

## CONSIDERATIONS REGARDING THE APPLICATION OF ART. 26 OF THE ROMANIAN CONSTITUTION IN RELATION TO THE MATERIAL REALITIES OF THE AVERAGE CITIZEN

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***Abstract:** We are living in bizarre context of global capitalism or as other academics took to calling it, neoliberalism. This specific context has resulted in atrocities that we came to accept as realities of the market and necessary evils. In this article, we shall observe how the oath taken by the Romanian government through the gaze of constitutional law is broken by conditions that go far beyond the life of the average person or even the national economy.*

***Keywords:** constitutional law, neoliberalism, Gilles Deleuze, Hannah Arendt, family law.*

### 1. Introduction. *When it doesn't start with a kiss*

Law is a complicated business for lack of better words. Whenever we observe the application of law results may vary. In some instances, law is mired with the practical issue of the parties that must respect and suffer the effects of applied law. Constitutional law is regarded as the backbone of rights and obligations with which the citizenry is imbued. The issue lies in the parties of the legal relation. On one hand, the citizen is bound to respect the rights of others which gives birth to obligations of a social nature. By such logic, the state must respect the rights that they provide to individual citizens. In this specific context, the state is both bound to offer and to respect certain liberties and rights granted to its citizens and strip such rights from those who disobey the laws of the land. Article 26. of the Romanian Constitution grant the right to private life, more specifically, “Public authorities respect and protect intimate, the familial and private life”. This statement looks suspiciously simple and clear on its surface, however, there are many fundamental issues to such a declaration.

Firstly, we must separate the specific issue that this article tries to present, mainly, how does this right of the citizen manifest in the form of an equivalent obligation towards the citizen. In order to have a better grasp regarding this obligation, we might as well deconstruct the article in itself. The public authority is a notion used for all state institutions and fact simile of such government functions. The life in question is that of individual citizens and that of family units that are considered by most legal scholars as the nucleus of all society. By the notions of intimate, familial and private life we understand that a citizen has the right to live a life as set person sees fit. The true issue comes in the form of the action. The idea of respecting and protecting the life of the citizen has come under fire in recent years. The main issue that has come to light is the private, intimate and family life of LGBTQ+ people. Both in the Coman-Hamilton decision and in the Buhuceanu decision, decided by different courts, has pointed out that gay couples should have the right to form a familial unit of sorts.

In the Coman-Hamilton case, a homosexual couple formed of a Romanian national and an American citizen asked for permission to gain residency for the latter husband (<https://romania.europalibera.org/a/adrian-coman-rezolutie-parlament-european/31460028.html>). The public authorities denied such a request basing their decision on article 277, points (2) and (4) of the Romanian Civil Code.

Point 2 of the article states that “Marriages between same sex people, officiated in a foreign country by a Romanian citizen will not be legally recognized on national soil”. The Constitutional Court of Romania decided that article 277 is partly unconstitutional as it impedes of the rights of Romanians to private life in Decision 534/2018. In the case of Buhuceanu, the stated person and another 20 other couples have sued the Romanian state at the European Court of Human Rights. The point of the lawsuit was to prove that the lack of rights to marriage or the lack of civil partnership as a legal institution infringes on the constitutional right to a private/intimate/family life. We see a similar situation that is argued on different terms than the decision of the Constitutional Court. The decision of the ECHR was just affirming the previous decisions in cases such as *Olari and Others v. Italy* (18766/11) or *Fredotova and Others v. Russia* (40792/10).

In all three cases, the court cites that article 8 of the Declaration of Human Rights as imposing on all signatory countries that they must provide freedom to individuals to have family lives. By not offering the right to form a family to people of different sexual orientation, the states are infringing upon the rights of their citizens. In a broader sense, such trials lead to the inclusion of civil partnership as an institution or to radio-silence from the states.

In these two instances we notice the fundamental issue of granting civil liberties and rights by any state. The state has to offer the rights and protect them, but due to historical and cultural conditions the state might do a poor job in practice. This space of interpretation leads to a plethora of incongruences in national and international law.

## **2. All along the watchtower**

In a more concise way, who watches the watchmen? Who is there to grant the rights that are supposed to be protected by the state when international courts and conventions can't benefit from the brutality of a police force or an active military? We must be precise here; I am not asking for the ECHR to get a standing military. However, I believe that the simple decision of the court or the signing of a convention is a feeble excuse of a greater warranty than those afforded by any state. A signature is not a shield, is a scrape of ink laid upon paper by a politician representing a country. The alienation and the distance between a person and that convention is crushing. The best explanation of this is presented by Hannah Arendt in her seminal work, *The Origins of Totalitarianism*. In chapter 9, she fundamentally dismantles the notion of human rights in a manner that no jurist had or will ever do.

To get specific, Arendt identifies the issue of ethnic minorities that occurred after the first world war. In her words, many people were left without a state to call their own. Due to the changing landscape of Europe, the new ethnic groups had to survive by the mercy of new nation-states that would sign a minority treaty (Arendt, p.270). By these treaties, a state would act fairly and give certain privileges towards minority groups residing on their territories.

As Arendt elaborates, these treaties were guaranteed by the western powers in Eastern and Southern Europe and by the League of Nations. Arendt spells out the fact that a convention

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is just a piece of paper and that an international institution has as much legitimacy as the states participating in any convention gives set organization (Arendt, 272)

In that specific historical context, the nationality of a person bound them to the state of belonging. As such, the ethnic minorities of Eastern and Southern Europe were never meant to be full citizens of the country that they reside in (Arendt, 275). These formulae were abandoned after WW2 but they were not fully erased from the collective consciousness of European political forces. This reality of laws being difficult to apply when the state is both the donor and the guarantor of such rights can be applied to all constitutional law regardless of country. Article 26 in itself is not the problem, the problem is the alienation occurring between the beneficiary of set rights as granted by a constitution or a treaty, and the state in charge of both administrating and delivering set promise.

We saw an example of how internationally recognized rights can be poorly applied by states manifest in the above-mentioned case law. The laws are nothing but suggestion in the absence of potentiality which ensures both the respect and the enjoyment of rights and obligations. Another problematic aspect that is rarely tackled by jurists of all nations is the material conditions in which the legal dialectic between state and subject take place. The issue that we must tackle now is that of material conditions and how they shape the possibility of a family/intimate/private life.

### ***3. Do the evolution!***

As humanity progressed in technological and social terms, humanity has shifted the way that they live substantially. These shifts are bound to modify the human as a beast and as a concept. If we were to ask a wealthy American what a human is in the 18th century, they would describe an Englishman. The same question proposed in our current age would widen to all humanoid formations of matter, and in some instances, they would extend empathy to animals as intelligent forms of life detaining some semblance of rights. We went from nomad tribes, to villages, to city states, to states, empires and now in the global paradigm of international trade routes solidified by neoliberal values as birthed by Raegan and Thatcher. This evolution has brought obvious benefits but also detrimental aspects to the many selves that form a society. The main defect of all modern lives is that of alienation.

By the term alienation we of course mean it in the Marxian sense of the word. In the process of creating money and economical systems a separation appears between the owner and the owned good (Marx, p.75). This alienation is transferred to the psyche of humans. Beyond being alienated from day-to-day goods from the lack of knowledge of their origin, we alienate ourselves from others. In many instances, we may alienate ourselves from the self. A loss of personal identity is bound to happen in the context of poor economic conditions as we are headed to strange times.

In a neoliberal paradigm, alienation is the standard state of all happenings. We have Korean televisions, exotic fruits in the markets, foreign films that have no connection to our phenomenology and any other commodity one may “need”. Are these luxuries a bad thing into themselves?

No, and yet, this fundamentally dissolves the structures that were valid and lively less than half a century ago. In ye olden days, if a person wished for a chair, they had to build one. As society evolved a carpenter appeared to handle all the needs for chairs and other wooden furniture. This allowed individuals to specialize. A symbiosis of workers emerged under a bourgeois whip. Each person knew their little sector and excelled in it.

We can boldly state that in this context of evolution there are no better authors to present the metaphysical aspect regarding labor than Deleuze and Guattari. In their seminal work, *A Thousand Plateaus*, they dedicate a whole chapter to the way that society is segmented. This segmentation is done in a circular fashion (Deleuze, Guattari, p.209).

Just as primitive people would sit around a fire and form circles, our world functions in similar models. A concentric source of power extends in different rings fulfilling different roles. The individual can shift their position in regards to the center of power in some instances.

Another manner in which society is segmented is linearly. In a linear segmentation, proceedings follow one another in order to form a chronology of events. These linear structures can easily be applied to the way that we apply laws. After a deed is committed or a juridical issue arises, the normal proceedings are followed and the necessary steps are taken to achieve a solution (Deleuze, Guattari, p. 210).

These two forms of segmentation are not mutually opposing and the circular forms of segmentation is not always concentric to the same power nucleus. These forms are more so put in place in order for us to have a grasp regarding a vast interconnected landscape of many moving parts.

In this cacophony of geometrical figures representing the hierarchical functions of society, the segments can be rigid or supple. A rigid segment is set in stone while a supple segment allows for passage of the individual or idea through its form or membrane.

We observe segmentarity in our modern cities and the way that the global segments intersect, crash into each other, reconstruct, deconstruct, become rigid and how these movements form the places that we reside in. To understand the material conditions of the average Romanian citizen is not to just state that the economy is not doing good. The main point of contention that we can finally analyze is the way cities are built.

#### **4. 21<sup>st</sup> century schizoid man**

One deeply cumbersome result of the global market, and inherently, of the world-finance structure is the lack of work in local areas. Law 350/2001 is the legal frame of urban development and city planning. From article 1, point 5, the law states that: “The management of the territory aims to ensure individuals and collectives the right of equitable, responsible and efficient use of the territory, adequate living conditions, the quality of architecture, protection of the architectural, urban and cultural identity of urban and rural localities, working conditions, services and transport that responds to the population's needs and resources, reducing energy consumption, ensuring the protection of landscapes both natural and built, biodiversity conservation and the creation of ecological continuities, public security and sanitation, rationalization of travel requests.”

This in a sense is the *modus operandi* of the law. A big sprawling declaration of the many issues that any decent legislator would have in mind when planning the law that is used

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to plan cities. The simplest analysis of such imposed and guaranteed ideals proves that the state is lacking in regards to their own obligations.

In the sense of economic prosperity, Romania has been on the up and up. According to a study coming from the World Bank, the economy of Romania has been growing for years and the recovery from covid was relatively swift. However, this growth is linked to consumption. There is a clear decline in essential sectors such as production and agriculture (World Bank, p.23). In more clear terms, a consumption economy is unsustainable.

Another issue that is slowly gnawing at the social fabric is migration. Due to the previously stated issue of a consumption economy, people are having a hard time finding any sort of employment. This factor leads a whole population of able body workers to seek for better salaries. Even based on these factors we can see the Romanian state has failed to fulfill the promise of the social contract as manifested in constitutional law. This is not an issue specific to Romania. All states are having some sort of infrastructural failure that creates classes of people condemned to alienation in rigid segments.

In a perverse twist of faith, the holistic structure of economical markets has created the conditions to take the situations experienced by ethnic minorities in Eastern and Southern Europe in the interwar period from a particular expression of oppression to a universal state as felt by all working-class people.

It's not the individual elements or some curse bestowed by an alien entity. It's the little cracks in the whole machinic assemblage that result in failures of all sorts. In themselves, both article 26 and law 350/2001 are great pieces of legal writing, however, the whole structural functions fail to meet the criteria the laws impose on the state and its citizens.

The poor state of infrastructure leads the average Romanian to spend hellish periods in transit (<https://pressone.ro/infrastructura-romaniei-de-ce-nu-avem-autostrazi-si-cai-ferate-moderne-dar-si-de-ce-romania-din-2030-va-fi-mult-diferita>). These waiting periods unavoidably result in the loss of all important resources mentioned by law 350/2001. It leads to a waist of energy and unnecessarily so. Even if projects are undergoing there is a precedent for the political class to never fully deliver on promises.

There are severe problems regarding the thermal insulation and the access to warm water in urban areas (<https://newsweek.ro/actualitate/termoficare-din-romania-ciur-mii-de-apartamente-ingheata-in-bucuresti-craiova-timisoara>) and in rural areas there are places that don't have access to water at all (<https://www.zf.ro/eveniment/romania-profunda-jumatate-din-populatia-moldovei-nu-are-acces-la-apa-22500078>). Under these conditions, the population is denied the right to have rights. In the absence of elementary living conditions, no citizen can benefit from the protection of rights that are not allowed to be born.

All of these little cuts in the body of society result in a deep dissonance between the law and the application. The law becomes a gathering of letters on paper in the absence of greater planning and continuity regarding national, local and familial projects.

Due to what can be called a tumultuous political evolution since the 2008 market crash, most nations have to face the absence of continuity and clarity in the face of many coming crisis, be them economical, ecological, immigrational in nature. No matter how we approach this issue, there seems to be no quick or simple solution to the crisis of national economies.

In the specific case of Romania, we depend on foreign commerce as most nations do nowadays. In a better-balanced global market, it would not be an issue. In the current volatile and war thorn state of the international economy, the lack of national production of most things becomes a huge problem which, again, lead to a failure of the state keeping it's promise.

## 5. Conclusions. *Barbarians/Overseas*

The few issues that we have presented are not solitary or unique. There are many more issues that we could address but it would lead us to the same conclusions. There are issues regarding working conditions, health care access and many other domains. All of these issues come back too the lack of material conditions and the absence of good planning at both national and local levels.

In Romania, these material conditions make article 26 and all connected laws impossible to apply or respect in all aspects. The promise of freedom that was gained in the 89 revolution is broken by petty political squabbles and precarious economic conditions. All populations owe themselves and their ancestors to live fulfilling lives as communities and as individuals. The many forms that power takes are in continuous dissonance. In this landscape, the average citizen is deprived from the right to have rights. The average citizen is deprived of the potential to form a family and to have an actual intimate or personal life in the struggle for survival. No person is free unless all humans are.

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