, a false (unfavourable) light, or appropriated his name for personal gain. Citizens who are considered to be public are less intimate, and this is an evolutionary field of law, because it has ramifications and includes aspects, media-related mechanisms.

The essence of the law derives from a right to private life, widely defined in American law "the right to be left alone". It usually excludes personal issues or activities that could reasonably be of public interest,

[1] Mortimer Sellers and Stephan Kirste, *Encyclopedia of the Philosophy of Law and Social Philosophy* (Amsterdam: Springer, 2017), 279.

such as those of celebrities or participants in public events. Invasion of the right to privacy may be the basis for a lawsuit with damages against the person or entity violating this right. These include the right not to be investigated or an unjustified seizure. The constitutional basis is the right recognized by the first amendment of the free association and the right to a fair trial of the Fourteenth Amendment, recognized by the Supreme Court as the protection of the general right to private life in the family, marriage, maternity, procreation and child rearing.

Attempts to improve consumer privacy protection in the US as a result of a privacy breach on Equifax data in May-July 2017, which affected 145.5 million US consumers, failed to pass to Congress.

As far as we are concerned, we observe a "type tendency" applicable in American law, and multiple attempts to legislate for personal data protection as well as any intimate elements related to the private life of individuals, thus overseeing compliance with the related obligations in a specific plan but also generic. We will also be able to see many elements that provide a grading and a framing of the committed deed (for example the successive provision of the need for the deeds committed to invade private life to be achievable in the case of any "reasonable person")

In the United States, today, "Invasion of privacy" is a common cause used in legal action. The Law on Modern Offenses, as first ranked by William Prosser, includes four categories of invasion of privacy:

a) Intrusion of loneliness: physical or electronic intrusion into the private aspects of a person

The intrusion of loneliness and isolation occurs when a person causes interference in the private aspects of another person. In a famous 1944 case, author Marjorie Kinnan Rawlings was sued by Zelma Cason, who was portrayed as a character in Rawlings's acclaimed memory, Cross Creek. The Florida Supreme Court said that the case for invasion of private life was supported by the facts of the case, but in a subsequent procedure it found that there were no actual damages.

Intrusion into isolation occurs when a perpetrator deliberately, physically, electronically or otherwise attacks the private space, loneliness or isolation of a person, private affairs or personal concerns,

by physical use or by electronic means (the device or devices that monitor or auditioning the private affairs of the person) or by any other form of investigation, examination, or observation relates to a person's private affairs if the intrusion would be very offensive to a reasonable person. Hacking someone else's computer is a type of intrusion into privacy, as is the act by which a person is secretly tracked or recorded by removing his private information with a video or audio device.

In order to determine if an intrusion has occurred, one of the three main considerations will be analysed: the perspective of privacy; if there was an intrusion, an invitation, or an overflow of the invitation; the existence of deception (deceit or fraud) to obtain a permit, a benefit.

b) Public disclosure of private facts: the dissemination of true personal information that a reasonable person would find unwanted

Public disclosure of private facts occurs when a person discloses information that is not of public interest and whose release would harm a reasonable person. Unlike slander or defamation, truth is not a motivation for invasion of private life. Disclosure of private facts includes the publication or dissemination of widely known facts, which are not known, are not part of public records, public procedures, not public interest, and would be offensive to a reasonable person if made public. .

c) "False Light": publishing facts that put a person in an unfavourable light, even if the facts themselves can not be defamatory

False light or unfavourable light is a legal term that refers to a confidentiality offense that is similar to a defamation offense. For example, US privacy laws include the right of a non-public to protect privacy from advertising, which puts them in a false light to the public. The right of a non-public to confidentiality vis-à-vis advertising is balanced against the right of the first amendment to freedom of expression.

False lights are intended primarily to protect the applicant's mental or emotional well-being. If a disclosure is false, then we will report a defamation offense. If this communication is not technically false but still misleading, then false light could have been born. The specific elements of the offense in question vary considerably even among those jurisdictions that recognize this offense. In general, these

elements consist of the following: a publication of the defendant on the applicant; positions the plaintiff in a false light; it is very offensive (that is, embarrassing to reasonable people).

d) approach: unauthorized use of a person's name or similarity to obtain certain benefits, undue benefits

Although confidentiality is often a common law, most states have adopted statutes prohibiting the use of a person's name or image if unauthorized use for the commercial benefit of another person.

Appears when a person uses the name or likeness of another person for personal gain or commercial advantage. The action for embezzlement of the right to publicity protects a person against losses caused by the acquisition of a personal resemblance to commercial exploitation. The exclusive right of a person to control his name and likeness to prevent others from exploiting them without permission is similarly protected by the action of a trademark related to the likeness of the person. Approach is the oldest known form of invasion of privacy, involving the use of the name, identity or identity of the unauthorized person for purposes such as advertisements, fictitious works or transactions.

### 2. *AUSTRALIA, FRANCE AND NORWAY*

A. Australia

In the Australian regulation[1] we find in this case that the Privacy Act from 1988, with its subsequent amendments and supplements, regulates how to handle personal information. The Privacy Act defines personal information as: "... information or opinions, whether or not they are true and whether they are recorded in material or non-material form, about an identified person or a person reasonably identifiable". Common examples are name, signature, address, person's phone number, date of

[1] The Privacy Act adopted in 1988 with the subsequent modifications and completions, regarding the handling and processing of personal data in Australia

birth, medical file, bank account details, and comments or opinion about a person.

The Privacy Act includes thirteen Australian Privacy Principles (APP), which apply to some private sector organizations as well as Australian and Norfolk island government agencies. These are collectively referred to as "APP entities". The Privacy Act also regulates the confidentiality component of the consumer credit reporting system, fiscal file numbers and medical research and health reports.

While APPs are not prescriptive, each APA entity needs to consider how the principles apply to their own situation. The principles cover: open and transparent management of personal information, including a privacy policy; a person who has the option to trade anonymously or to use a pseudonym if possible; collecting requested personal information and receiving unsolicited personal information, including notification of collection; how personal information can be used and disclosed (including abroad); maintaining the quality of personal information; keeping personal information safe; the right of individuals to access and correct personal information.

There are also distinct APPs that deal with the use and disclosure of personal information for the purposes of direct marketing (APP 7), cross-border disclosure of personal information (APP 8) and the adoption, use and disclosure of government identifiers (APP 9).

APP applies stricter obligations for APP entities when managing "sensitive information". Sensitive information is a type of personal information and includes information about individuals: health (including predictive genetic information), race or ethnic origin, political opinions, membership of a political association, professional or trade association or trade union, religious beliefs or affiliations , philosophical beliefs, sexual orientation or practices, criminal record, biometric information to be used for certain purposes, biometric templates.

B. France

The notion[1] of intimacy is not defined by French law. Sufficient references appear in the civil law (ART.9) and the general criminal law. However, there are special legislation which also examines this area and provides a set of guiding rules and generally valid conditions.

The courts have intervened to specify what should be established in the area of privacy[2]. It has therefore been decided that privacy can include: Personal information (emotional / family life, sexual life, health, home); Material information (property status, correspondence secret); Professional life.

The protection[3] of freedom of expression is not limited to the freedom of expression of opinion and the prohibition of censorship. Under the influence of EU law, national judges included free access to pluralist and independent information sources.

It is important to note that the right to private life is not absolute, especially when it is in contradiction with freedom of expression and freedom of the press. Relevant jurisprudence (strongly influenced by the European Court of Human Rights) has set a number of criteria to strike a balance between these rights. Normally, the courts will assess: the contribution to the public interest debate, the public's reputation, the previous behaviour of the targeted person, the way in which the information and truth were obtained, the content, form and consequences of the disclosure of the information at issue. Conflict rights are therefore usually resolved by the necessity (general interest, journalistic goals and current events) and the proportionality of the violation (the extent of the breach of each right).

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[1] Le Code Civil. Annote, 117th edition (Paris: Dalloz, 2018), 39.

[2] Mortimer Sellers and Stephan Kirste, *Encyclopedia of the Philosophy of Law and Social Philosophy* (Amsterdam: Springer, 2017), 296.

[3] Radu Chiriță, Ioana Seuche, Roxana Maris, Otilia Bordea, Bianca Pantea, Romina Florina David, Alina Gaje and Mircea Farcau, *Right to private and family life. E.C.H.R. Jurisprudence* (Bucharest: Hamangiu, 2013), 299-300.

C. Norway

In Norway[1] the most important aspect of this fundamental right, and which simultaneously guarantees the correlation obligation, is the existence of a special law in the field, the Personal Data Act[2] and as well as the existence of a permanent organization that controls and supervises the application of the special law, The Norwegian Data Protection Authority, these two features create a substantial legal element that gives the Norwegian system the necessary levers to establish a proper framework for manifestation, the existence and security of the concepts debated on our work(the elements could also be included in the Romanian legislation).

## CONCLUSIONS

Coming close to the end of our work, we want to further strengthen our idea that there is a febrile need for legislative change on several interconnected levels and also to supplement and adjust the existing regulations so that the right and related obligations have the most advanced protection and a concrete and actually beneficial environment in the sense of exercising and observing these two interconnected and indispensable elements of humanity.

As far as we are concerned, we consider legally and ethically comprehensive the examples presented and analysed in previous sections, and we also strongly support the harmonization of any changes and additions with the international documents and standards.

All above taken into consideration we can conclude that, the sensitivity and importance of the elements under consideration emphasizes the need to create a more organized and secure framework for the issues envisaged in the present study, which, although we are

[1] www.datatilsynet.no, site accesed on April 15th, 2018, at 21:30

[2] Law no. 31 entering into force on April 14th, 2000, related to the processing of personal data

aware of the fact that it necessarily can undertake certain limitations and interferences based on the imperative of the general good, But they cannot be attacked and diminished from a moral and essential point of view precisely because of their connection and their valuable importance, so intrinsic and tied to the society as a whole and each of us *stricto sensu*.

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5. Law no. 235/2015 for amending and completing the Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector published in the Official Gazette of Romania, No. 767/2015
6. The Privacy Act adopted in 1988, Australia, on the handling and processing of personal data
7. Law no. 31 entering into force on April 14th, 2000, related to the processing of personal data
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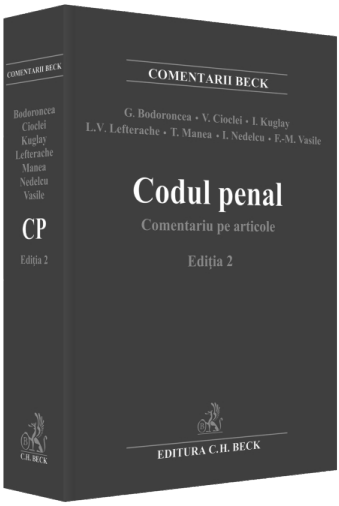
# Codul penal

Comentariu pe articole

Ediția 2

*G. Bodoroncea, V. Cioclei, I. Kuglay, L.V. Lefterache, T. Manea, I. Nedelcu, F.-M. Vasile*

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**Comentarii și adnotări**

Lucrarea oferă cititorului informația necesară pentru a putea înțelege, interpreta și aplica noua legislație penală. Este realizată o explicare aprofundată a textelor noului Cod penal și o adnotare selectivă cu exemple jurisprudențiale.

**Ediția 2**

Comentariile semnalează aspectele de continuitate, dar se concentrează asupra textelor modificate sau nou introduse, marcând, în primul rând, originea și rațiunea acestora. Punctual, sunt semnalate deficiențele unor texte sau problemele de interpretare pe care acestea le ridică și se propun soluții. Problemele ridicate de aplicarea în timp a legii penale sunt și ele avute în vedere. Adnotările reflectă măsura în care soluțiile privind probleme importante, de regulă controversate, din practica judiciară, își mențin sau nu actualitatea.

# Codul de procedură penală

Comentariu pe articole

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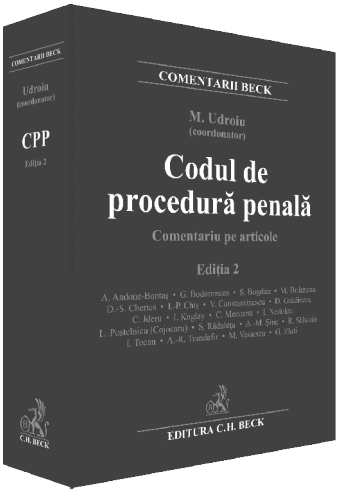


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Comentariul Codului de procedură penală are drept punct de plecare textul **noului Cod de procedură penală și al Legii de punere în aplicare** a acestuia și oferă cititorului informația necesară pentru a putea înțelege, interpreta și aplica noua legislație procesual penală. Pentru corecta înțelegere a noii reglementări, o serie de instituții sunt tratate și din perspectiva istorică, a evoluției lor, sunt explicate motivele pentru care s-a renunțat la unele soluții din vechea reglementare, după cum sunt prezentate și rațiunile care au stat la baza introducerii acelor instituții de **noutate absolută** în sfera procesuală.

Structura comentariilor, care cuprind atât interpretarea textului, cu explicații de ordin teoretic, cât și clarificări privind modul de aplicare a normelor, cu soluții de ordin practic, este astfel concepută încât să prezinte o maximă utilitate nu doar pentru orientarea cititorului, ci și pentru **promovarea unor direcții corecte și coerente** în plan legislativ și jurisprudențial.

La realizarea acestei lucrări au contribuit **juriști recunoscuți pentru calitățile lor profesionale și științifice**, membri ai Comisiei de elaborare a Proiectului noului Cod de procedură penală și/sau ai Comisiei de elaborare a Proiectului Legii de punere în aplicare a noului Cod de procedură penală, efortul lor fiind de a pune la dispoziție un ghid care să conțină răspunsuri imediate, clare și relevante, întemeiate pe solide explicații teoretice.