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**“BLASPHEMY AND OTHER LIMITATIONS TO THE
FREEDOM OF EXPRESSION”**

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“Freedom of conscience”

REPORT BY

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“Freedom of conscience”

I. Introduction

The Romanian legislation does not lay down specific rules on blasphemy and the Constitutional Court has not been notified in this regard. Related however to this issue, which concerns both the freedom of expression and the freedom of conscience and religion, I have chosen to refer in this study to the cases dealt with by the Romanian Constitutional Court, cases in which the authors have relied upon the constitutional provisions relating, in particular, to the freedom of religion. I have come with this proposal because the decisions to which I shall refer have been pronounced in situations which have given rise to controversy and recently to the decision ascertaining the unconstitutionality of the National Education Law.

First, I will make a short presentation of the constitutional and legal framework of reference. I shall refer to three of the areas/rights in connection with which it was invoked the freedom of conscience/religion: health, elections and education.

II. Regulation of the freedom of conscience in Romania

Article 29 of the Constitution of Romania, entitled freedom of conscience regulates all together the freedom of thought, opinion and religious belief.

In the view of the Romanian constitutional legislature, the freedom of conscience is the individual right to have and to express in private or in public a particular conception of the world around, to share or not to share a certain belief, to belong or not to belong to a religious belief, to fulfil or not to fulfil a ritual under that belief.

The largest regulation in the overall constitutional text mentioned above belongs to the freedom of religion. Thus, the text enshrines:

- prohibition of coercion to adopt an opinion or to join a religious belief;
- freedom of religious denominations and organisation thereof according to their own statutory rules, in accordance with the law;
- prohibition of any form, means, act or action of religious enmity in the relations between cults;
- religious cults' autonomy in relation to the State;
- State's obligation to support religious cults also by facilitating religious assistance in the army, hospitals, prisons, homes and orphanages;
- right of parents or legal tutors to ensure, according to their own convictions (also religious), the education of children who are minors.

From amongst all constitutional provisions, the cited rules on freedom of religion relate in particular to those of:

- Article 4 paragraph (2) which states that *“Romania is the common and indivisible homeland of all citizens, without any discrimination on account of [...] religion”*;
- Article 6 paragraph (1) *“The State recognizes and guarantees for persons belonging to national minorities the right to the preservation, development and expression of their [...] religious identity”*;
- Article paragraph 16 (1) *“Citizens are equal before the law and public authorities, without any privilege or discrimination”*;

- Article 32 paragraph (7) *“The State ensures freedom of religious education, subject to the specific requirements for each denomination”*;
- Article 48 which refers to religious marriage;
- Article 53 governing the conditions for the restriction on the exercise of certain rights and freedoms.

Moreover, pursuant to Article 20 of the Constitution, which enshrines the constitutional interpretative value of international human rights instruments to which Romania is a party and their priority when they contain more favourable provisions, the constitutional rules are linked with the provisions of international instruments which enshrine the freedom of religion. I consider as particularly relevant the Universal Declaration of Human Rights¹, the European Convention for the protection of human rights and fundamental freedoms² and the Charter of Fundamental Rights of the European Union.³

In the application of the constitutional principles and based on the international instruments referred to, Law no.489/2006 on the freedom of religion and the general regime of cults⁴ defines freedom of religion as including *“the right of every person to have or to adopt a religion, to express it individually or collectively, in public or in private, through specific rituals and practices, including through religious education, as well as the freedom to preserve or change one’s religion”*. The law also establishes that *“the freedom to express religion beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society for public security, for the protection of order, health or morals, or for the protection of human rights and fundamental freedoms.”*

Religious freedom is also protected by the rules set forth in the Criminal Code⁵, i.e. under Title VIII — Offences affecting social relations, in a separate Chapter — *Offences against religious freedom and the respect due to deceased persons*. Within the said Chapter, the following are punishable as offences against religious freedom: *Hindering the exercise of religious freedom* (Article 381 of the Criminal Code) and *Desecration of places or objects of worship* (Article 382 of the Criminal Code).

As regards the offence of hindering the exercise of religious freedom regulated by Article 381 of the Criminal Code (having as correspondent “hindering freedom of worship” provided for by the Criminal Code of 1969), this occurs, in the simple form, in two alternative ways, consisting of hindering the free exercise of the ritual of a religious cult, which is organised and operates in accordance with the law, or disruption of the free exercise of a religious cult, which is organised and operates in accordance with the law.

1 Article 18: *“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”*

2 Article 9: *“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”*

3 Article 10: *“(1) Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. (2) The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.”*

⁴ Republished in Official Gazette of Romania, Part I, no. 201 of 21 March 2014

⁵ T. Toader, M. SAFTA, *Libertatea religioasă între consacrarea constituțională și protecția penală*, International Conference *“Dreptul între modernizare și tradiție”*, Bucharest, 21-23 April 2015, Hamangiu Publishing House, 2015, pp. 407-413

The criminalisation text provides for two aggravated forms, consisting of compelling a person to attend the religious service of a cult or to carry out an act linked to the exercise of a cult, or compelling a person, through violence or threat, to perform an act prohibited by the cult, organised according to the law, to which he or she belongs.

III. The case-law of the Constitutional Court of Romania on the freedom of conscience in its component on freedom of religion

1. The regulations in the field of health — an approach from the perspective of freedom of religion

1.1 The compulsory health insurance does not infringe the freedom of conscience and religion

The Constitutional Court was notified with the exception of unconstitutionality of the provisions of Law no.95/2006 on health reform concerning the compulsory health insurance.⁶ These provisions have been criticised, inter alia, in the light of the provisions of Article 29 (1) of the Constitution on unrestricted freedom of thought, conscience and religious belief. It was deemed as unconstitutional the obligation to contribute to the health insurance system where personal beliefs would prevent a person to get treatment in cases of illness.

Dismissing as unfounded the exception of unconstitutionality⁷, the Court found that the contested rules do not lay down any obligation for a person to adopt a certain conduct on his or her state of health, which would be contrary to his or her religious beliefs. They establish a general and neutral duty to contribute to the health insurance fund so that the State can fulfil its constitutional obligation to take measures for ensuring hygiene and public health. It is also an expression of the social nature of the Romanian State, which includes, inter alia, participation of all citizens in ensuring the exercise of the rights by and the welfare of all other people. In this respect, the Court noted that “the social health insurance scheme can achieve its main objective due to the solidarity of the contributors, so that Article 208 (1) e), (3) and (6) of Law no.95/2006 is in fact an expression of the constitutional provisions on the protection of health and which enshrines the obligation of the State to ensure the social protection of citizens”.⁸

1.2 The rules on the national health insurance card do not infringe the freedom of conscience and religion

The Constitutional Court was notified with the exception of unconstitutionality of the provisions of Law no. 95/2006 on health reform with regard to the “*national health insurance card*”.⁹ The author of the exception argued that these provisions are contrary to the constitutional provisions of Article 29 (2) on freedom of conscience since “they establish an obligation without any alternative to the acceptance of such electronic health insurance card”. There should be an alternative to the national health insurance card by virtue of the right of option of citizens who refuse this document, on grounds of conscience or religion.

Having examined the exception of unconstitutionality, the Court held that the legal provisions subject to criticism have been amended after the notification to the Constitutional Court, and the legal solution criticised by the author of the exception has no longer been enacted.¹⁰ According to the new legal content of Article 212 (1) of Law no.95/2006, “*The*

6 Published in the Official Gazette of Romania, Part I, no. 372 of 28 April 2006.

7 Decision no. 1.362 of 18 October 2011, published in Official Gazette no. 39 of 17 January 2012

8 Decision no. 838 of 24 June 2010, published in Official Gazette of Romania, Part I, no. 566 of 11 August 2010

9 Published in the Official Gazette of Romania, Part I, no. 372 of 28 April 2006, as subsequently amended and supplemented

10 By Government Ordinance no.11/2015 amending and supplementing Law no.95/2006 on healthcare reform,

documents certifying the status as insured person are, as the case may be, the certificate issued by the care of the insurance agency where the insured is registered or the document resulted when the providers that are under contract with health insurance agencies access the electronic tool made available by the National Health Insurance Agency. After the implementation of the provisions of Title IX, these supporting documents are replaced by the national health insurance card, or the certificate with a validity of 3 months for persons who expressly decline for reasons related to conscience or religion the receipt of the national card. [...]". At the same time, under the second sentence of Article 330 (2) of Law no.95/2006, as amended by Government Ordinance no.11/2015, in order to enable the persons who expressly decline for reasons related to conscience or religion the receipt of the national card to prove their status as insured person, a certificate shall be issued with a validity of 3 months, as provided for in Article 319 (b¹), which provides that such certificate is *"the document attesting the capacity as insured person, valid for a maximum of 3 months from the date of issue, for persons who expressly decline for reasons related to conscience or religion the receipt of the national card, the model of which is established by order of the president of the National Health Insurance Agency"*.

As a result, given that after the notification of the Constitutional Court, the impugned legal texts were modified in line with the claims made by the author of the exception, the complaint has become devoid of purpose, and the exception of unconstitutionality was dismissed as inadmissible.¹¹

2 Regulation of the right to vote from the perspective of the freedom of conscience/religion

The Constitutional Court was notified with the exception of unconstitutionality of the provisions of Article 34 of Law no.3/2000 on the organisation and holding of the referendum, criticised in relation to the rules set forth in the Constitution and in the Conventions for the purpose to guarantee freedom of thought, conscience and religion, on the one hand, and the right to vote, on the other hand. It was invoked the discrimination on grounds of religious affiliation, as citizens whose weekly day of prayer is Saturday were prevented to participate in the referendum on the dismissal of the President of Romania held on 19 May 2007, Saturday, from 8.00 a.m. to 8.00 p.m. As by Article 1 (3) of Resolution no.21/2007 of the Parliament of Romania, Saturday was established as the day of the referendum for the dismissal of the President of Romania, and given the time interval set forth in the impugned legal text, the followers of this cult were prevented to vote in the referendum organised then, as they had to meet their religious obligations during the whole Saturday until sunset.

The Court dismissed as unfounded the exception of unconstitutionality.¹² The fact that, by the organisation and conduct of the referendum for the dismissal of the President of Romania dated 19 May 2007, regulated by a law of general application covering all citizens of the country, the followers of a religious minority in Romania were unable to effectively exercise their right to vote, in exchange choosing to fulfil their religious obligations and cult-related practices, within the same time interval, cannot be construed as a ground of unconstitutionality of the provisions of Article 34 of Law no.3/2000 or as a restriction of voting rights or exercise of freedom of religion. In accordance with Article 29 (5) of the Basic Law *"Religious cults are autonomous of, and shall enjoy support from the State [...]"*, but they are to be organised according to their own statutory rules, under the conditions set out by the law, without distorting the legal order of the State or infringing upon citizens' fundamental rights and freedoms.

published in Official Gazette of Romania, Part I, no. 84 of 30 January 2015

11 Decision no. 105 of 3 March 2015, Official Gazette, no. 273 of 23 April 2015

12 Decision no. 845 of 3 June 2009, Official Gazette, no. 524 of 30 July 2009

The importance of a referendum or of elections organised at a given moment in a State is obviously overriding in terms of the general interest the limited group or individual interest proclaimed by some religious minority, so that the followers of such a cult cannot justifiably claim that the organisation of national elections must take place according to the practices of that cult. In electoral matters, and not only, the legislature takes into account the general interests of society and cannot legislate depending on the option of every citizen. At the same time, this legislative policy cannot be construed as discrimination on the grounds of religion, as claimed by the author of the exception, since it represents the natural mechanism of a democratic and social State governed by the rule of law, where citizens' rights and freedoms are protected in such a way as to achieve a reasonable balance between the general interests of society, on the one hand, and the individual rights and freedoms, on the other.

The Court also noted that the criticism of the author of the exception is rather an issue of practical nature as regards the organisation of the referendum of 19 May 2007 and not an issue of unconstitutionality against the provisions of Article 34 of Law no.3/2000 on the organisation and conduct of the referendum which would be of the competence of the Constitutional Court. Moreover, the date and the time of the referendum were established by resolution of Parliament, and not by the impugned legal text, which is a text of principle and of general application.

3. The right to education and the freedom of religion - teaching religion in schools

The Constitutional Court was notified with the exception of unconstitutionality of the provisions of the National Education Law no.1/2011 concerning the possibility that the pupil does not attend religion classes provided that a request in this respect is made in writing by the parent, the legal guardian or the major pupil.¹³

As grounds for the exception of unconstitutionality, it was claimed that these provisions violate the right to freedom of thought, conscience and religion, both of the pupils and of his or her parents. The legal provisions subject to criticism enable parents to request in writing non-attendance of these classes by the pupil, but this rule does not cancel the obligation to study religion, as until such written request, the child is required to attend religion classes.

The Court upheld the exception of unconstitutionality and found that the way in which the legislature has regulated the educational offer relating to religion is likely to affect freedom of conscience. Thus, according to the provisions of Article 29 (1) of the Constitution, individuals are entitled to unrestricted freedom of thought, conscience and religious belief, which gives consistency to the free development of human personality as a supreme value guaranteed by Article 1 (3) of the Basic Law. At the same time, according to Article 32 (5) of the Constitution "Tuition at all levels is conducted in public, private, or confessional schools, according to the law", therefore religious education concerns both religious education institutions organised by cults for training own staff in accordance with the law, and religious education in public schools, as well as respect for the right of parents or legal tutors to bring up the minor children according to their own convictions. This framework is set up to ensure the protection of each individual's religious beliefs.

The Court found that the Basic Law guarantees the parents' right to care for and educate their children and includes the right to religious education. Therefore, their right to transmit to their children their own beliefs relating to religious issues is paramount. In addition, parents have the right to keep the children away from religious beliefs. But this right of education does not pertain solely to parents, whereas the State, entrusted with the control over the entire school system, autonomously and concurrently assumes its own mission of education, in a correlative relationship with the parents.

13 Published in the Official Gazette of Romania, Part I, no. 18 of 10 January 2011.

The Court has distinguished between the negative obligation of the State not to intervene in forming or joining a conviction or religious belief, and the positive obligation that, insofar as the individual expresses his/her will to study or to attend the teachings of a certain cult or religious belief, create the legislative and institutional framework necessary to the exercise of the rights provided for by Articles 29 and 32 of the Constitution.

The Court held that in no case a person may be placed *ab initio* in the situation to defend or protect freedom of conscience, because such an approach would be at odds with the obligation of the State, which, by virtue of that obligation cannot require the study of religion. Therefore, only once the major student or the pupil's parents or legal guardian expresses the will to study the philosophical concepts specific to a certain religious worship, the State must comply with its positive obligation, i.e. to ensure that the necessary framework.

Upon enacting the regulations in the field of education, the legislature must take into account the fact that Article 29 (6) of the Constitution guarantees the right to religious education and not the obligation to attend religion classes. In this respect, the free choice necessarily implies the person's own initiative in terms of attendance of religion classes and not the tacit consent or outright refusal.

To fully respect freedom of conscience and religion, which includes the freedom to either belong or not to a religion, enshrined in Article 29 (1), (2) and (6) of the Constitution, the legislature is bound by an obligation of neutrality and impartiality. This obligation is fulfilled if the State sees to the compliance with these freedoms, enshrining the parents, legal representatives of minor pupils, adult learners' possibility to request attendance of religion classes.

IV. Conclusions

The above legislation and case-law review illustrates the importance which the Romanian legislature attaches to the religious freedom in all its components. As a general remark, I consider that exercise of the freedom of religion should be organised by the State authorities so that the expression of inner beliefs does not affect the fundamental rights and values. In other words, the constitutional rules do not guarantee an individual's absolute right to behave in public in accordance with his/her own beliefs. Consequently, conscience cannot constitute a basis for non-compliance with legal obligations, such as, for example, the obligation to contribute to the social security system, especially since such an obligation is established based on neutral criteria, which are not related to religious beliefs, the right to vote, the right to education, the freedom of expression.¹⁴

As regards the specific issue of blasphemy, the Romanian legislation does not contain a separate regulation in this respect. The current international debates, highlighted also during this conference, pave the way for development of the law in this regard. Moreover, the last initiative for revision of the Constitution has contained a proposal for a more comprehensive regulation of the freedom of conscience and religion. It was thus proposed the amendment of paragraph (4) of Article 29 of the Constitution in the sense of prohibiting any form, means, act or action of religious enmity, and not just those "in the relations between cults" as laid down in the current constitutional text.

¹⁴ T. Toader, M. SAFTA, *Libertatea religioasă între consacarea constituțională și protecția penală*, International Conference "Dreptul între modernizare și tradiție", Bucharest, 21-23 April 2015, Hamangiu Publishing House, 2015, pp. 407-413