CONSTITUTIONALISATION OF CIVIL LAW: THE RIGHT TO RESPECT FOR PRIVATE LIFE AND HUMAN DIGNITY

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Abstract
Personality rights are fundamental rights and also subjective rights, enjoying double protection at constitutional and civil law level. The legal nature, the content, the limits and interferences to these rights are regulated by the Constitution, international conventions on human rights Romania is a party to and the new civil code.

Keywords: constitutionalisation, private life, human dignity, limits, interference

Introduction
The new Civil code provides new rights called personality rights or right of publicity in common law system, such as: right to life, to safety, to physical and moral integrity, rights to respect for private life and human dignity, right to one’s own image, the right to name and domicile, right over one’s own body and other rights recognized by law. In most civil law jurisdictions these rights are provided by civil codes and are generally inheritable. In common law jurisdictions these rights are generally judge-made law, non-inheritable, not clearly distinguished.

In Romania these rights were first provided by the Constitution, then some of them being introduced in civil code through the phenomenon of constitutionalisation under the form of dispersion of norms.

1. Legal features
Personality rights are the rights inherent to human beings, endowed with ratio and conscience, they are fundamental rights provided in the supreme law of a state. The features of fundamental rights suppose they are subjective rights, essential for the citizen’s life, liberty and dignity, requisite for the development of human personality, provided and guaranteed by the constitution and laws.

These rights are included into the first generation of rights, the criterion for determining a generation being their evolution. In order to include a right into one or other generation of rights it is important to determine the nature of the right, the owner of the right, the action of the owner. The first generation of human rights is based on the principles of individualism and non – interference of the state power, being designated as “negative” rights.

1 Published in the Official Gazette of Romania no. 505 of 15 July 2011; it entered into force on 1st October 2011; the personality rights are regulated in chart I, title II, chapter II of the Civil code. It is of great interest to take also into consideration the Law no. 71/2011 for the enforceability of Law no. 287/2009 of civil code, published in the Official Gazette of Romania no. 409 of 10 June 2011.
2 Revised in 2003 and published in the Official Gazette of Romania no. 767 of 31 October 2003. The rights are provided by articles 1 par. (3), 22, 26, 30 par. (6).
They have developed under a strong mistrust in the government and have evolved since then into what are now known as civil or political rights. Any humankind shall dispose of these rights since genesis and anyone shall exercise them anytime. The aim of the state power shall be limited to the general protection of the rights through a set of guarantees.

Personality rights are established into declarations of rights, such as Universal Declaration of Human Rights (article 1, 3, 6, 12) and European Convention of Human Rights (article 2, 5 par. 1, 8).

According to articles 11 and 20 of the Romanian Constitution, international conventions, treaties and covenants on fundamental human rights Romania is a party to shall have priority over the national legislation, except the case the Constitution or national laws comprise more favorable provisions. The principle of priority of application of international provisions with the exception of mitior lex is established: in other words, the national legislation remains into force, but it is not applicable to a certain case. Thus, international regulations are directly invoked before national jurisdictions, particularly when they are given supremacy over ordinary domestic provisions.

The configuration of rights of European Convention is structured as follows: the scope of application of a given right, the derogatory clause, if any, the positive or negative obligations for the states, the balance between the protection of human rights and the states’ margin of appreciation.

One may conclude that, in Romania, the level of protection of personality rights is higher than of other subjective rights, given the constitutional protection and the direct applicability of the Constitution.

Due to the process of constitutionalisation of civil law, personality rights were included into article 58 (general provisions), article 71 (right to respect for private life), article 72 (right to human dignity), article 75 and article 76 (limits) of the new Civil code. Thus, a process of soaking of civil law with directly applicable constitutional norms takes place, all public authorities and individuals being kept to obey. Even in the Constitution personality rights are clearly enumerated, the civil code uses a non-extensive and exemplificative manner of expression, the sphere of the personality rights seen as subjective rights being larger than of personality rights seen as fundamental rights.

From the civil law point of view, personality rights are personal un-patrimonial, non-inheritable, unceasible, intangible, indefeasible, directly exercised and not by representation, opposable erga omnes rights, as any absolute right.

2. The right to respect for private life

European Court of Human Rights (ECHR) acknowledged the nature of the interest within the case-law on art. 8 of European Convention, given that the article is drafted in a general manner: “private life”, includes “activities of a professional or business nature”, the “right to establish and develop relationships with other human beings and the outside world”, “a zone of interaction of a person with others, even in a public context”, the “physical and psychological integrity of a person”, the “right to…personal development”, and “the right to

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5 Rotaru v. Romania, Amann v. Switzerland, cited.


8 Peck v. United Kingdom, cited.
establish details of their identity as individual human beings”. Interests as diverse as the right to live as a gypsy, the right to change one’s name and the right to be free from environmental pollution, as well as more traditional “privacy” rights, such as protection against dissemination of personal information and images, fall within the framework of article 8.

Giving the broaden case-law of the Court on this article, some authors tried to identify sub-categories of private interest such as: three “freedoms from” - the right to be free from interference with physical and psychological integrity, from unwanted access to and collection of information, and from serious environmental pollution – and two “freedoms to” - the right to be free to develop one’s identity and to live one’s life in the manner of one’s choosing.

National courts will have to take into consideration the developing jurisprudence of ECHR in order to avoid liability in Strasbourg and to give priority to the most favorable level of protection, the state being held not to overcome the given margin of appreciation. The case-law of ECHR and the European Convention is directly applicable in the Romanian system of law according to article 20 par. (1) of the Constitution.

The right to respect for private life is regulated by article 26 of Constitution (intimate, family and private life) which states: “(1) The public authorities shall respect and protect the intimate, family and private life. (2) Any natural person has the right to freely dispose of himself unless by this he infringes on the rights and freedoms of others, on public order or morals”. As well, article 27 provides the inviolability of the domicile and residence.

This right is a complex one and it constitutes a character of human being personality, set forth by article 1 of Constitution as a supreme value. Public authorities shall undertake all possible and reasonable measures to protect intimate, family and private life of a person; no one could infringe the limits established by law, except the case the person expressly assents.

The right of the person to dispose over his own body represents one of the most natural, unassignable and indefeasible rights. Once deniable, this complex right has two limits: only the person may dispose over his own body, physical integrity and liberty; and the person exercising this right shall not infringe others’ rights, public order or the morals.

Article 71 and 73 of the civil code define the private life in a restricted manner, as included: family life, intimate life, the life in domicile, the domicile itself, the residence, the correspondence, the manuscripts, other personal documents and the information regarding private life and the aspects implicitly regulated as restraints to private life by the article 74. Correlatively to this right, the code institutes an obligation for the authorities and individuals to abstain from any interference in someone’s business or intimacy.

But the extent of the right of private life differs from person to person; the ECHR decided that the observance of private life is restricted when a person puts together his/her private and public life, as in case of politicians.

Unlike an absolute right, after establishing the content of private life right, article 75 of civil code contains the limits of this right in order to assure a balance between the observance of private life and the right to information of citizens. The limits shall be read in accordance with art. 8 par. (2) of the European Convention and with art. 27 of the Constitution.

The civil code regulates separately the right to one’s own image in art.73, as an aspect of private life, defining the content of the right in par. (2): the physical image and the voice. The right to image has a double nature: an un-patrimonial personality right and a patrimonial right in case of celebrities, in the last case being included in their patrimony.

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It results a close relation between the right for respect to private life, the right to one’s own image and the right to dignity, all constitute the content of the right to private life and establishing boundaries between them is difficult to be assessed.

3. The right to human dignity

Human dignity is an important part of the transnational vocabulary of constitutionalism and human rights, being consecrate in several primary documents of human rights: United Nations Chart, Universal Declaration of Human Rights, The American Declaration of the Rights and Duties of Man, the two covenants, Charter of Fundamentals Rights of the European Union, in some constitutional laws, such Germany, Romania, Israel, South Africa, Greece, Portugal, Poland, Russian Federation and in the case law of the constitutional courts such United State, France, Canada. In some constitutions human dignity is entrenched as an individual right. Sometimes, dignity is invoked as the basis of other human rights or as a guide to their interpretation, it is often referred to in conjunction with the values of freedom (or the free development of the person), equality and solidarity. Sometimes, it is also related to the concept of the social state, or used to ground the right to social assistance and security.

It results that dignity is a concept with different meanings given by theoreticians and by the court judgments using different cultural values. The fact that “dignity” is an important yet slippery concept has become commonplace.

Firstly, in its most universal and open sense, dignity focuses on the inherent worth of each individual (intrinsic dignity). Such dignity exists merely by virtue of a person’s humanity and does not depend on intelligence, morality, or social status. It is a presumption of human equality that each person has the same quantum of dignity by virtue of his humanity (whatever the grounding of such humanity maybe). As such, it applies universally across all cultures and peoples. Inherent human dignity is not measured by an external goal of what counts as being dignified or worthy of respect. Rather, such dignity inheres in all individuals and expresses a universal quality of people everywhere.

Secondly, dignity can express and serve as the grounds for enforcing various substantive values (substantive forms of dignity) which require living in a certain way. Dignity may require the observance of certain social norms. Communities often adopt policies to further a particular sort of dignity—to protect what are thought to be valuable forms of human behavior and morality. This type of dignity depends on conformity to social norms.

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12 The Preamble of the Chart expresses belief in the dignity and the worth of the human person.
13 The Preamble and article 1 which states: All human beings are born free and equal in dignity and rights.
14 The first line of the Preamble states: All men are born free and equal, in dignity and in rights.
15 The preamble states that “the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity”. It is also invoked within the context of socio-economic rights, grounding the notion that the state is obliged to ensure conditions which are consistent with basic human dignity.
17 Article I, Section 1 states: The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority. See for more information Vicki C. Jackson, Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse, Montana Law Review 2004, vol. 65, p. 14-40.
18 Namibia, Ethiopia, Colombia, Poland, Switzerland.
that will vary over time and in different communities. Another aspect of substantive dignity emphasizes the material conditions required for living with dignity. A number of modern constitutions explicitly protect dignity and associate this value with social and economic rights, such as rights to housing, healthcare, education, and a minimum standard of living.

Substantive views of dignity, however, may constrain choices and thereby it fails to respect the individual agency of those who have a different view of the good.

Finally, constitutional courts often associate dignity with recognition and respect. This dignity is rooted in a conception of the self as constituted by the broader community—a person’s identity and worth depend on his relationship to society. Accordingly, respect for a person’s dignity requires recognizing and validating individuals in their particularity. This dignity stands for modern demands that go beyond first-generation civil liberties and even second-generation social-welfare rights to require a certain attitude by the state and by other people. This desire to be recognized, to have the political and social community acknowledge and respect one’s personality and dignity, derives from the idea that individuals are constituted by their communities and therefore their self-conception depends on their relationship to the greater social whole. Dignity as recognition focuses on ideals of self-realization as well as third-generation “solidarity rights.”

These three concepts of dignity reflect different ways of thinking about what dignity constitutes as a legal matter. But the boundaries between these types of dignity are not impermeable, and constitutional courts will often use “dignity” in overlapping ways.

Constitution of Romania invoked dignity as a supreme value, an interpretive Leitmotiv, a basis for the limitation of rights and freedoms, and a guide to the principled resolution of constitutional value conflicts.

Unlike Constitution, article 72 of civil code provides that every person has the right to the observance of his dignity. Any interference to one person’s honor and reputation without her consent or the observance of the limits provided by article 75 is forbidden.

This right is not defined, the legislator limiting to consecrate the existence of the right to dignity, offering protection to all individuals, irrespective of their social statute or others criteria. It is not a fundamental right, but a subjective one with protection at constitutional level. Concerning the content of the right, it is narrower than the value protected by the constitutional law, being restricted to honor and reputation. These two concepts should be regarded in a tight interdependence, the honor being innate and the reputation being gained. The interferences to this right are provided by par. (2) of the article, having the form of insult or calumny. In order to constitute interference it is necessary that the fact shall be committed with intent to offend someone. The law regulates the facts which are not interferences to right to dignity; the consent of the person and the limits established by article 75.

Article 74 establishes a series of facts which constitute civil delicts, common to all three rights: right to private life, right to dignity, right to one’s own image. The drafters of the civil code used the case law of ECHR and of other states when regulating these delicts. One can summarize the civil delicts as follows: breach of the inviolability of home, the

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21 See the cases of banning the burqa in France (full veil and headscarves), the choice of a degrading profession as prostitution or pornography, abortion, the self representation for the individuals with reduced mental capacity, euthanasia, bioethics, assisted suicide.

22 South Africa, Hungary, India, Italy, Sweden.

23 Article 1 par. 3 provides: Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens’ rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed. Article 30 par. 6 provides: Freedom of expression shall not be prejudicial to the dignity, honor, privacy of a person, and to the right to one's own image.

interception of private conversations, breaching of one’s own image, broadcasting of images from a private space, keeping the private life under scrutiny, breaching of intimate, private and family life, broadcasting of information about the safety of the person, interferences to the right to a name and the right to one’s own image, using personal documents and data.

4. Limits

After enumerating the delicts, article 75 establishes the limits to these rights, seen as restrictions of their exercise in order to observe general interest. These limits may be imposed by authorities only in conditions allowed by laws, international human rights covenants and conventions Romania is a party to. The person himself may consent for the breach of his rights, article 76 regulating even the presumption of consent.

Limits on personality rights are provided as well by article 21, par. (2) from Universal Declaration of Human Rights, article 8, par. (2) and article 10, par. (2) from European Convention of Human Rights.

Other limits are established by article 75, par. (2) and they result from the exercise of other people’s rights which shall accomplish the following conditions: the exercise should be on good faith and with the observance of conventions and covenants Romania is a party to. If these conditions lack, there is abuse of law.

5. Consequences for non-observance of personality rights

Similar to France, in Romania the process of constitutionalisation is mainly determined by the direct access of an individual to the constitutional justice and the activity of interpretation made by the constitutional judge. Unlike the above mentioned states, in Spain and in Portugal this process is augmented by the individual recourse to the Constitutional Tribunal, named amparo recourse.

Consequently, direct applicability of constitutional norms contains two elements: judicial review within the citizens exercise a posteriori control and the activity of constitutional courts which realize a priori and a posteriori control. Non-observance of constitutional norms is sanctioned by an independent authority with exclusive competence to ascertain the unconstitutionality of laws. Thus, the values contained by constitution benefit from the protection offered to constitutional norms, the control of constitutionality realized by constitutional courts or habitual courts, depending of the chosen model.

The activity of constitutional justice influences different legal relations, contributing to the efficiency of guarantees of human rights of the citizens. So, rights such as of intimate, family and private life, inviolability of domicile, right to life, physical and moral integrity, principle of equality etc. constitute a set of principles for the reconsideration of the whole legislation and the orientation of judicial and administrative case law. Constitutional norms enter into the whole system of law enjoying the supremacy over the norms from other branches of law. Thus, the norms with double legal nature are protected both at constitutional and public/private law level.

As well, the non-observance of constitutional norms regarding human rights can entail the protection of European Convention or other international conventions regarding human rights. Thus, an individual, whose rights were infringed without obtaining satisfaction within the internal system of law for this breach of law, may introduce an individual plaint for indemnities to the European Court of Human Rights after he performed all internal effective procedures. European Court may recognize the infringement of the European Convention and give satisfaction for the injured damages.

Since the new Civil code entered into force, before addressing to European Court, an individual whose personality rights regulated by the civil code were injured, may introduce a complaint to the habitual courts on the basis of the delictual (tort) civil liability (article 1349 et subseq. Civil code) and special protection norms of un-patrimonial rights (article 252-257
CONSTITUTIONALISATION OF CIVIL LAW: THE RIGHT TO RESPECT FOR PRIVATE LIFE AND HUMAN DIGNITY

Civil code). Notwithstanding, national judge shall not overrun the margin of appreciation given by the European Convention of Human Rights.

The injured person, depending on the moment of the breach and its length may demand for: the banning of the breach, the ending of the breach and the banning for the future, the finding of the illicit character of the breach if it continues. The judge may dispose the reinstatement of the parts in the previous situation, such as obligation of the author to publish on his expense the condemnation decision or other necessary measures for the ending of the breach or for reparation of the damage. The injured person may also introduce an action for the indemnities or for the reparation of the prejudice, even un-patrimonial against the author of the breach, being applicable the dispositions for the delictual (tort) civil liability.

For the protection of an un-patrimonial seriously and immediately harmed or threaten right, the injured person may ask to the judge for provisional measures until the introduction of the complaint.

Conclusions

We can infer that personality rights, as inherent rights to human nature have the same characteristics of all rights under natural law. Some of personality rights are fundamental rights enjoying the constitutional and conventional protection through the activity of constitutional justice and of European Court of Human Rights. The protection is also assured by the provisions of Civil Code, the delictual (tort) liability and the special protection of un-patrimonial rights offered by article 252-257. The subjective personality rights benefit only from the protection offered by the civil code.

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