

## LEGAL ASPECTS OF THE RIGHT TO RESPECT PRIVATE AND FAMILY LIFE

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**Abstract:** *Free development of human personality and dignity, which are values proclaimed by the Romanian Constitution, right in the Article 1, can not exist without respecting and protecting married, family and private life. The right to respect and protect married, family and private life is part of the list of fundamental rights and freedom, and has a complex content. Belonging to the legal category of fundamental rights clarifies the legal character of the right to respect private and family life, but even its definition is not as clear as such. The legal aspect of family is, at its turn, complex and can be divided into two major coordinates: protecting family as a social entity by establishing legal requirements to ensure access to such status and establishing mutual rights and duties of family members.*

**Keywords:** private life, family, protection, secret, respect

### 1. Theoretical regards regarding private and family life

The notion of private life is hard to be comprised in a definition. The content of this notion is variable and still imprecisely defined in the European jurisprudence, receiving a broad interpretation on the part of judges of the Court.

The term of private life usually refers to privacy, confidentiality that every person understands to keep around. In this respect, there occur the aspects of a person's married life, activity, identity and sexual preferences and the health. Moreover, private life involves elements belonging to personal and social context, for example, a person's identification elements such as, home, name, marital status[1].

The right to the respect private life is a complex right with multiple aspects due to the jurisprudence of the European Court. It includes the right to the secret of private life, and the right to personal and sexual identity, the right to physical and moral integrity and the right to a healthy

environment. The European Court included, in this context of protection, the right to freedom of movement[2], the right of people belonging to national minorities to maintain their traditional way of life[3].

Guaranteeing this right, the Article 8 of the European Convention on Human Rights requires the existence of a family. To define this notion, both the Commission and the Court emphasized the effectiveness of family life: "from the moment of birth, there is a constitutive bond of family life between children and his parents".[4] Therefore, the notion of family was extended by the European Court "beyond formal relationship and legal orders".

The notion of family is complex, as the reality it is trying to express, because it includes a moral, emotional, social and legal dimension. Within this context, the right to respect and protect family life as a fundamental right guaranteed by the Constitution, must have a complex and multidisciplinary protection.

## 2. Legal protection of the right to respect private and family life

The right to respect private and family life is guaranteed and protected under the international law and domestic law as follows:

The Universal Declaration of Human Rights, the Article 12, establishes the following: *"No one shall be subjected either to arbitrary interference in his private, family life, home and correspondence, or attacks upon his honor and reputation. Everyone is entitled to protection of law against such interferences or attacks"*.

**The European Convention on Human Rights**, in the Article 8, provides that:

*"Everyone has the right to respect his private and family life, his home and his correspondence; no public authority shall interfere in the exercise of this right, excepting the case when this interference is required by law and represents a measure, which in a democratic society, is necessary for the national security, the public safety, the economic well-being of the country, the defense order and the prevention of crime, the protection of health, moral or the rights and freedom of people."*

**Art. 7 of the Title VII of the Charter of Fundamental Rights of the European Union** provides that: *"Everyone has the right to respect private and family life, home and communications."*

**The Romanian Constitution** within the Article 26 provides: *"The public authorities shall respect and protect married, family and private life; The individual has the right to dispose of herself, if he does not infringe the rights and freedom of the others, the public order or some manners."*

**The Romanian Constitution within the Article 27** provides: *"Home and residence are inviolable. "No one may enter or remain in a person's home or residence without his/her consent"*.

"Not at least, the Article 28 of the Romanian Constitution provides that:

*"The secret of letters, telegrams and other postal, telephone calls, and other legal means of communication are inviolable".*

In the Penal Code of Romania, in the Chapter IX of the Title I, there are mentioned the punishable offenses against home and private life as follows:

- Violation of home (art. 224);
- Violation of job headquarters ( art. 225);
- Violation of private life (art. 226);
- Disclosure of job confidentiality (art. 227);

The crime of violation of job headquarters (art. 225) is a new regulation in our penal code, being adopted in the light of the jurisprudence European Court of Human Rights, which considers that also the registered entity or business address of a person shall benefit from protection as mentioned in the Article 8 of the Convention.

The Article 225 stipulates: *"Penetration without right, in any premises where a legal person or an individual operates, or refusal to leave at the request of the entitled person shall be punished by imprisonment from 3 months to 2 years or a fine."*

The job headquarter means the premises where a person or authorized entity develops his professional activity. The New Civil Code assigns the notion of "job headquarter" (art.96), establishing that "the one who operates a site or an enterprise resides there, too".

The crime of violation of privacy (art. 226) refers to:

*"Violations of private life, without right, through photography, capturing images or recording, listening to with technical means or audio recording a person in a room, house or outbuilding, or violating a private call is punishable by imprisonment from one month to six months or a fine"*;

Disclosure, distribution, transmission or presentation of sounds or images, without assignment, as provided in the paragraph (1) to another person or to the public, shall be punished with imprisonment from 3 months to 2 years or a fine;

In the New Penal Code of Romania, it is used, for the first time, the term "private life", whose specialized doctrine is inextricably linked to the right to liberty and human dignity.

In the Gilbert Law Dictionary[5], private life is defined as *"the right to be left alone, protected by law, including the confidentiality of communications and private letters, freedom to make personal decisions, the right to enjoy private property and interests against false advertising"*.

As we said, the ECHR jurisprudence has decisively influenced the legal systems of the contracting states aligned it in the virtue of the right to respect private and family life, the right which aims mainly that the individual and his family be against the abuses and the interferences of public power.

Moreover, the right to respect private and family life generates "positive obligations" from the states that must adopt legislative measures able to block any damage of this right.

### **2.1. The right to private social life** comprises:

The right of every individual to establish and develop relationships with peers.

The European Court establishes with all clarity "that private life is not limited to an intimate circle within which everyone can live his personal life as he pleases", but includes also the right of person to establish and develop relationships with peers. In other words, the term "private life" includes professional activities, trade and communication that individuals initiate, develop and strengthen.

The right to personal development is assigned by the European Court by extending the notion of private life to "the right to know his own origins."

So, this right involves that fact that there is a social private life that completes the classic notion of private personal life.

**2.2. The right to healthy environment** is one of the most interesting jurisprudential structure of the European Court of Human

Rights by including it in the protection of private life.

This right is assigned by the Romanian Constitution, the Article 35, as follows:

"The state recognizes the right of everyone to a healthy and ecologically balanced environment;

The state shall ensure the legal context for the exercise of this right;

The individual and legal persons have the duty to protect and improve the environment."

In the context of international law, the first document that proclaimed the fundamental human right to a healthy environment was the Declaration UN Conference on the Human Environment in Stockholm (June 1972) where it was stated: "Man has the fundamental right to freedom, equality and satisfactory living conditions, in an environment whose quality would allow him to live in dignity and welfare. He has a solemn duty to protect and improve the environment for present and future generations".

The legal assignment of the right to a healthy environment was internationally done by the Aarhus Convention adopted in June 5, 1989, ratified by Romania in 2000.

In the European Community law, fundamental human right to a healthy environment is assigned by the Charter of Fundamental Rights of the European Union, the Chapter IV, the Article 37: "The European Union policies shall provide a high level of environmental protection and improvement of the quality of which will be provided in accordance with the principle of sustainable development".

The principles of the European Community law in this matter are: the principle of preventing environmental degradation; the principle of subsidiarity; the precautionary principle; the principle of correction referring mainly at source pollution; the "polluter pays"; the principle of integrating environmental issues into all Community policies.

### **2.3. Protection of family life**

**The right to marry**

Regarding this, the Article 48 of the Romanian Constitution establishes the following:

"Family is founded on the freely consented marriage of the spouses, their equality and the right and duty of parents to ensure a safe upbringing, education and instruction of children.

The terms for entering into marriage dissolution and nullity of marriage shall be established by law. Religious wedding may be celebrated only after civil marriage. Children who are born out of marriage are equal in front of law with those born during marriage. "

The Romanian Civil Code (adopted by Law no. 287/2009) includes the following important provisions in the context of constitutional provisions above:

- ✓ Art. 271: *"marriage between man and woman is done by staff and their free consent";*
- ✓ Art. 277: *"it is prohibited the marriage between persons of the same sex. Same-sex marriages concluded or contracted abroad are not recognized in Romania. Civil partnerships between persons of the opposite sex or same sex concluded or contracted abroad, either by Romanian citizens or foreign citizens, are not recognized in Romania";*
- ✓ Art. 273: *"conclusion of a new marriage is prohibited by the person who is married";*
- ✓ Art. 274: *"it is prohibited the marriage between near and distant relatives, up to the fourth degree including";*
- ✓ Art. 272: *"marriage may be done if the intending spouses have reached the age of 18" [exceptions are prescribed by law - see Article 272 paragraph (2) - (5)];*
- ✓ Art. 295: *fictitious marriage - "marriage done for purposes other than that of founding a family shall be null and void".*

In the EU Charter of Fundamental Rights, the Article 9 states: *"the right to marry and right to found a family shall be guaranteed*

*in accordance with the national laws governing the exercise of these rights."*

From this formulation, it is observed that the ECHR **dissociates the right to marry from the right to found a family**, it points out that "inability of a couple to conceive or to raise a child can not in itself be a reason to deprive him of right to marry ". (F. Sudre, *op. cit.*, p. 329).

We notice in the Charter (article 9) that it is excluded any reference to "man" and "woman", admitting implicitly homosexual marriage.

In this context, the contracting states jurisprudence leaves a wide margin of appreciation, which gives the right to regulate their own intuition in family law according to the principles of its own legal system.

The Court of Justice of the European Union stated the fact that there is no doubt that the term "marriage" designates a union between two persons of different sex", making an agreement with the National Human Rights Committee's decision of the UN, which "recognizes marriage as the union of man and woman who want to marry. "

Being a domain with a deep spirituality and sensitivity, marriage as a fundamental legal institution has surprisingly evolved during this period, compared to case-law cited above.

Thus, in the years 2012 - 2013, a total of eight European countries have enacted, homosexual marriage in their national law, due to the fact that the Catholic Church opposes such practices[6].

### **The right to respect family life**

The first issue to be clarified refers to the notion of 'family life' where we have to extract its components from, namely the notion of life and the one of family.

Family life is the essence of the legal institution called "family", meaning that concrete and obvious reality characterized by strong and stable relationships that generate and develop a unique universe, that of a real life family. In this universe, we find the connections between married man and woman (affective ties, biological,

cohabitation), and between them and their former families.

Family life, promoted through the ties of kinship, includes relationships between near relatives, especially between grandparents and grandchildren, uncles and nephews of and relationships with children born out of marriage.

On one hand, we take into consideration natural or nuclear family (built by the free consent of man and woman), but also legitimate family due to the existing family ties.

The UN Human Rights Committee defines "family not only in terms of marriage or cohabitation with a partner, but also the relationship between parents and children in general."

Moreover, in this conception, "family" means everybody who makes up a family, as it is perceived in society of the State which is a concerned party "[7]. It is to be reminded, in this context, prohibitions or impediments to marriage laws established in the states. These bans are likely to protect biological component but also the morality of marriage. In other words, you can not marry, to found a family, your relatives to a certain degree of kinship. In pre-modern Romanian law talked about "mixed blood", a circumstance which led to the prohibition of marriage between persons of the eighth degree of kinship.

About modern American family there is a particularly suggestive talk of Alvin Toffler and Heidi Tofflerin in the volume *Revolutionary Wealth* [8] as follows: "Experts show that ... nuclear family - officially defined as a father who works, a housewife and mother of two children under 18 years - had not lost seven mid-decade domination of the twentieth century. Currently, more than 29% of American households fall into this category. Single parents, unmarried couples, couples remarried (once, twice or several times) with children from previous relationships, geriatric marriages and gay civil unions recently, if not even their marriages, appeared suddenly or became public. Thus,

in a few decades, the family system turned and a new quick change is about to occur. "Forming a family, frequent abortions, sexual activity, relationships, relationship patterns, raising children and other aspects of family life change very quickly".

The European Court consecrates itself as a determinant criterion of "family life", **the effectiveness interpersonal relationship** (relationship between husband and wife and their relationship with family members).

What does this mean?

- The cohabitation of family members is, in principle, the essential (primary) condition of the effectiveness of "family life". But the European Court of Human Rights stipulates that a "family life" can exist in the absence of cohabitation. Thus, divorce or finish of cohabitation does not put an end to maintain the report itself, between parent and child.[9]
- Homosexual couples do not receive acknowledgment of family life. In this respect, the European Court (the ECHR) refuses to believe that a homosexual relationship is related to "family life" and, as a consequence, the homosexual partner is not entitled to the right to respect family life to get to the other partner's death transferred benefit or contract of lease.[10]
- During both deprived of their liberty, **prisoners have the right** to respect family life (personal and emotional relationships).

### 3. The European jurisprudence

The most important decisions of the ECHR in this field aim:

- Private life includes physical and moral integrity of the person, revealing and development of the personality of each individual in relations with peers;
- Right to private life, the right to life is protected from foreign eyes;
- Powers to secretly monitor citizens can not be accepted as legal only to the extent strictly necessary protection determined by democratic institutions and national security;

- National authorities are required to adopt positive measures to protect from disclosure of the press of private telephone conversations and, equally, to conduct an effective investigation to uncover the causes of such facts (see F. Sudre, *op. cit.*, p. 319);
  - Right to respect private life involves the right of people to have the secret regarding his health, the applicable principle of protecting personal data relating to health;
  - The right to private life includes the right to establish and maintain relationships with other human beings, especially in the emotional sphere, in order to fulfill their personalities. In this context, the ECHR unequivocally states the right of every person to have sexual life that he has chosen, according to his own beliefs;
  - Lesbian or homosexual relationships belong to private life;
  - Domestic law of each state may prohibit the public manifestation of homosexual attitudes, creating, in this way, the protection of those who do not accept such practices.
  - Right to respect family life requires the state to act so that any person could enjoy a normal family life. In this respect, it must be established an effective legal protection, particularly in terms of family relationships, meaning an equal treatment for children born out of marriage with those resulted from the marriage (to eliminate any discrimination based on origin).
  - The European Court of Human Rights assigns the principle of equal rights for children, regardless of the nature of their filiation;
  - Family life does not include only social relationships, moral or cultural, it also includes pecuniary interest. Equal economic rights of natural children to those of legitimate children involves recognition of succession rights of the former, both father and mother succession, succession and other family members, especially grandparents (F. Sudre, *op. cit.*, p. 337).
- Effectiveness of family life involves protecting the relations between parents and children, because the fundamental element of family life is the fact that the father should be together with the child. In case of separation of parents, it is about the principle that the child maintains personal relationships with each separated parent. To address the issue of family life protection, authorities of the Contracting States must adopt concrete measures, taking into account the existing realities in society:
- The alarming increase in the rate of divorce and single-parent families;
  - The existence of a large number of cases in which children are abandoned or entrusted to relatives by parents working in other cities or states;
  - The great number of families in which one or both spouses performs custodial sentences;
  - Reduced ability of states to ensure social and educational assistance for children who are in situations that require such procedures.

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