REFLECTING THE RIGHT TO PRIVACY IN THE DECISIONS OF THE CONSTITUTIONAL COURT OF ROMANIA

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Abstract

The need to protect has deep roots in the history of law. Paradoxically, the more humanity has endeavored to legislate, the abuse and the lack of real support from those responsible for ensuring security and peace have increased.

That is how society felt that, besides the internal regulation of privacy, it had to appeal to international organisations whose purpose was to persuade states that they alone could be able to resist any abusive interference in the individual's privacy.

The Universal Declaration of Human Rights established in 1948 that no man would be the object of arbitrary interference in his private life, as long as there is legal protection against these intrusions[1].

Article The Right to Privacy written by Samuel Warren and Louis Brandeis, appeared in the Harvard Law Review, volume IV, issue 5 of December 15, 1890, is considered to be one of the most influential essays in the history of American law2, and the right to private life is defined by the authors as the right to be left alone or the right to loneliness3.

The social evolution and the transformations of law have gradually led to an increasing distance between the initial desideratum - that of loneliness - and the real need to ensure a safety and protection environment for each individual.

Even if at the theoretical level any individual has the right to be left alone, in reality this right is not necessarily illusory, but rather impossible to be respected in the way we would probably want each one of us.

Complex threats, from wars, civil movements, terrorism, to cyber attacks, and the need for strong nations to dominate, have transformed the right to private life into a promising slogan whenever interest calls for it, or, worse, have reduced to noticeable dimensions invoking the need for over-protection of the individual by the state.

But what are governments doing in the name of protecting their own citizens? They violate private life, but they do it under the protection of the law, they do not respect fundamental rights, but their action appears justified, they restrict liberties and even suppress any intimacy in the name of the protection of the general good.

What does ultimately mean private life and how much should the state be interested in protecting it?

Of course, the notion itself is all-encompassing, with unspeakable valences and hidden ramifications throughout our existence.

We have a private life from the moment we are born, but others are responsible for it, private is the home with all its dependencies, private information about the state of health, or personal data, at work we have the right to intimacy, even a detainee has the right to ensure and respect his private life in designated spaces and the list can continue.

By making a parallel between private life in the American model and the way it is protected in European law, a fundamental difference emerges.

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[1] http://www.un.org/en/universal-declaration-human-rights/.

[2] Susan E. Gallagher, Introduction to "The Right to Privacy" by Louis D. Brandeis and Samuel Warren: A Digital Critical Edition, University of Massachusetts Press, forthcoming.

[3] Warren & Brandeis, paragraph 1.

If in American law individual autonomy is the expression of absolutism, being the core of the existence of social rights, Europeans did not think this notion as an independent, stand alone, supreme relation to the other rights recognized by the individual but as an important, but not exclusive component or outside any limitations or restrictions.

In European law, the balance between the protection of the general interest and the need to guarantee, within reasonable limits, respect for the right to privacy was maintained.

Although Romania signed the Universal Declaration of Human Rights in 1948, the constitutional right to privacy did not find a distinct regulation either in the 1848 constitution or in 1952 or in 1965.

At present, the Romanian Constitution protects and regulates the right to private life and the authorities have the obligation to respect it.

Keywords: *the constitutional court of Romania, the right to private life, the right to family life, unconstitutionality*.

1. The proper regulation

1.1. The Right to Private Life in the Romanian Constitution

Article 26 of the Romanian Constitution

Intimate, family and private life

1. Public authorities respect and protect their intimate, family and private life.
2. The individual has the right to dispose of himself if he does not violate the rights and freedoms of others, public order or good morals.“

Although Article 26 of the Constitution of Romania recognizes the right to private life with all its valences (intimate, family), it does not define the notions, for the simple reason that a fundamental law does not have the role of limiting the situations that the practice could generate, leaving the lawyer, the courts, the doctrine, the freedom to interpret and create the right.

1.2. The right to privacy in the Civil Code

The Civil Code, which entered into force on 1 October 2011, dedicates a whole chapter (Chapter II) of respect for the human being and its inherent rights, and in Section II deals with respect for the privacy and dignity of the human person.

According to Article 71 of the Civil Code, every person has the right to respect for his private life, just as no one can be subjected to any interference in his or her private, personal or family life, or at home, residence or correspondence without his consent or without complying with the limits laid down in Article 75 of the Civil Code[1].

Particular importance is attached to correspondence, manuscripts or other personal documents, as well as to the personal information of a person, which can not be used without its consent or without observing the limits provided by Article 75 of the Civil Code.

With a wider scope of privacy, Article 58 of the Civil Code speaks about the right

[1] Article 75 Civil Code Limits: (1) Do not violate the rights set out in this section, which are permitted by law or international human rights conventions and pacts to which Romania is a party. (2) The exercise of constitutional rights and freedoms in good faith and in compliance with the international covenants and conventions to which Romania is a party shall not constitute a violation of the rights provided for in this section.

of personality, giving another valence to the protection we are talking about.

Thus, everyone has the right to life, to health, to physical and psychological integrity, to dignity, to their own image, to respect for private life, and other such rights recognized by law.

Let us say that all these regulations would be deprived of practical utility, as long as there were no punitive measures meant to sanction any violation of the values under the protection of the law.

As superficial as it may seem at first glance, or because of excessively long periods in national courts, we can not deny their importance and necessity, because the only way to prevent abuse is by imposing rules and imposing sanctions.

Speaking of civil sanctions, the Civil Code in Article 252 protects the human personality by establishing that every individual has the right to protect the intrinsic values of the human being, such as life, health, physical and mental integrity, dignity, private life, freedom of conscience , scientific, artistic, literary or technical creation.

1.3. The right to privacy in the Criminal Code

We have decided to end with the Romanian Penal Code, which came into force in February 2014, precisely because its regulations should be, in essence, a stepping stone for potential criminals, and coercion measures get more serious, going as far as affecting the freedom of the guilty person and the damage to her property through the imposition of fines or civil damages.

In Chapter IV on offenses against freedom of the person, Article 208 governs the offense of harassment, according to which the action of a person who repeatedly pursues, without right or without a legitimate interest, a person or oversees his home, work or other frequented places by causing it a state of fear, shall be punished by imprisonment from 3 to 6 months or by fine.

Making telephone calls or communications by means of remote transmission which, by frequency or content, causes a person to fear, shall be punished by imprisonment from one month to three months or by a fine if the act does not constitute a more serious crime .

The initiation of criminal proceedings takes place at the preliminary complaint of the injured party .

At first sight, the punishments could be considered ridiculous, but the fact that there was a concern to regulate this kind of acts denotes an anchoring of the current legislation to social transformations and the evolution of inter-human relations.

Even if the state is the one who intervenes to sanction, by bringing to account the guilty ones, it remains to the victim's discretion if they choose to bring the offenders before the law, so that the initiation of criminal proceedings only takes place at the preliminary complaint of the person injured.

Domicile, as a component of privacy, is protected in Chapter IV, Article 224, on Domestic Violence.

Intangible access in any way to a house, room, dependency or enclosure connected to the house without the consent of the person using it or the refusal to leave them at its request shall be punished by imprisonment from 3 months to 2 years or a fine. If the act is committed by an armed person, during the night or by use of lying qualities, the punishment is imprisonment from 6 months to 3 years or a fine.

The initiation of criminal proceedings takes place at the preliminary complaint of the injured party .

And in the case of this crime, criminal liability depends on the injured party's

decision, but sanctions are more drastic, and there is even an aggravating variant.

A new incrimination in Romanian criminal law is the introduction of Article 226 on the violation of private life.

Although, at first glance, it could be considered a reiteration, or even a duplication of other offenses (such as home violence), in fact this offense concerns the attainment of privacy by specific methods, involving the use of techniques more or less sophisticated surveillance, using instruments and means capable of intruding a person's private life in a way that is sometimes inscrutable.

Taking pictures, capturing or recording images, listening with technical means, or recording audio are ways to accomplish this type of offense, and the disclosure, broadcasting, presentation or transmission without right of the sounds, conversations or images provided in the form of a crime, have the character of aggravating, the limits of punishment being increased.

The fact that even in the case of this crime the legislator left the injured person the right to decide whether the offender was to be held criminally liable was originally justified as a guarantee that the individual is free to decide for himself what actions he / she is injuring or not.

In fact, the practice has shown that the number of cases concerning the investigation of this last crime, for example, is low, the victims often choose to remain passive.

The reasons why the passive subjects of this crime decide not to denounce this type of antisocial behavior that affects their right to private life are multiple, starting from the social implications of such an approach, fear of repression, shame, or simply distrust of force government to stop these abuses.

2. Decisions of the Constitutional Court of Romania on the analysis of private life

2.1. DECISION[2] no. 1258/2009 regarding the admission of the unconstitutionality exception of the provisions of Law no. 298/2008 regarding the retention of the data generated or processed by the providers of electronic communications services for the public or public communications networks, as well as for the amendment of the Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector

The subject of the exception of unconstitutionality was Article 1 and Article 15 of Law no. 298/2008 on the retention of data generated or processed by providers of publicly available electronic communications services or public communications networks and amending Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector ", published in the Official Journal of Romania, Part I, no.780 of 21 November 2008.

Article 1. - "(1) This law establishes the obligation for the providers of public electronic communications networks and services to retain certain data generated or processed in the framework of their activity of providing electronic communications services, for making them available to the competent authorities for use in research, discovery and prosecution of serious crimes.

(2) This law applies to the traffic and location data of natural and legal persons as well as related data necessary to identify the subscriber or the registered user.

[2] Text published in the Official Journal of Romania, in force since November 23, 2009.

(3) This law shall not apply to the content of the communication or the information consulted during the use of an electronic communications network.

(4) The enforcement of the provisions of the present law is done in compliance with the provisions of the Law no. 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data, as subsequently amended and supplemented, as well as of Law no. .506 / 2004 on the processing of personal data and the protection of privacy in the electronic communications sector, with further additions. ";

Article 15. - "Providers of public communications networks and providers of publicly available electronic communications services shall, at the request of the competent authorities, on the basis of the authorization issued in accordance with the provisions of Article 16, transmit immediately the data retained under this law, except in cases of force major. "

The author of the unconstitutionality exception criticized the retention of the data generated or processed by the providers of publicly available electronic communications services or public communications networks and the amendment of the Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector .

These regulations, claimed the author of the exception affect the exercise of the right to free movement, the right to private life, private and family life, affect the secrecy of correspondence and freedom of speech.

Regarding the clarity and precision of the regulations under consideration, the Constitutional Court has found that they give rise to abuses in the retention, processing and use of data stored by providers of publicly available electronic communications services or public communications networks.

Even if it is remembered that the right to privacy, the secrecy of correspondence and freedom of expression may be restricted or limited, however, any interference must be regulated in a clear, predictable and unambiguous manner.

Lastly, the Court reminds the importance of the obligation to refrain from any interference in the exercise of citizens' rights and freedoms in the matter of personal rights such as the right to intimate and free speech and the processing of personal data.

2.2. DECISION[3] no. 440 of 8 July 2014 on the exception of the unconstitutionality of the provisions of Law no.82 / 2012 on the retention of data generated or processed by the providers of public electronic communications networks and of the providers of publicly available electronic communications services, as well as for the modification and completing the Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector and Article 152 of the Code of Criminal Procedure

The subject of the exception of unconstitutionality was the provisions of the Law no.82 / 2012 on the retention of the data generated or processed by the providers of public electronic communications networks and the providers of publicly available electronic communications services, as well as for amending and supplementing Law no.506 / 2004 on the processing of personal data and the protection of privacy in the electronic communications sector, republished in the Official Journal of Romania, Part I, no. 211 of March 25, 2014,

[3] Text published in the Official Journal of Romania, in force since September 4, 2014.

and article 152 of the Criminal Procedure Code:

Article 152 of the Criminal Procedure Code: "(1) The criminal investigation authorities, with the prior authorization of the judge of rights and freedoms, may require a provider of public electronic communications networks or a provider of publicly available electronic communications services to transmit retained data under the special law on the retention of data generated or processed by providers of public electronic communications networks and providers of publicly available electronic communications services other than the content of communications where there is reasonable suspicion of an offense; and there are grounds for believing that the requested data constitutes evidence for the categories of offenses provided by the law on the retention of data generated or processed by the providers of public electronic communications networks and the providers of elec- tronic communications services for the public.

(2) The judge of rights and freedoms shall pronounce within 48 hours on the request of the criminal prosecution bodies to transmit the data, through reasoned conclusion, to the council chamber.

(3) Providers of public electronic communications networks and providers of publicly available electronic communications services who cooperate with the criminal investigation bodies are obliged to keep the secret of the performed operation. ".

The author of the unconstitutionality objection said that the criticized texts violate the constitutional provisions of Article 26 on intimate, family and private life.

In 2012, following the defeat to the Constitutional Court by Decision[4] No. 1258/2009, a new transposition of Directive[5] 2006/24 / EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58 / EC in the national legislation, by Law no.82 / 2012, republished in the Official Journal of Romania, Part I, no.211 of 25 March 2014.

According to the Constitutional Court, Law no.82 / 2012 did not bring substantial modifications to the previous unconstitutional law, which provided identical solutions ignoring Decision No. 1258 of October 8, 2009[6].

A second rejection of the law at the Constitutional Court on July 8, 2014 came after, not long before, even the EU Data Retention Directive 2006/24 / EC was invalidated.

"We are aware that on 8 April 2014, the Court of Justice of the European Union invalidated Data Protection Directive 2006/24 / EC from the date on which it was issued, considering that there was a wide-ranging interference and the seriousness of the fundamental rights to respect for privacy and the protection of personal data, without such an interference being limited to what is strictly necessary, "the Court's press release states[7].

Regarding violation of the right to privacy, the Constitutional Court notes that in terms of access and use of data, the issue of unconstitutionality arises, given the access of the judicial bodies and other state bodies with attributions in the field of national security to the stored data.

[4] Text published in the Official Journal of Romania, in force since November 23, 2009.
[5] https://eur-lex.europa.eu/eli/dir/2006/24/oj.
[6] https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-106, 18.09.2014.
[7] http://unbr.ro/wp-content/uploads/2014/04/CP140054EN.pdf.

As such, the law does not provide the safeguards necessary to protect the right to intimate, family and private life, the secrecy of correspondence and the freedom of expression of persons whose stored data are accessed. "(Paragraph 61)

This decision has sparked vehement reactions both from the Romanian Intelligence Service and from the representatives of the prosecutor's offices, going to the assertion that the national security of Romania is jeopardized and the criminal investigations can no longer run in good conditions, because, overwhelmingly, criminal investigations were based on data stored by operators.

On September 18, 2014, the Constitutional Court of Romania issued a statement[8] attempting to justify taking the above-mentioned decisions: "We mention that other Constitutional Courts or European Courts have already declared unconstitutional national laws on data retention, in this situation - with Germany, Austria, Czech Republic or Bulgaria, with the same object appearing in the role of the constitutional courts in other states. On the other hand, as it appears from the motivation of the decision establishing the unconstitutionality of Law no.82 / 2012, the Court does not said unconstitutional data retrieval and storage operations in themselves, but only that access to and use of data is not accompanied by the necessary safeguards to ensure the protection of the above-mentioned fundamental rights, in particular the fact that the judicial bodies with attributions in the field of national security have access to these data without the judge's authorization.

2.3. DECISION[9] No. 580 of 20 July 2016 on the Citizens' Legislative Initiative entitled "Law on the Revision of the Romanian Constitution"

It was through this decision that a citizen's initiative, supported by several non-governmental organizations, was to change the content of Article 48 of the Constitution:

Present as follows: "(1) The family is based on the freely consented marriage between spouses, on their equality, and on the right and duty of parents to ensure the raising, education and training of children. (2) The conditions for termination, termination and invalidity of marriage shall be established by law. Religious marriage can only be celebrated after civil marriage. (3) Children outside the marriage are equal before the law with those in marriage. "

The proposal[10] was in the following sense: "The family is based on the freely agreed marriage between a man and a woman, on their equality and on the right and duty of parents to ensure the raising, education and training of children."

In other words, it was desired to replace the phrase between husbands with the phrase between a man and a woman.

The motivation for this citizens initiative to review the Constitution has come from the fact that in Romania the right to marry belongs only to a man with a woman, being excluded from the same sex.

In the initiators view, the attempt to clarify the term "spouses" in Article 48 of the Constitution was intended to remove any interpretation contrary to that of a woman and a man in a family.

Another argument used has started from the definition of the family as it results from Article 16 of the Universal Declaration

[8] https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-106.
[9] published in the Official Journal no. 857/2016 - M. Of. 857/27 October 2016.
[10] http://www.cdep.ro/proiecte/2017/100/20/7/pl34.pdf.

of Human Rights, namely that of a natural and fundamental element of society.

According to Article 16 (1) of the Universal Declaration of Human Rights adopted by the United Nations General Assembly on December 10, 1948, "men and women have the right to marry and to found a family".

Article 12 of the European Convention on Human Rights[11] states that "From the age of the law the husband and wife have the right to marry and to found a family under the national law governing the exercise of this right."

Romania remains tributary to the old traditions, and society as a whole is not yet ready to cope with changes in perceptions rooted centuries in the culture of this people.

Romania is still in Europe, a country where the marriage rate is among the highest, and this is the fear of embracing innovative experiments, decadent for most and destabilizing for others.

Article 258 (4) of the Civil Code, speaking of spouses, describes them as the man and woman united by marriage[12], and marriage is the freely consented union between a man and a woman (Article 259 of the Civil Code).

Perhaps the large number of citizens who have consented to the Constitutional Court's request to ask the Court to clarify the notion of spouses shows precisely the traditionalism that I mentioned above and the need to preserve the values that have remained unaltered or perhaps, was just a speculated subject of organizations or political actors interested in acquiring notoriety or image capital.

Being a sensitive issue at European level, the European Court of Justice has left the role of regulating permissively or restrictively each state, considering it to be their absolute attribute to decide on the definition of marriage, civil status, the possibility of validating a legal union between same-sex couples.

It is worth recalling the Judgment of the Court of Justice of the European Union of 1 April 2008 in Case C-267/06[13] Tadao Maruko v Versorgungsanstalt der deutschen Bühnen, which established more than eleven years ago that "the civil status and benefits derive from it, are matters which are the responsibility of the Member States and Community law does not affect that competence. '

The same approach we find in the Judgment of 10 May 2011 in Case C-147/08 Jürgen Römer v Freie und Hansestadt Hamburg[14].

The Resolution of the United Nations Human Rights Council on Family Protection of July 3, 2015 defines the family as a natural and fundamental group of society that must be essentially protected by the state.

It must be mentioned some of the arguments of the Constitutional Court in Decision 580/2016 because they describe its concept of marriage, private life, family life: "The Court holds that Article 48 of the Constitution enshrines and protects the right to marry, and family relationships resulting from marriage, distinct from the right to family life / respect for and protection of family life, with a wider legal content enshrined and protected by Article 26 of the Constitution, according to which "(1) Public authorities respect and protect the intimate, family and private life . (2) The individual has the right to dispose of himself if he does

[11] https://www.echr.coe.int/Documents/Convention_RON.pdf.

[12] (4) For the purposes of this Code, spouses are men and women united by marriage.

[13] Repertoriul de jurisprudență 2008 I-01757, https://eur-lex.europa.eu/legal-content/RO/TXT/ ?qid= 1553454942837&uri=CELEX:62006CJ0267.

[14] Cauza C-147/08, Repertoriul de jurisprudență 2011 I-03591, https://eur-lex.europa.eu/legal-content/RO/TXT /?uri=CELEX:62008CJ0147.

not violate the rights and freedoms of others, public order or good morals. "

The notion of family life is complex, including family relationships in fact, distinct from family relationships resulting from marriage, the importance of which the constituent legislator has emphasized distinctly in Article 48 the protection of family relationships resulting from marriage and from the link between parents and children.

2.4. DECISION[15] No.51 of 16 February 2016 on the objection of unconstitutionality of the provisions of Article 142 (1) of the Code of Criminal Procedure

The subject of the exception of unconstitutionality was the provisions of Article 142 paragraph (1) of the Code of Criminal Procedure, according to which "*the prosecutor enforces the technical supervision or may order it to be carried out by the criminal investigative body or specialized police officers or other specialized bodies of the state* ".

The authors of the exception considered that Article 1 (5) on the Romanian State, Article 20 on international human rights treaties, Article 21 on free access to justice, Article 53 on restricting the exercise of rights or freedoms , as well as the provisions of Articles 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the right to a fair trial and the right to respect for private and family life.

As a first conclusion, the Court has held that the phrase "*or other specialized bodies of the state"* is lacking in clarity, precision and predictability, as it does not allow the identification of those competent authorities to carry out measures with a high degree of intrusion into the privacy of individuals.

Also, the lack of clear, precise regulation would lead, in the Court's view, to an abusive violation of some of the essential fundamental rights in a state of law: intimate, family and private life and the secrecy of correspondence.

2.5. DECISION[16] no. 336/2018 concerning the rejection of the unconstitutionality exception of the provisions of Article 231 (2) with reference to Article 229 (1) lit. b) and d) and para. (2) lit. b) the second sentence of the Criminal Code, published in M.Of. of Romania, in force since 6 September 2018

By the Conclusion of June 1, 2016, pronounced in File no. 3.319 / 328/2015, the Turda District Court notified the Constitutional Court, except for the unconstitutionality of the provisions of Article 231 paragrapf (2) with reference to Article 229 (1) letter b) and d) and paragrapf (2) letter b) second sentence of the Criminal Code.

The exception was invoked by the public prosecutor in the case of concerning criminal liability for committing the offense of qualified theft, an offense under Article 228 paragraph (1) in relation to Article 229 (1) letter b) and d) of the Criminal Code.

The prosecutor requested the change of legal classification - by retaining and the provisions of Article 229 paragraph (2) letter b) of the Criminal Code, in the sense that the act was also committed by violation of the professional headquarters of the injured person. In the case, one of the defendants reconciled himself with the injured person.

In justifying the objection of unconstitutionality, the prosecutor, as the author of the exception, claims in essence

[15] Official Journal of Romania no. 190 of 14 March 2016.
[16] Text published in the Official Journal of Romania, in force since September 6, 2018.

that the provisions of Article 231 (2) of the Criminal Code, which establishes the possibility that the reconciliation, which removes the criminal responsibility, also intervenes in the case of theft theft crimes under Article 229 paragraph (1) letter b) and d) and paragraph (2) letter b) second sentence of the Criminal Code - serious crimes and with a very high impact on society - violates the constitutional provisions of Article 1 paragraph (3) on the rule of law, in which citizens' rights and freedoms and justice are the highest and guaranteed values of Article 26 on the intimate, family and private life of Article 27 (1) on inviolability of domicile, Article 44 (1) on the right of private property, Article 53 on the restriction of the exercise of certain rights or freedoms and Article 131 (1), according to which, "*In the judicial activity, the Public Ministry represents the general interests of society and defends the rule of law, as well as citizens' rights and freedoms"*.

In paragraph 21 of the aforementioned decision, which has been called upon to adjudicate on the violation, inter alia, of Article 26 of the Constitution of Romania on Intimate, Family and Private Life, it leaves the legislator's appreciation of the measures necessary to protect the social values invoked by to the author of the exception of unconstitutionality.

It also reminds the Constitutional Court in the same paragraph that the criminal policy of a state is not its attribute, which is a priority of the lawyer according to priorities, opportunity, frequency of violations, gravity and consequences of antisocial acts.

2.6. DECISION[17] No 498 of 17 July 2018 on the unconstitutionality of the provisions of Article 30 (2) and (3) and the phrase "the system of electronic patient patient file" in Article 280 (2) of the Law no.95 / 2006 on health reform

The texts invoked in support of the objection of unconstitutionality were Article 1 (5) on the quality of law, Article 26 on intimate, family and private life, and Article 53 on the restriction of the exercise of fundamental rights and freedoms in the Constitution of Romania, as well as Article 8 The Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the right to respect for private and family life.

This exception was raised directly by the People's Advocate, arguing that in the matter of healthcare provision, the legal regulation must not contravene the fundamental rights provided by article 26 of the Constitution, according to which the public authorities are obliged to respect and protect the intimate, family and private life .

In the opinion of the author of the objection of unconstitutionality, the regulation contained in Article 280 paragraph (2) of Law no. 95/2006 on healthcare reform is of a general nature, without any guarantee of confidentiality of personal data of medical nature, contained in electronic health records.

The views expressed in public space by physicians 'and patients' associations have also been invoked, meaning that the implementation of the electronic health records could seriously violate the intimate, family and private lives of patients, through the possibility of disclosing personal data of a medical nature public.

Even the Constitutional Court in its previous jurisdiction has established that, in order to ensure respect for privacy and the

[17] Published in the Official Journal no. 650 of July 26, 2018.

confidentiality of medical data, it is necessary to limit the access of persons to such data (see, in this regard, Decision[18] No 17 of 21 January 2015 and Decision[19] no.440 of 8 July 2014).

Referring to the violation of the individual's right to privacy, the Constitutional Court considered the personal data and the processing of this information, recalling, inter alia, the case[20] of 4 May 2000 in Rotaru v. Romania, paragraph 43.

The Court recalls a series of judgments handed down by the European Court of Human Rights in the area of patient healthcare protection as follows: (Judgment of 17 July 2008 in Case I v. Finland, paragraph 36) [Judgment of 17 January 2012 in Varapnickaitė-Mažylienė v. Lithuania[21], paragraph 41) (Judgment of 17 July 2008 in Case I v. Finland, paragraph 37) (case of 17 July 2008 in Case C- Finland, paragraph 38) (Judgment of 17 July 2008 in Case I v Finland, paragraph 38, Judgment of 25 February 1997 in the case of Z. v. Finland, paragraph 95, or Judgment of 10 October 2006, pronounced in the LL case against France, par.44]. (Judgment of 6 June 2013 in Avilkina and Others v. Russia, paragraph 45) (Judgment of 25 February 1997 in the case of Z. v. Finland, paragraph 95).

All the arguments that we find in this decision are based on a comparative analysis of the case law of the European Court of Human Rights on the violation of Article 8 of the Convention, concluding that the disclosure of medical data can seriously affect the person's family and private life, such as and its social and employment situation by exposing it to public atrocities and the risk of ostracization (Judgment of 17 January 2012 in Varapnickaitė-Mažylienė v. Lithuania, paragraph 44, or the judgment of 6 June 2013 in Avilkina and others against Russia, p.45][22]

Paragraph 42 of the decision concludes with regard to the issue at stake in the debate, meaning that "if the State has established by law a measure in the application of the right to the protection of the health of a person, it is also incumbent on it to protect and guarantee the confidentiality of information medical treatment, through a normative act of the same level, respectively by law. ,,

Moreover, the Court uses the syntagm of the legislator's silence, in other words, it speaks of a passivity in ensuring minimum guarantees that the right to intimate, family or private life is respected.

In the Court's view, the introduction of electronic health records is only an interference of the state in the intimate, family and private life of the individual.

Such a lack of concern to ensure minimum leverage can not be overlooked by arguments such as the existence of a constitutional obligation to protect the health of the individual, because its accomplishment must not violate other rights, as laid down in the Constitution.

It was therefore found that although the legal interference in the law provided for in Article 26 of the Constitution may have a legitimate purpose (protecting the health of a person by ordering his medical history and holding it by a state authority), it is appropriate and necessary for the purpose does not maintain a fair balance between competing interests, namely the public interest in public health, the interest of the person in protecting his or her health, and the interest of the person in protecting his private, family and private life.

[18] Text published in the Official Journal. of Romania, in force since January 30, 2015.
[19] Text published in the Official Journal of Romania, in force since September 4, 2014.
[20] Text published in the Official Journal. of Romania, in force since 11 January 2001.
[21] http://health-rights.org/index.php/cop/item/case-of-varapnickait%C4%97-ma%C5%BEylien%C4%97-v-lithuania-2012.
[22] https://www.globalhealthrights.org/health-topics/hospitals/avilkina-and-others-v-russia/.

2.7. DECISION[23] no.91 of 28 February 2018 on the objection of unconstitutionality of the provisions of article 3, article 10, article 11, paragraph 1, letter d) and article 13 of the Law no.51 / 1991 on the national security of Romania, as well as the provisions of article 13 from Law no.51 / 1991 on the national security of Romania, in the form prior to the amendment by the Law no.255 / 2013 for the implementation of the Law no. 135/2010 on the Criminal Procedure Code and for the modification and completion of some normative acts containing provisions criminal proceedings

The subject of the exception of unconstitutionality constituted the provisions of Articles 3, 10, 11 and 13 of Law no. 51/1991 on the national security of Romania, in the form before the amendment by Law no. 255/2013, as well as the provisions of Article 13 of the same normative act, in the form in force at the time of notification to the Constitutional Court.

It was argued that the texts of the abovementioned articles contradict the constitutional provisions contained in Article 1 paragraph (5), according to which, in Romania, compliance with the Constitution, its supremacy and the law is mandatory, Article 21 paragraph (3), according to which the parties right to a fair trial and the settlement of cases within a reasonable time, Article 26 on intimate, family and private life, Article 28 on the confidentiality of correspondence, and Article 53 on the restriction of the exercise of rights or freedoms.

This decision is relevant from the point of view of the Court's analysis of the phrase *"seriously undermining the rights and fundamental freedoms of Romanian citizens"* in Article 3 let f) of Law no 51/1991.

In paragraph 79 of the Decision, the Constitutional Court recalls the Joint Opinion of the Venice Commission and the Human Rights Directorate, citing a passage that we consider relevant and exposing it exactly: *"In the Law on the Functioning of the Service, the mandate given to this Service by Article 7 requires defending against actions that "violate the constitutional rights and freedoms of citizens and endanger the state" and against attacks against senior officials, etc. Undoubtedly, both situations can be considered to be clear criminal matters and not just a legitimate aim to protect national security. Therefore, their use in these cases, with no specific safeguards for criminal investigations and trials, can be justified only if the phrase "and jeopardizes the state" is read literally in the sense that only when the threat affects democratic order, in other words, when it is sufficiently concrete and serious that it becomes a matter that can come to the attention of the Service. For example, the Swedish Security Police mandate includes investigating attacks and threats directed against the high dignitaries (when they affect democratic order), as well as actions that undermine the exercise of constitutional rights of citizens. This latter function has the relatively narrow meaning of investigating the activities of organized extremist groups that are hostile to certain groups of citizens or residents, for example of a certain ethnic origin "[Opinion no. 756 of 2 April 2014, paragraph 27, CDL-AD (2014) 009]*.

In essence, in analyzing the provisions criticized by the author of the objection of unconstitutionality, the Court has held that the lack of clear rules providing information on the circumstances and conditions under which national security authorities are

[23] Published in the Official Journal of Romania no. 348 of April 20, 2018.

empowered to resort to the technical supervision measure is violation of fundamental rights, essential in a state governed by the rule of law, concerning intimate, family and private life and the secrecy of correspondence.

Thus, the phrase "*seriously undermines the fundamental rights and freedoms of Romanian citizens"* contained in article 3, letter f) of Law no. 51/1991 on Romania's national security violates the constitutional provisions contained in article 1 paragraph (5) which enshrines the principle of legality , Article 26 on private life and Article 53 governing the conditions for the restriction of the exercise of certain rights or freedoms.

2.8. DECISION[24] No 534 of 18 July 2018 on the objection of unconstitutionality of the provisions of Article 277 (2) and (4) of the Civil Code

The subject of the exception of unconstitutionality was the provisions of Article 277 (2) and (4) of the Civil Code, republished in the Official Journal of Romania, Part I, no.409 of 10 June 2011, according to which:

"(2) Marriages between persons of the same sex concluded or contracted abroad either by Romanian citizens or by foreign citizens are not recognized in Romania. [...]

(4) The legal provisions regarding the free movement on the territory of Romania of the citizens of the Member States of the European Union and the European Economic Area remain applicable "and, in the author's opinion, these texts represent a violation of the right to intimate, family and private life, the criterion of sexual orientation.

By doing a comparative analysis, the Constitutional Court lists the states that have adapted their legislation so that they can provide effective protection of the right to intimate, family and private life as regards homosexual couples.

It reminds the Court that thirteen Member States of the European Union recognized same-sex marriage: the Kingdom of the Netherlands, the Kingdom of Belgium, the Kingdom of Spain, the Kingdom of Sweden, the Portuguese Republic, the Kingdom of Denmark, the French Republic, the United Kingdom of Great Britain and Northern Ireland The United Kingdom (with the exception of Northern Ireland), the Grand Duchy of Luxembourg, Ireland, the Republic of Finland, the Federal Republic of Germany and the Republic of Malta and Austria, which by the Austrian Constitutional Court of 4 December 2017 (G 258-259 / 2017-9) the provisions of the Civil Code limiting the right to marriage to heterosexual couples, and furthermore stated that without the intervention of the legislator before that date, same-sex marriage would be possible from 1 January 2019.

In the Czech Republic, the Republic of Estonia, the Hellenic Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, Hungary, the Republic of Austria and the Republic of Slovenia, there is the notion of registered partnership or civil partnership for homosexual couples, which, although distinct from marriage, recognizes, however, a series of rights similar to those derived from the marriage between a man and a woman.

States such as Canada, New Zealand, South Africa, Argentina, Uruguay or Brazil authorize same-sex marriage by law, and others, through Mexican judgments (Supreme Court Supreme Court ruling no. 155/2015 June 3, 2015), the United States[25] (Supreme Court ruling of June 26, 2015,

[24] Published in the Official Journal of Romania. no. 842 of 3 October 2018.
[25] https://supreme.justia.com/cases/federal/us/576/14-556.

"Obergefell et al. Hodges, Director, Ohio Department of Health, et al., 576 U.S. (2015), Colombia (Constitutional Court judgment SU-214/16 of 28 April 2016, Case T 4167863 AC) Taiwan[26] (judgment of the Constitutional Court of the Republic of China (Taiwan) of 24 May 2017, J.Y. Interpretation N ° 748, on Consolidated Claims of Huei-Tai-12674 and Huei-Tai-12771].

It is important that the comparative analysis which the Court made in the decision, because it led to the suspension of the judgment and to the lodging of a request to the Court of Justice of the European Union for a preliminary ruling on the following questions:

'(1)' Husband 'in Article 2 (2) (a) of Directive 2004/38, in conjunction with Articles 7, 9, 21 and 45 of the Charter, includes the same-sex spouse of a non- , of a European citizen with whom the citizen has legally married under the law of a Member State other than the host State?

2. If the answer to the first question is in the affirmative, Articles 3 (1) and 7 (2) (3) of Directive 2004/38, read in conjunction with Articles 7, 9, 21 and 45 of the Charter, require the Member State host country to grant a residence permit in its territory for more than 3 months to a same-sex spouse of a European citizen?

3. If the answer to the first question is in the negative, the same-sex spouse from a non-Member State of a European citizen with whom the citizen has legally married under the law of a Member State other than the host State may be 'any other family member ...' within the meaning of Article 3 (2) (a) of Directive 2004/38 or 'the partner with whom the Union citizen has a duly substantiated, lasting relationship' within the meaning of Article 3 (2) (b) of Directive 2004/38, with the host State's correlative obligation to facilitate entry and stay, even if the host State does not recognize same-sex marriages or provides for any alternative form of recognition legal partnerships such as registered partnerships?

4. If the answer to the third question is in the affirmative, then Articles 3 (2) and 7 (2) of Directive 2004/38, read in conjunction with Articles 7, 9, 21 and 45 of the Charter, require the host Member State grant the right to reside in its territory for more than three months to a same-sex spouse of a European citizen?"

The reasons justifying this move were that Romania, together with the Republic of Bulgaria, the Republic of Latvia, the Republic of Lithuania, the Republic of Poland and the Slovak Republic, are the only Member States of the European Union which do not offer any form of formal and legal recognition of the established couple relationships between the same sex.

By Judgment of 5 June 2018 in Case[27] C-673/16, the Court of Justice of the European Union (Grand Chamber) answered in the affirmative the first two questions.

Relevant is paragraph 36 of the judgment, according to which a Member State can not rely on its national law to oppose the recognition on its territory, solely for the purposes of granting a right of residence to a third-country national, of the marriage entered into by a citizen of the same sex in another Member State in accordance with the law of the latter State.

It has thus been established that the relationship of a same-sex couple is circumscribed to the notion of "private life" and "family life", with no distinction as to the relationships established between persons of different sex .

[26] http://www.loc.gov/law/foreign-news/article/taiwan-constitutional-court-rules-same-sex-marriage-prohibition - unconstitutional/.

[27] http://curia.europa.eu/juris/liste.jsf?num=C-673/16.

In those circumstances, the State is bound to ensure the protection of both categories of relations by virtue of respect for the fundamental right to private and family life guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union by Article 8 of the European Convention for the Protection of Human Rights and Freedoms Fundamental and Article 26 of the Romanian Constitution (paragraph 41).

3. Conclusions

This article aimed to draw attention to the relevant decisions of the Constitutional Court of Romania regarding the right to privacy, the evolution of its approach in the case law of the Court, and the need to bring the legislation subject to constitutional review into conformity with the Court's rulings.

Regarding the jurisprudence of the Court so far, we can note that, in its decisions, the Court has often replaced the passivity of the legislature or the parliament's refusal to regulate in accordance with the fundamental principles found in the international treaties Romania adhered to, increased attention to the necessity to comply with the Romanian legislation with the European one.

Not long ago, the Constitutional Court had to respond to challenges that generated social, sometimes institutional, discontent, but it is precisely its role - to restore the balance and supremacy of the Constitution by reconciling the law with the fundamental law.

The border between law and politics is a fragile one, and here the role of the Constitutional Court intervenes through actions designed to defeat any attempt to distort the purpose of a law so as to remind the lawmaker that its role is to pass laws respecting fundamental rights of citizens.

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