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# CRITIQUE OF AN EPITOME PRACTICAL ROLE OF LAW CLINIC IN CLINICAL LEGAL EDUCATION IN NIGERIA

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**ABSTRACT**

*The old legal tradition of great / heavy reliance on theoretical legal learning appeared hitherto the order of the day in Nigeria. Learning is a continuous process and education is crucial for the passing of knowledge. Contemporarily, one of the most effective methods of passing impactful legal education more effectively is vide Clinical Legal Education (CLE). CLE was introduced into the Nigeria legal education space as a result of the fact that learning in law faculties was essentially by the archaic (rote method) of teaching, passing on few skills and inculcating no worthwhile values. A significant upshot of CLE is the operation of law clinics. These law clinics serve as a bridge between the classroom and legal practices. Apart from law students put into practical action on what they have learned in the classroom, they also help the students to serve as a bastion of legal aid for the legally disadvantaged by offering paralegal supports to a greater extent. This paper examines the role and significance of law clinics in CLE, with particular focus on the University of Ilorin Legal Aid Clinic. Through a doctrinal examination of the activities of the law clinic and its achievements, the paper finds that law clinics do in fact contribute immensely to the actualization of the goals of CLE. The paper further interrogates the challenges that militate against the operation of law clinics and CLE in Nigeria and offers recommendations on how they can be resolved. It is found that there is the urgent need to ensure practical implementation of the mainstreaming of CLE in Nigerian law faculties to keep pace with international best practices for the development of the legal profession in Nigeria.*

**KEYWORDS**: *Legal Aid, Clinical Legal Education, Law Clinic, Clinician and Nigeria*

## INTRODUCTION

*The purpose of education, especially legal education, is to pass information and instruction from teacher to student, with the ultimate purpose being to produce subsequent sets of legal practitioners well equipped for practice. Many theories and models of education have been developed to ensure the effective education. Unfortunately, many of these continue to be inefficient and unsuitable to the effective actualization of the ultimate goal, to produce multi-talented lawyers with deep skills.*[1]

*Elucidating on the troubling state of affairs, Adekoya, stated in her 2006 report at the Summit on the Future of Legal Education that:*

[1]B.A. Nsamenang, *Teaching Methods*, in B.A. Nsamenang & M.S.T. Tchombe, (eds) *Handbook of African Educational Theories and Practices: A Generative Teacher Education Curriculum,* Presses Universitaires d'Afrique, Cameroon, 2011, pp. 289 – 302.

*in both the university and at the Law School, subjects are taught by rote, with students being given handouts and lecture notes. Independent research is not often encouraged, and the facilities for it are virtually non-existent".*[2] *This situation "led to the need to devise new methods of skills training in order to produce a new generation of competent lawyers with a level of practical experience that will enable them to be responsive to the needs of the society".*[3]

*It was to this end that Clinical Legal Education (CLE) was developed as a panacea to the problem. At the end of the 2006 Summit on the Future of Legal Education, it was proposed that practical/clinical training be introduced into legal education.*[4]

*Since its steady introduction in 2003 alongside the establishment of the Network of University Legal Aid Institutions (NULAI), CLE has continued to grow in Nigeria. This paper proposes to x-ray the development of CLE in Nigeria, with emphasis on the increasing significance of Legal Aid Clinics (Law Clinics) to the practical education of law students. The paper especially focuses on these developments through the myriad of the activities and achievements of the University of Ilorin Law Clinic.*

## 1. CLINICAL LEGAL EDUCATION IN NIGERIA

Although there is no consensus as to the definition of CLE especially that the existing definitions are often representative of the experiences of the authors. Some attempts made by authors at the definitions of CLE are as follows. Woodruff and Bucker posited that "*clinical legal education is a method of training law students by putting them in situations where they must apply legal theory, principles and doctrines they have studied in a class room setting*".[5] Another author, Grimes, described the concept to mean:

> *a learning environment where students identify, research and apply knowledge in a setting which replicates, at least in part, the world where it is practiced ... it almost inevitably means that the student takes on some aspect of a case and conducts this as it would… be conducted in the real world.*[6]

Grimes' definition seems to view CLE through the prism of a hypothetical environment where students apply knowledge they have gained in the traditional classroom setting. However, the definition proposed by Woodruff and Bucker is much closer to the ideal of CLE as a mechanism that allows students apply classroom lessons in a *real* environment. Reinforcing this position, Sun defined CLE as:

> *a new pattern of legal education that uses the form for reference that medical schools use with clinics to cultivate interns, to introduce the pattern of clinical education to legal education. In an actual or suppositional legal scenario and under the teacher's guidance, through real cases and participation in law suits in person, students understand and study law; 'diagnose' and 'prescribe' the legal problems of clients and provide solutions for their problems and legal service.*[7]

This description better captures and reflects the purpose and significance of CLE as a tool that tests law students' performance on live cases or problems, exposes them to the

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[2] F. Adekoya, *The Problems Of Legal Education In Nigeria – Setting The Tone For Discussion*, Summit on the Future of Legal Education, Nigerian Bar Association, Sheraton Hotels and Towers, Abuja 2nd - 3rd, May 2006

[3] A. O. Popoola, *Restructuring Legal Education in Nigeria: Challenges and Options*, In Ayua, I. A. and D. A. Goubadia, *Legal Education for the 21st Century Nigeria*, Nigerian Institute of Advanced Legal Studies, 2000, pp. 233-260

[4] F. Adekoya, *The Problems Of Legal Education In Nigeria – Setting The Tone For Discussion*, n. 2

[5] W. A. Woodruff, A. Bucker, The Bologna and German Legal Education: Developing Professional Competence through Clinical Experiences, *German Law Journal*, Vol. 9, p. 575, 2008.

[6] R. Grimes, *The Theory and Practice of Clinical Legal Education*, in J. Webb, C. Maugham (eds.), *Teaching Lawyers' Skills*, p.138, 1996.

[7] S. Sun, On the Teaching Objectives and Special Features of Clinical Legal Education in Advanced Educational Technologies, p. 166, in L. Odigie-Emmanuel, The Impact of Clinical Legal Education Curriculum and Delivery on Students Performance: A Case Study of the Nigerian Law School, *International Journal for Clinical Legal Education Conference, University of Valencia Spain*, 2011.

simulation of a lawyer's role in hypothetical cases, helps them master basic lawyering skills and allows them attain to a better understanding of professional responsibility, substantive and procedural law, as well as the theory of legal practice.[8] It is "*the use of any kind of experiential, practical or active training as legal professionals to impart such skills as the ability to solve legal problems*".[9]

In essence, CLE helps prepare students better for the task of meeting the needs of clients in multifarious scenarios through different methods that use a number of interactive teaching strategies. These include brainstorming, case studies, community resource problems, community impact projects, group discussions, lectures, mock trials, client counseling and mooting.[10]

## 2. THE NETWORK OF UNIVERSITY LEGAL AID INSTITUTIONS (NULAI)

NULAI has undoubtedly been the most important factor and the brain behind the growth of CLE in Nigeria. This is largely because the introduction of CLE into Nigeria is mostly due to the pioneering efforts of NULAI. The body was established in 2003 as a non-profit, non-political, non-governmental organization with focus on promoting clinical legal education, reform of legal education, access to justice and legal aid in Nigeria.[11]

The process that led to its establishment began with the first British-Nigeria Law Forum hosted in Abuja, Nigeria in 2001.[12] The forum, which was sponsored by the British Council and the Department for International Development, laid the foundation for a follow-up Legal Education Forum which was hosted in Nigeria in January 2002. These forum helped foster discussions that turned public attention towards the urgent need for the reformation of legal education in Nigeria and the introduction of CLE into law faculty curricula. Eventually, in June 2003, the Open Society Justice Initiative organized the first All Africa Clinical Legal Education Colloquium and at the conclusion of the event, representatives from the Nigerian Law School, Enugu Campus, University of Ado-Ekiti and the University of Ibadan met and laid the foundation for the emergence of NULAI.[13]

### 2.1 Activities and Impact of Nulai on Clinical Legal Education in Nigeria

In the years, since its establishment in 2003, NULAI has had significant impact on the development of CLE in Nigeria. In partnership with international donors, the body hosted the 1st Nigeria Clinical Legal Education Colloquium in February 2004, at Abuja. The immediate effect of the colloquium saw the establishment of four pilot law clinics in the following institutions: Abia State University, University of Maiduguri, University of Uyo and Adekunle Ajasin University.[14]

In order to further enlighten law lecturers on the benefits of CLE, the body facilitated a special session on CLE at the 41st Annual Conference of the Nigerian Association of Law Teachers (NALT) at the University of Jos in 2005. A similar session was facilitated at the Nigerian Bar Association Summit on Legal Education in 2006.

As part of its continuing impact on law students and law faculties, NULAI also hosts annual Client Interviewing and Counseling Skills Contests to inculcate clinical skills in law students through the medium of simulated client interview sessions. The 14th edition of the

[8]American Bar Association, *Report of the Association of American Law Schools* (American Bar Association Committee on Guidelines for Clinical Legal Education, 1980, p. 12.

[9]*Inside the Network of University Legal Aid Institutions*, NULAI, <www.nulai.org> accessed June 9, 2019

[10]J.K.. Asiema, L.W. McKinney, *The Clinical Programme of the Faculty of Law, University of Nairobi: A Hybrid Model*", Paper presented at the 1st All-Africa Clinical Legal Education Colloquium Durban, South Africa, 2003

[11]E. Ojukwu, S. Erugo, C. Adekoya, *Clinical Legal Education: Curriculum, Lessons and Materials*, Network of Universities Legal Aid Institutions, Abuja Nigeria, 2013. See also <www.nulai.org>

[12]Network of Universities Legal Aid Institutions Activities Report 2004 – 2008, see also www.nulai.org

[13]Ibid

[14] Ibid

contest was held in, Sokoto State Nigeria, in January 2019. The winner of the national competition qualifies to represent Nigeria at the Louis M. Brown and Forrest Mosten International Client Counseling Competition.

The body also routinely conducts and engages law clinics in access to justice and social advocacy programs in conjunction with international donors. These include campaigns on prison decongestion, freedom of information, child rights and trafficking in persons. In 2014, NULAI invited law clinics from across Nigeria to participate in a prison decongestion project sponsored by the Justice 4 All Initiative. A similar project was launched in 2018, in conjunction with Open Society Initiative for West Africa.

Apart from producing a wide range of publications including curricula, handbooks and reports that are aimed at guiding law teachers and students in implementing CLE,[15] the body has also helped to introduce CLE as a full credit course of study for students in their penultimate or final year classes. Through their activity, the minimum standard of the NUC and Council of Legal Education now recognizes CLE as an important part of legal education in Nigeria. This is also reflected within the provisions of the Legal Aid Act 2011, which recognizes law clinics as legal aid providers.

According to NULAI's 2013 Impact Assessment Report, the activities of the body have resulted in the training of over 100 law teachers and engagement of over 3,000 law students in CLE since its inception.[16] It reports that over 1,800 indigents have received free legal services and up to 7,400 people have been educated via street law programmes during more than 60 community outreaches.[17]

## 3. LAW CLINICS IN NIGERIA

As reported in its 2014 Compendium of Campus Based Law Clinics in Nigeria, there are 18 law clinics in Nigeria.[18] These are located in University of Ilorin, University of Maiduguri, Adekunle Ajasin University, University of Uyo, Ebonyi State University, Ambrose Alli University, Ahmadu Bello University, University of Ibadan, University of Abuja, University of Nigeria, OlabisiOnabanjo University, Nassarawa State University and the Nigerian Law School Campuses at Abuja, Enugu, Kano, Lagos and Yola.[19]

In addition to serving as platforms for the inculcation of practical CLE, these law clinics also help to fill the uncovered gap left by the inadequacies of government legal aid programmes.[20] This is why Emil Winkler described law clinics as "*a combination of practical legal education and legal aid*".[21]

### 3.1 University of Ilorin Law Clinic as an Epitome

The University of Ilorin Law Clinic (ULC) came into full-fledge operation by February 2013, sequel to an application made to NULAI in November 2011. The ULC became fully operational in the same year, operating out of an office within the Law Faculty, University of Ilorin.

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[15] These include *Clinical Legal Education Curriculum for Nigerian Universities Law Faculties/clinics,* now reviewed and titled *Clinical Legal Education: Curriculum, Lessons and Materials*, ISBN: 978-978-932-380-7); *Handbook on Prison Pre-trial Detainee Law Clinic,* ISBN 978-978-932-354-8; *Manual on Prison Pre-trial Detainee Law Clinic*, 978-978-932-364-7; *African Journal of Clinical Legal Education and Access to Justice* (ISSN 2315-5728).

[16] Network of Universities Legal Aid Institutions Assessment Report 2013. Available at www.nulai.org

[17] Ibid

[18] *Compendium of Campus Based Law Clinics in Nigeria*, Network of Universities Legal Aid Institutions Publication, Nigeria, 2014. Available at <www.nulai.org> accessed June 10, 2019

[19] Ibid

[20] O. Bamgbose, Access to justice through clinical legal education: A way forward for good governance and development, *African Human Rights Law Journal*, Vol. 15, pp. 378-396 2015. <http://dx.doi.org/10.17159/1996-2096/2015/v15n2a7> accessed June 9, 2019

[21] E. Winkler, '*Clinical Legal Education: A report on the concept of law clinics'* <http://law.handels.gu.se/digitalAssets/1500/1500268_law-clinic-rapport.pdf> accessed June 9, 2019

The idea behind the ULC is closely linked to the need to reform legal education and promote human rights in relation to access to justice for indigent individuals and vulnerable groups. In this respect, the ULC was set up to achieve two fundamental objectives: the service and educational objectives in addition to ensure collaboration with major stakeholders in the justice sector.

The educational objective of the ULC revolves around developing and enhancing students' learning experience through practical application of classroom lessons. The focus is specifically on building understanding of substantive law and procedural legal process, professional ethics and responsibilities, and the role of law, justice and legal professionals in society. The service objective on its part is adapted towards the provision of opportunities for indigent and unrepresented or underrepresented members of communities within the jurisdiction of the law clinic to access justice and legal aid. Specifically, the ULC has the mandate of providing free legal representation, legal advice, community outreach and advocacy, legal assistance and alternative dispute resolution services. Unlike some law clinics such as the Women's Law Clinic, University of Ibadan, the ULC does not offer specialized services to any class of persons but to all. However, due to its situation within the heart of the University of Ilorin campus, the client profile of the law clinic is dominated by students of the university, with a smattering of university staff.

The ULC is a walk-in law clinic operating from Mondays to Fridays, except on public holidays and is usually open from 09:00am to 04:00pm. Although participation at the ULC is not currently required as part of minimum academic requirements for graduation, interest in the law clinic amongst students of the law faculty is high. Thus, membership of the law clinic is strictly voluntary, with membership mostly restricted to 3rd– 5th year law students (although 2nd year law students may be admitted on ad-hoc basis) referred to as "clinical law students" or "clinicians". The ULC is managed substantially by law students. It is administered by a team of executives appointed from amongst the students and chaired by a Clinic Manager. The ULC is likewise supervised by a team of staff coordinators that provide guidance to the students and headed by a Lead Coordinator.

### 3.2 Activities and Achievements of the Clinic

In pursuit of its objectives, the ULC has maintained a number of programs and projects geared towards achieving these objectives. These include the following:

#### 3.2.1 Advisory and Affidavit Exercise

The ULC embarked on the Affidavit Project in March 2017. At its inception, the Project was meant to help facilitate easy access to legal advice and drafting services in respect of affidavits for screening for penultimate year students of the University of Ilorin during their mandatory university clearance process. The Project was born out of a need to help ensure that students do not fall into the hands of individuals that would levy outrageous sums upon them for affidavit services, especially at the High Court entrances. As such, it was created in direct response to an observed need to ameliorate the unnecessary and avoidable hardship on students.

Since its inception in 2017, the Affidavit Project has been very successful. In its first year, the Law Clinic advised on over 300 affidavits and drafted a further 200 for various penultimate year students of the university. Due to its success, the Project has attracted clients of an increasingly wider service base. As such, from 2018 to 2019, the Law Clinic has been able to provide a wider range of services to individuals comprising more than just penultimate year students.

The Law Clinic currently advises on myriad affidavit issues including but not limited to correction of details on documents, harmonisation of BVN details, loss of identity cards and other documents, declaration of age, change of name inter alia. Through the Project, the Law Clinic has attained higher relevance within the university community. Indeed, this

relevance is now such that banks within the university environs refer their clients to the Law Clinic whenever they identify the need for an affidavit.

Also, in consequence of the expanded services being provided by the Law Clinic, a larger number of students are now able to escape paying exorbitant fees for affidavit services at respective courts in Ilorin Kwara State Nigeria. At last count, the Law Clinic has provided advisory and drafting services on over 500 affidavits from late 2018 till mid-2019, a substantial increase from previous years.

#### 3.2.2 Community Awareness and Freedom of Information (FOI) Project

The ULC has also conducted a number of community impact projects meant to create awareness about access to justice, rights and the means of their enforcement.

On February 1 and 8, 2017, the law clinic visited six associations within the University of Ilorin campus to educate students on the rights of a tenant in relation to the rights of a landlord. The awareness event was necessitated by the observed increase in the number of students that visited the law clinic in relation to landlord and tenant disputes. The execise was conducted with a view to eradicating or at least mitigating these problems through the medium of education on the rights available to these students.

The event achieved its aim as most of the educated students were able to ask several questions on the content of their rights and left the awareness program much better fortified to deal with landlord related issues.

On another occasion, the law clinic organized a Freedom of Information awareness advocacy visit and outreaches in target communities aimed at improving freedom of information in Ilorin Kwara State and its environ to spread awareness about the Freedom of Information Act 2011 (FOI Act) and the benefits it holds for communities, specifically the power to hold their elected leaders to account to enhance growth and sustainable development. The awareness project sponsored by the United Nations Democracy Fund (UNDEF) and implemented by NULAI, improved the capacity of law clinics around the country to help educate communities about the power of the FOI Act.

#### 3.2.3 Prison Decongestion Exercises

In the same vein as the community impact projects the ULC was able to execute, in 2014 and 2018, the law clinic was also sponsored by Open Society Initiative for West Africa (OSIWA) in conjunction with NULAI to provide access to justice services for awaiting trial inmates in Kwara State prisons.

In 2018 particularly, the law clinic participated in a prison decongestion project tagged "Expanding Access to Justice for Pre-Trial Detainees in Nigeria". The project was sponsored by the Open Society Initiative for West Africa and implemented by NULAI between January to December 2018.

Under the project, the law clinic was able to provide access to justice services for 50 pre-trial detainees in Oke-Kura Maximum Security Prison and Mandala Medium Security Prison in Ilorin, Kwara State. At the end of the project, the law clinic was able to provide legal representation for 23 detainees that had no counsel to represent them in court. DPP's advice was requested on behalf of 18 detainees and bail application services were provided for 6 detainees. The ULC was also able to secure the completion of a number of cases including 5 detainees discharged and/or acquitted, 3 convicted and 5 cases settled.

Apart from this, the law clinic was able to employ extensive measures aimed at contacting families of the detainees to apprise them of the detainees' situation and also to secure their cooperation with regards to bail and other matters. The ULC was able to contact 28 detainee families and link them up with their loved ones in detention.

### 3.3 Worthy Experiences and Lessons

The prison visitation offered an avenue to some of the clinicians their first opportunity to see what happens behind a prison gate. After their encounter with the inmates, many

decided to commit themselves as the voice of the voiceless while others confessed that they were surprised that not everyone behind bar was actually a "criminal".

Also, two clinicians embarked on a trip to locate the family of an inmate who was awaiting trial. The inmate had been incarcerated without the knowledge of his where-about by his family.

The clinic had also brought smiles to the faces of many people in the society. The clinicians were thrilled when an inmate, whose acquittal and transportation to Calabar to reunite with his family was facilitated by the Clinic, called after some weeks informing that he had secured a job, reunited with his family and was quietly enjoying his life. The encomiums showered on clinicians and coordinators alike by the family members of an accused person and other released inmates were continuously refreshing and invigorating.

It is noteworthy that the experiences of clinicians and the contact they were afforded with the Nigerian justice system especially during the prison decongestion exercises were illuminating. One clinician, Asipa Itunu, opined:

> *I always thought that the prison was home for convicts, most especially those guilty of capital offences, but I got to find out that some of them are just victims of circumstances. I dare say I had a change of perception and for that I am grateful.* [22]

This exposure is not just limited to the prison decongestion exercises either. The ULC's affidavit project also brought many clinicians directly in contact with the culture of exploitation at the state High Court in Kwara State. One clinician, Ibrahim Ismail, was so frustrated at the state of affairs that he called the Clinic Manager from the court premises and lamented:

> *The commissioners [for oaths] have refused to sign our affidavits sir. They keep saying we should give them something because we are also making profit from the affidavits. I explained to them that we are only providing legal aid but they refused to listen. I have gone to four commissioners now and all of them have refused to sign. They keep referring me to other commissioners.*[23]

It must be stated that notwithstanding the above, there are a number of commissioner for oaths that are supportive and always willing to discharge their duties diligently.

## 4. IMPACT OF CLINICAL LEGAL EDUCATION ON CLINICIANS AND STAFF COORDINATORS

It is without doubt that the opportunities for a more engaged legal education and involvement provided by CLE-inspired law clinics continues to bring about significant advantages for law students and coordinators.

### 4.1 Impact on Clinicians

In one study conducted on the impact of law clinics on students at the University of Ibadan law faculty, one author observed that students, under the system of rote learning were in the habit of missing classes and failing to pay attention to lectures.[24] As such, they were not being involved adequately in the learning process. However, on the introduction of CLE and the law clinic, "*students showed positive attitude towards clinical learning since both students and lecturers were able to contribute and share knowledge with higher rate of interaction*".[25]

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[22] NULAI Nigeria, *Learning and Reflections Portal* <https://nulaiprisonclinics.blogspot.com> accessed June 10, 2019

[23] Report of visit to the High Court, Ilorin premises to oath affidavits on behalf of clients of the ULC. Information on file with the author, 2019

[24] A. A. Adewumi, O.A.. Bamgbose, Attitude of Students to Clinical Legal Education: A Case Study of Faculty of Law, University of Ibadan, *Asian Journal of Legal Education*, Vol. 3, No.1, pp. 106-111, 2016.

[25] O.S. Adelakun-Odewale, Role of Clinical Legal Education in Social Justice in Nigeria, *Asian Journal of Legal Education*, Vol. 5, No.1, pp 1–11, 2017., citing Adewunmi & Bamgbose, n. 24

This was eventually linked to higher participation and better grades, with zero withdrawal rate.[26]

At the ULC as well, it has also been observed that CLE and the law clinic have helped many of the students to build a reserve of knowledge that is deeper and richer than what they can access in the ordinary classroom. Through the medium of the varied experiences they are exposed to while participating in the law clinic's projects, they have attained better understanding of procedural and substantive law as well as the simple, practical experience of what the legal realities are in Nigeria.

The ULC's activities have also been vital to helping clinicians develop a range of lawyering skill that would, hitherto, have only seen improvement in active practice as a barrister or solicitor. These include client interviewing and counseling skills, office management skills, legal problem analysis, development of legally sound courses of action etc.

Moreover, clinicians have been able to adapt the skills they have learned and knowledge they have gained in the law clinic to their lessons in the classroom. Courses such as Moot Court and Mock Trial Advocacy[27] have been made so much easier for clinicians because they include topics such as advocacy, client counseling, legal writing, legal research and problem solving, all skills that are routinely inculcated in the students through the law clinic, including areas not covered like training and training workshops, drafting, interviewing of inmates, client interviewing and counseling, data management and reporting, digital input of clinic cases on specially designed databases, fundamentals of ethics, privileges, and confidentiality. It is noteworthy that clinicians have constituted the nucleus of high scoring students in that course for the past few years.

### 4.2 Impact on Staff Coordinators

To the coordinators, the law clinic serves two purposes. First, it has served as a great platform on which the coordinators are able to build their public interest lawyering portfolios and indulge their passion for helping to achieve access to justice and legal aid. This is arguably more important now than ever before since the Legal Practitioners Privileges Committee requires evidence of involvement in pro bono cases for the award of the distinguished honour of Senior Advocate of Nigeria. One prominent example of this impact is Amari Omaka (SAN), Dean of Faculty of Law, Ebonyi State University and an ardent supporter (and coordinator) of the EBSU Law Clinic.

The second area in which the law clinic impacts on coordinators is in the academic sphere. Since law clinics are active supporters in the Nigerian justice administration and legal aid system, as the Legal Aid Act shows that coordinators are rich resource for statistics and insights into the state of access to justice and legal aid in Nigeria. They provide rich fodder for academic studies and research, and have even been vital to the creation of many advantageous academic papers like this. Besides, in the course of training, advocacy visits to prisons and stakeholders in the justice sector, interviewing, filing of processes, interventions and prosecution, by implication, both clinicians and coordinators are offered continued legal education.

On these two counts, law clinics remain significant to coordinators, just as much as they are vital to law students.

## 5. CHALLENGES OF LEGAL AID CLINICS AND CLINICAL LEGAL EDUCATION IN NIGERIA

Unfortunately, the quest for justice is neither easy nor swift. Law clinics do face significant challenges in the course of their daily business. Apart from this, CLE has not reached an optimal position within the Nigerian legal education system. The challenges that law clinics continue to face include the following:

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[26]A. A. Adewumi, O.A.. Bamgbose, Op. Cit.

[27]A compulsory 3 Credit course offered by part 4 students at the University of Ilorin, Faculty of Law

Funding: As one would imagine, one of the most enduring challenges that face law clinics, as with other legal aid institutions, is access to a stable source of funding.[28] Most law clinics have no basic infrastructure such as good chairs, tables, working computers, fast internet facilities and access etc. Many law clinics do not even have adequate office space.

In adequate popularization of law clinics: It remains disheartening that despite the number of law faculties in the country, there are still only 18 law clinics in the entire country. This is representative of the fact that many faculties are yet to get on board the wagon of law clinics[29] and especially CLE in Nigeria.

Little financial support from law faculties: Most of the support that law clinics currently receive, as a whole, comes from NULAI and its project partners. Without the grants coming from these sources, law clinics have little to no recourse from their host faculties, except for some few notable exceptions.

Dearth of adequate staff: There are two problems tied together here. First, law clinics are understaffed, in terms of qualified lawyers. Since students cannot appear in Nigerian courts, many of the cases that would need legal representation must either be referred to an equally understaffed legal aid council or referred to outside lawyer for pro bono handling, which is hard to come by. Second, even the staff coordinators often appointed to handle the affairs of law clinics end up being overworked, since they have to handle, at the same time, their academic and administrative duties within the faculty.

Language barrier: from experience in the handling of some projects, is another challenge, in term of interpretation due to the nomadic nature of some of the inmates

Delay is still part of the criminal justice system, there were instances where the accused were not brought to court on the days their cases were listed to be heard. This stalled the progress of the case and resulted in unnecessary adjournments.

These challenges unfortunately continue to affect the growth of CLE and law clinics in Nigeria. If effort is taken to combat them, legal education in Nigeria will rise to a point where the system can routinely produce lawyers that are abundantly equipped to practice and as well serve humanity.

## 6. RECOMMENDATIONS ON RESOLVING THE CHALLENGES

This paper makes the following recommendations as possible panacea to the challenges militating against law clinics and CLE in Nigeria.

As suggested that Postgraduate Students may be used to combat staff inadequacy and the introduction of CLE as a course in all law faculties for increased participation in support and relevance for law clinics. Together with mainstreaming of CLE as argued, that there is an urgent need to mainstream CLE in Nigeria, not just in theoretical requirements at the NUC and Council of Legal Education level but also at the practical level in each Nigerian law faculty. The scholar observed, *"[e]xperience has shown that once approved, most law faculties in Nigeria do not make actual use of the ... law clinic for social justice education*".[30] More effort must be made to actually ensure that law faculties establish and actually support their law clinics. It is further suggested that the clinic should be funded by the university as an independent unit of the faculty of law together with budgetary allocation by the National Universities Commission towards achieving the objective of clinical legal education.

On the issue of lack of staff, the Legal Practitioner Privilege Committee should include as part of the condition for practitioner aspiring to be Senior Advocate of Nigeria to show evidence of participation in CLE training of clinician, including handling of *pro bono* cases.

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[28] O.S. Adelakun-Odewale, Op. Cit. p. 8

[29] Association of University Legal Aid Institutions, Open Society Justice Initiative & University of Natal, *Combining Learning and Legal Aid: Clinics in Africa*, Report on the First All-Africa Colloquium on Clinical Legal Education, June 23–28, 2003, at <http://www.justiceinitiative.org/>accessed June 10, 2019

[30] O.S. Adelakun-Odewale, Op. Cit., p. 8

It is believed that the popularization of CLE by National Association of Law Teachers (NALT) and the practical mandatory introduction of CLE as well as its enforcement by National Universities Commission of Nigeria that is saddled with promoting higher quality education in Nigeria will go a long way to entrench clinical legal education in Nigeria.

The problem of language interpretation barrier may be surmounted by the approval of para-legal services by clinicians to serve as interpreter to the courts. It is believed that strict compliance with the provisions of Administration of Criminal Justice Act[31] (ACJA) 2015 will definitely remove incidences of delay and its attendant consequences.

## 7. CONCLUSION

It is truism that CLE is absolutely important to achieve a successful transmission to law students those practical skills that make a 21st century lawyer. If the advantage of law clinics is properly managed and students are skillfully and purposefully exposed to participation in law clinics for extensive periods during their undergraduate, law school and postgraduate degrees, the mainstreaming of CLE will be a reality sooner than later. The realization of the education and service objectives, access to justice and legal aid will be realism.

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[31] L. A. Ayinla, J. Ayodele, B. A. Ahmed, The ACJ Act. 2015, Plea Bargain and Other Innovations: A Review towards Peaceful Resolution in Nigeria. *KIU Journal of Humanities,* Vol.1, No. 2, pp. 257-275, 2016 available on line at https://www.academia.edu/32347850/KIU_Journal_of_Humanities_Vol._1_No._2_December_2016

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# THE GENEREAL THEORY OF LAW IN THE CONTEXT OF NEW REALITIES PARTICULAR TO THE 21ST CENTURY

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**ABSTRACT**

*The general theory of law is source for every other branch of law. In the present context, the general theory of law must incorporate new concepts particular to cognitive psychology. The challenges posed by virtual environments require ethical clarifications. Artificial intelligence, datism and algorithms are all factors that entail new regulations which must be incorporated in the general theory of law.*

**KEY WORDS:** *law theory, state, philosophy*

**INTRODUCTORY REMARKS**

*The general theory of law is a component of juridical sciences that are tightly interwoven with field specific juridical disciplines. I believe that is important to highlight the role played by the general theory of law in shaping the future legal expert. Without a doubt, this traditional area is a source for every other branch of law. Also, reflecting upon the fundamental concepts and categories of values derived from it has been a constant preoccupation of mine. Being aware that no answer can rise to the magnitude of its original question, in this article I will try to provide an answer as well as to open a few new possible directions for questioning within the general theory of law, directions that are directly derived from the context of new realities offered up by the 21st century. I am aware, of course, that there are overlaps between the philosophy of law and political philosophy. In order to be considered a science a theory must be objective, universal and unbiased. In other words, a theory about law can be scientific and general at the same time if it is successful in going beyond the (i) particularities of each branch of law and (ii) the character of national laws. Throughout time, this science of law has been known under 4 distinct designations[1]:*

*a) juridical encyclopaedia or formal encyclopaedia*
*b) general theory of law*
*c) philosophy of law*
*d) introduction to law*

*It is well known that until the XIXth century, the general theory of law has been a subdivision of the philosophy of religions, of ethics or politics. The general theory of law has passed over to the juridical and became autonomous only during the XXst century.*

*The general theory of law must not be understood as a simple catalogue of norms and juridical institutions, but instead, it should be viewed as a thorough, philosophical*

[1] https://studentladrept.blogspot.com/2008/

*exploration of juridical concepts and categories. It formulates the most general, valid categories for every juridical branch; meaning disciplines that tackle the history of law and every other specific juridical branch. Each branch of law is studied separately and constitutes a separate juridical subject: constitutional law, family law, labour law, international aw etc.*

*The general theory of law is "source of law" and inspiration even for dedicated, special juridical sciences that aim to aid the juridical activity conducted by a jurisdictional institution: forensic medicine, legal psychology etc. The general theory of law ensures the methodological, inner cohesion of these disciplines and juridical branches. It also provides interrogative options to other legal disciplines.*

*Philosophy of law - as a standalone branch of juridical sciences - would be involved with the gnoseology of juridical realities. This also implies a critical evaluation of the basis for juridical authority and implicitly of the moral ground that fundaments every legal decision, i.e. ethical jurisprudence. Moreover, with the aid of its specific instruments, the general theory of law affords an analysis of juridical systems based on the nature of law, i.e. analytical jurisprudence.*

*Natural rights - developed during the middle ages, although based on Aristotle`s Nicomachean Ethics and late stoicism, - stipulate that the law must be in conformity with the "universal natural law". During the middle ages, human law had to be subordinate to divine law.*

*Later secular scholars (Th. Hobbes, J. Locke and J.J. Rousseau) supported the thesis according to which law must reflect certain aims and objectives that are natural to humankind. Both versions insist on the idea that law incorporates a strong moral core, as expressed by the famous Latin adage „Lex injusta, non est lex" (An unjust law is no law at all)[2].*

*In opposition to the naturalist conception of the XVIIth century, XIXth century positivism (Bentham and J. Austin) postulated that law can be defined without any kind of reference towards its content: "The existence of law is one thing; its merit and demerit another.", wrote Austin.[3] According to positivism, law is the will of a sovereign power or the souverain himself and is accompanied by sanctions that are considered adequate by him.*

*H. L. A. Hart`s famous "The concept of law" (1961), can be included in the same trend of positivism (inaugurated by Auguste Comte); Hart constructs a more intricate positivism, according to which law is not a simple list of arbitrary commandments but a complex network of "primary and secondary rules" whose legitimacy depends on the possibility of deriving them from a "fundamental rule of recognition"[4]. Defining law based on its origins and not its contents, i.e. a deductive model of hierarchical rules that form a closed system, as understood by Hart, has been amply criticised - especially for the limits of this deductive model in explaining innovation and the emergence of the new in the real juridical system.*

## I. THE GENERAL THEORY OF LAW WITHIN THE PRESENT CONTEXT

According to Alex Carey: "The twentieth century has been characterized by three developments of great political importance: the growth of democracy, the growth of corporate

[2] F.Antony, *Dicționar de filosofie și logică,* Ed. Humanitas, București, 1996, p.100
[3] Ibidem
[4] Idem, p.101

power, and the growth of corporate propaganda as a means of protecting corporate power against democracy"[5].

XXst century general theory of law will have to reconsider the relationship between human rights, not only in rapport within the classic state-individual dyad, but also in relationship with this new entity that encroaches on individual rights, especially negative ones. Under the pretext of developing new types of positive rights, corporations tend to elude certain negative rights (certain categories of liberties), the very category of rights that we know for certain to represent human rights and best describe a person`s unique essence. Corporations propose a utilitarian ethic, which by definition, is always teleological and eminently futuristic.

Another paradox tied to the end of the XXst century and the beginning of the XXIst was international terrorism, a problem faced by many old democracies. It is a paradox because the outcome of this confrontation was a curtail of civil rights in order to protect the general interest. The very universal essence of law is somewhat negated, for, as J.S.Mill (one of the fathers of modern liberalism) acknowledged „Having a right means having possession of something that society owes to protect"[6].

Also, the general theory of law will have to clarify or to redefine fundamental concepts pertaining to judiciary practice and theory, such as "responsibility" or "intent". It will have to take into account the progress registered by fields such as neurology or cognitive psychology according to which not every act can be tied directly to consciousness event if the act proves a certain *sui generis* intent, in the sense that it is oriented towards something. Within the conceptual change from "*res cogitans*" to "the extended mind", the issue of responsibility is changed noticeably in the sense that the notion becomes much more complex and nuanced. Yet, law systems already incorporated much more vague concepts such as diminished responsibility, state of altered conscience, discontinuity of conscience *etc.*[7]

Beyond behaviourism, which considered every deed to be directly tied to consciousness, thus presuming intention, and with the development of cognitivism in defining consciousness, new consequences have been produced, that are to be replicated in the near future in various concepts and branches of law.

The main problem of ethical jurisprudence concerns the notion of responsibility. Under what circumstances can a court hold someone responsible for their actions or for abstaining from certain actions by omission? Roman and Greek law philosophical edicts might be of service in this direction and can be succinctly expressed through „*Actus non facit reum nisi mens sit rea*" („A deed does not make a man culpable if his mind is not guilty"). But what is the mental element (*mens rea*) supposed to be a compulsory condition for guilt? Aristotle and the tradition inspired by his writings considers that „*mens rea*" is tied to will, *i.e.* to a previous act that implies decision. Conceptually, these delimitations are limited and from a practical standpoint prove to be inadequate, for example when considering neglect inadvertence.

Closely tied to the issue of responsibility is a philosophical questioning related to the justness of the punishment. The traditional justification was retribution or, best case scenario,

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[5] Baillargeon Normand, *Petit cours d'autodéfense intellectuell,* Éditions Lux, collection Instinct de Liberté, Paris, 2005, p. 247

[6] S. Mill, *Despre libertate,* Editura Humanitas, București, 2017, p.53

[7] I. Mladin, *De la res cogitans la mintea extinsă,* Ed. Institutul European, Iași, 2018, p.63

discouragement. Today, the idea of punishment seems outdated in legal terminology; more curative terms being preferred: education for inclusion, resocialization, etc.

## II.THE GENERAL THEORY OF LAW AND THE VIRTUAL WORLD

A large part of our private and public life is shared today between the physical and the digital world. It is therefore necessary to transfer the discussion pertaining to our safety, individual rights and freedom towards the digital space. This argument was sustained by a 2015 report issued by the general director for foreign policy of the European Parliament: "As peoples` lives follow a transition towards the online, their rights must accompany them … the objective of protecting human rights must be transferred in the digital reals. It is explicitly stated that "The main challenge faced by the European Union is to bring human rights into the digital sphere" [8].

The internet is defined by the EU as "a tool for promoting the right to education"[9]. The EU aims to bolster confidence in this tool and to ensure its credibility by identifying and tackling risk factors that threaten individual freedom and human rights. According to the report the main threats posed by the virtual environment are: the violation to the right for private life through surveillance software, encroaching on the freedom of expression, freedom of association, various forms of discrimination *etc.*

Another important role played by the internet is that of fostering development and innovation – according to the 2016 ONU resolution pertaining to the promotion and protection of human rights on the internet "Individual rights available in the physical world must be equally protected online, particularly the freedom of speech…The global online network must fulfil its role of facilitator of development and innovation"[10].

In the '80s, M. Kranzberg defined the 6 laws of technology. The first stated that „technology is neither good nor bad; however, it is also not neutral"[11]. Contemporary philosophical thinking on technology reached the conclusion that technology is not axiologically unbiased, especially since information technology poses important ethical influence through its programming and computational algorithms. The algorithm has been considered a rational product (belonging mainly to exact sciences) for a long time, completely nonmoral and subject only to logical and mathematical rules. Yet, by governing the virtual space, it gains ethical attributes. It is no longer sufficient to regulate online environments, regulations must reach at a much deeper level, one that involves developing and creating hardware and software solutions. This level mediates relationships between humans, affords communication, gathers and analyses data, offers solutions and makes decisions. Because IT related social outcomes are important, the field needs to find solutions in order to incorporate ethical elements during the programming and design stages.

Philosophers Brey and Sorakes argue that: „software environment and hardware systems can be evaluated from a moral perspective independently (partially or completely) from their users. It can be argued that software and hardware incorporate values in the sense that by usage, they tend to promote certain values". Therefore, it would be necessary for all

[8] https://revista22.ro/eseu/bogdan-diaconu-moga/infrastructur-algoritmic-specificatii-etice
[9] ibidem
[10] ibidem
[11] ibidem

software applications and hardware solutions to be endowed with ethical algorithms that ensure all desirable moral values [12].

American professor M. Ananny, in his article "Toward an Ethics of Algorithms" (2015), shows that algorithm control an ever-increasing part of the public and private spheres of our lives, therefore it is necessary to regulate the premises and axioms on which these algorithms are built upon. Without a serious debate and thorough regulations, the ethical and juridical mishaps particular to the field shall severely affect the social freedoms and rights in the form they have been designed before the advent of the internet. Ananny asserts: "algorithms govern because they have the power to structure possibilities. They establish what information is included into an analysis; they forecast; plan and process data, offer results with a certain degree of objectiveness and certainty, act like filters and mirrors by selecting information that make sense within the logical framework of a computational system within which they were created". Algorithms not only speed up commerce, journalism, finances or any other area but also impose a discourse and culture of knowledge". [13]

Algorithms have the ability to process immense quantities of anonymous data which in turn serve as decisional basis in the health sector, public safety, labour markets *etc*. As highlighted by a study (centred on internet and human rights) conducted by Viadrina University of Germany, these algorithms function just like people or institutions. "These operate either like main or auxiliary tools or even as single deciding factors in areas of life that were non-existent a decade ago, as well as in traditional areas in which decisions used to be taken through human judgement as is the case in public health or HR. Algorithms occupy activities that involve subjective decision making judgements."[14]

The interference of algorithms into the private and public aspects of the individuals' life, into government policies and into every corporate decisional pattern is undeniable, yet regulation efforts are timid at best. One such initiative belongs to the German "Algorithmwatch" NGO which proposes a manifesto addressing decisional algorithms. This is based on 5 principles:

1. Decisional algorithms (AD) are not unbiased;
2. AD creators are responsible by the generated results;
3. AD must be easy to comprehend so that it can be democratically controlled;
4. Democratic societies are to ensure AD comprehension by relying on available technologies and the regulation of surveillance institutions;
5. We must decide how much AD is allowed to infringe on our liberties.[15]

**CONCLUSIONS**

|In order to protect a person in an online environment (where they are not an abstraction but a human being), to ensure the transfer of their rights from the real to the virtual world (which is sometimes more real than reality itself) it is necessary to amply interrogate the possibilities afforded by technology, to evaluate the programming algorithms in addition to an ethical reconsideration of the decisional factors involved in both software and hardware technology. Without a doubt this involves the collaboration of many fringe sciences, but, I

[12] ibidem
[13] ibidem
[14] Y.N. Harari, 21 de lecții pentru secolul XXI, Editura Polirom, București, 2018, p.34
[15] https://revista22.ro/eseu/bogdan-diaconu-moga/infrastructur-algoritmic-specificatii-etice

believe, that is compulsory to analyse these new realities within the general theory of law, because everything that is to be regulated will become source of law and hence reference for the next decades.

The enormous ethical implications of this new environment are already areas of reflection and even subject to regulation for many branches of law (as well as auxiliary branches of law), yet the major role played by the general theory of law, I believe, is to bring this new reality to the agora of the spirit in order to clarify its content through an interdisciplinary and ethical approach. The characteristics of morally sensitive IT systems – by being associated with private life, justness and democracy - must be thoroughly addressed.

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# THE ADMISSIBILITY OF THE EXCEPTION REGARDING THE LACK OF ACTIVE PROCEDURAL LEGITIMACY IN VIEW OF ART. 906 CODE OF CIVIL PROCEDURE

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**ABSTRACT**

*The present article aims to analyze the different solutions pronounced by the courts in relation to the admission, respectively the rejection of the exception regarding the lack of active procedural legitimacy, in disputes having as object the application of delay penalties under art. 906 Code of Civil Procedure, in the situation where the request for the enforcement was initiated by an association established under Government Ordinance no. 26/2000 on associations and foundations. Consequently, we will be considering the argument that the applicable legislation does not establish a right of representation of the association towards its members, as it happens in the case of trade unions founded on the basis of the Social Dialogue Law no. 62/2011.*

**KEYWORDS:** *active procedural legitimacy, association, delay penalties, creditor, representation.*

## INTRODUCTION

*In recent judicial practice, some divergences have been observed with regard to resolving the exception of lack of active procedural legitimacy, considering a number of arguments, such as: the right to represent a person before enforcement bodies and courts (including enforcement courts), respectively to whom belongs the attribute to initiate a request for enforcement and, subsequently, the right to initiate a litigation having as object the application of delay penalties for the non-execution of the obligation to perform by the debtor.*

*Thus, the debtor was obliged to proceed with the reconstitution of the accounting documents attesting the gross incomes on component elements for all the plaintiffs, during the entire period in which they held the status of employees. The enforceable title was obtained following the initiative of an association to bring such an action before the courts, on behalf of all its members.*

*Irrespective of the reason for non-compliance with the obligation that the debtor should have fulfilled, it is perfectly justified for the sanction of the obligation to intervene. Specifically, "the sanction of the obligation consists in the creditor's right to sue the debtor and to proceed with the forced execution of his property in order to realize his claim[1]".*

*However, since the obligation we have in question is to perform, modern law has maintained the concept that it cannot be realized in kind (in nature)[2], this being, moreover, the reason why the provisions of art. 906 Code of Civil Procedure have found application, namely the attempt to compel the debtor to perform the obligation he/she is required to do, in order to avoid the establishment of penalties for the delay in this respect.*

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[1] See in this respect **Liviu Pop, Ionuț-Florian Popa, Stelian Ioan Vidu**, *Tratat elementar de drept civil: Obligațiile*, Universul Juridic Publishing House, Bucharest, 2012, p. 18.
[2] *Idem*, p. 729.

*If the debtor persists in refusing to perform the obligations, the court, at the request of the creditor, has the possibility to establish a global amount of money, which is obviously easier to enforce, compared to the enforcement of an obligation to perfom.*

*It should also be noted that these disputes do not benefit from the double degree of jurisdiction, being definitive, final, from the first ruling*[3]*. Having in view the fact that each creditor requested the debtor to pay a penalty in the maximum amount of 1000 RON per day of delay, from the debtor's point of view, the mere possibility of not having the case dismissed equals a potential case of bankruptcy.*

*Considering the way in which the creditors from the enforceable title understood to initiate the litigations based on the provisions of art. 906 Code of Civil Procedure, the debtor defended itself by invoking a series of arguments, the latter being both accepted and rejected by the courts that had to resolve disputes of such nature.*

*It is interesting to point out that the litigations brought before the courts were resolved approximately in the same period of time, and by the same court (only the trial panels were different), hence the increased interest in the diametrically opposed views established by the sentences, being definitive rulings.*

*In the following paragraphs, we proceeded to analyze the arguments of the debtor, but also those retained by the different trial panels of the court, in order to outline an overview of the situation and reach a logical conclusion based on the applicable legislation.*

## 1. THE ARGUMENTS BROUGHT BY THE DEBTOR, THROUGH THE OBJECTIONS FORMULATED, IN SUPPORT OF THE EXCEPTION OF LACK OF ACTIVE PROCEDURAL LEGITIMACY.

As already mentioned, the enforceable title was obtained as a result of the dispute initiated by an association, on behalf of its members, each of them being natural persons.

From our point of view, the fact that the matter of the association being legally able to represent its members or not has not been called into question in the litigation that ended with the pronouncement of the enforceable title, does not equate in any way with the idea that, from that moment, the association gained the legal possibility to introduce any actions on behalf of its members, recognizing its capacity to represent "with the power of res judicata".

After all, in any legal dispute, regardless of its object, among other conditions, it is absolutely necessary that the active legitimacy of the plaintiff[4], respectively the legitimacy of the person representing the plaintiff, where required, to be proven.

Therefore, analyzing logically and grammatically the provisions of art. 906 Code of Civil Procedure, we note the following wording: *"the court notified by the creditor may oblige the debtor (...) to pay a penalty (...) in favor of the creditor"*.

The concept of notifying a court does not bring any aspect of novelty. However, it is necessary to make some clarifications as to whom exactly has the legal possibility to initiate such a dispute, as well as if, respectively when and under what conditions may operate the representation of the parties.

In this respect, from the corroboration of art. 83[5], art. 645 para. (1) and art. 646 para. (1) Code of Civil Procedure, it results that a natural person can be represented only by a lawyer or by a representative agent, including in the enforcement phase, the parties in the enforcement procedure being the creditor and the debtor, not the representative agent.

[3] Article 906 para. (2) Code of Civil Procedure: "When the obligation is not assessable in money, the court notified by the creditor may oblige the debtor, by final ruling given with the summoning of the parties, to pay in favor of the creditor a penalty from 100 RON to 1000 RON, established per day of delay, until the execution of the obligation provided in the executory title". Law no. 134/2010 regarding Code of Civil Procedure, republished in Official Journal of Romania no. 545 of August 3rd, 2012, as further amended and supplemented

[4] Consult in this respect the provisions of article 32 para. (1) point b) Code of Civil Procedure.

[5] Article 83 para. (1) Code of Civil Procedure: "(…) natural persons may be represented by a lawyer or other agent (...)".

Also, art. 644 para. (1) Code of Civil Procedure lists the participants in the enforcement procedure as follows: "*1. parties; 2. third party guarantors; 3. intervening creditors; 4. the court of enforcement; 5. the bailiff; 6. The Public Ministry; 7. law enforcement agents; 8. assistant witnesses, experts, interpreters and* ***other participants, under the specific conditions provided by law***".

Since enforcement is a distinct phase of the civil process which ensures the practical realization of the right recognized by the enforceable title[6], respectively there are no other special rules regulated, derogating from the common law, regarding the representation of the creditor before the bailiff or the enforcement court, we consider that the provisions of art. 83 Code of Civil Procedure, to which we have already referred, are fully applicable and mandatory.

Therefore, in order for a natural person to be legally represented, he or she must either turn to a lawyer or a non-lawyer, such as a spouse or a relative up to and including the second degree, if they have a degree in law[7].

On the other hand, we must not forget the provisions of art. 85 Code of Civil Procedure, respectively those regarding the form of the representation mandate, especially those of para. (1), namely: "*the power to represent a natural person given to the agent who does not have the quality of lawyer is proved by an* ***authentic document***".

Obviously, an association cannot hold the status of a lawyer, having no connection whatsoever with the status of the latter profession. The association had been established under Government Ordinance no. 26/2000 on associations and foundations[8], a normative act which, in our opinion, does not include any legal norm that could confer the appearance of the right to represent a natural person, even its own members, without providing an authentic document, issued by the notary, in this respect.

The aforementioned ordinance contains the applicable provisions regarding the legal way in which "*natural persons and legal persons pursuing activities of general interest or in the interest of certain communities or, as the case may be, in their non-patrimonial personal interest may constitute associations or foundations*", as provided by art. 1 para. (1) of the ordinance.

Also, art. 2 of the same normative act exhaustively lists the purposes for which the ordinance was adopted, respectively: "a) the exercise of the right to free association; b) promoting civic values, democracy and the rule of law; c) pursuing the achievement of a general, local or group interest; d) facilitating the access of associations and foundations to private and public resources; e) the partnership between the public authorities and the legal persons of private law without patrimonial purpose; f) observance of public order ".

From the simple reading of those listed exhaustively by the act that enshrines the way in which the associations are constituted, respectively for what purpose they are to be established, it is easy to notice that nowhere in the text of the normative act is any reference or mention made regarding the legal possibility for an association to represent its own members before the courts or other enforcement bodies.

We consider, therefore, that the attitude displayed by the association corresponds to the pattern that a trade union organization would use. Unlike legal entities established under Government Ordinance no. 26/2000, trade unions, in the light of art. 28 of Law no. 62/2011 of the social dialogue[9], "have the right to take any action provided by law, including to take legal action on behalf of their members, based on a written mandate from them[10]".

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[6] See in this respect **Gabriel Boroi, Mirela Stancu**, *Drept procesual civil*, third edition, Hamangiu Publishing House, Bucharest, 2016, p. 916.

[7] Article 83 para. (2) Code of Civil Procedure.

[8] Published in Official Journal of Romania no. 39 of January 31st, 2000, as further amended and supplemented.

[9] Published in Official Journal of Romania no. 3229 of May 10th, 2011, as further amended and supplemented.

[10] See article 28 para. (2) of the Social Dialogue Law no. 62/2011.

On the other hand, we consider that, in a dispute in which a member of an association is involved, the latter has the legal possibility to make a request for an accessory intervention in order to support its member's arguments, but in no way a legal leverage is granted to act as a lawyer or trade union organization in the absence of a genuine mandate or a derogatory legal provision from the common law.

Thus, the introduction of an enforcement request on behalf of the members of the association, whom, in fact, are the creditors, should have been subject to the mandatory rules on the granting of a mandate, in which case they must meet the requirement of authenticity. The fact that the request for enforcement was made by the lawyer whose services were requested only by the association, in its own name, shows that the members of the latter have no active legitimacy whatsoever in the entire enforcement proceedings (including foreclosures, respectively summons and so on).

It is irrelevant that the creditors in their personal name subsequently formulated the action seeking the application of delay penalties. As is well known, an essential condition for the promotion of such a dispute is the expiry of the period of 10 days from the communication of the conclusion of the enforcement by the bailiff.

In other words, a condition of admissibility is the very existence of an enforcement file initiated by the creditor, by seeking the services of a bailiff, so that the latter can intiate the necessary procedures in order to obtain and subsequently communicate the conclusion of the enforcement to the debtor. Only in case of non-compliance, the creditor has the possibility to request the application of penalties for delay.

However, as long as the creditors did not formulate the request for enforcement in their personal name, respectively there was no authentic mandate given to the association to act in this way on behalf of its members, it results, in our opinion, that in the enforcement file thus started, the legitimacy of the creditor will belong only to the association in whose name the application was submitted by the lawyer, and not to its members.

We consider that the legal provisions regarding the non-lawyer representative agent cannot be circumvented, all the more so since "*the application of comminatory fines (currently penalties) does not mean an actual enforcement of the execution, but constitutes a means of indirect coercion of the debtor*[11]".

Moreover, perhaps the most important provision that should be interpreted in conjunction with the provisions regarding representation is that of art. 664 Code of Civil Procedure. Thus, in accordance with par. (1), "*enforcement may start* ***only at the request of the creditor****, unless otherwise provided by law",* while in the very next paragraph it is established that *"the application for enforcement is submitted, personally or through a legal or conventional representative*[12]".

Summarizing the arguments already detailed, the debtor understood to defend itself by raising the exception of lack of active procedural legitimacy, argumenting, in essence, the fundamental difference between the legitimacy of creditor as a whole and the legitimacy of creditor in an enforcement case, in the absence of authentic mandate given to a legal person who desires to act as the creditor's representative agent.

As to the extent to which the plea of lack of active procedural legitimacy could be raised, it must be pointed out that there is no real and legal justification for not examining it both in the enforcement appeal and directly before the court seised to pronounce a sentence in a dispute having as object the application of penalties for delay, due to the non-fulfillment of the obligation to perform by the debtor, all the more so as it is an absolute and peremptory exception.

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[11] See in this respect **Viorel Terzea**, *Noul cod de procedură civilă adnotat*, Universul Juridic Publishing House, Bucharest, 2016, p. 1066.

[12] Consult in this respect the provisions of article 664 para. (2) Code of Civil Procedure.

**2. THE CONTRADICTORY ARGUMENTS HELD BY THE COURTS ON THE SAME ISSUE OF LAW.**

By the Sentence from June 6th 2019, the Court of First District of Bucharest rejected the exception of the lack of active procedural legitimacy, raised by the debtor, as unfounded.

In order to pronounce the aforementioned solution, the court retained the following: "within an action based on the provisions of art. 906 alin. (1) C.pr.civ, the active procedural legitimacy belongs to the creditor from the executive legal report, a report that represents the transposition, on an executive level, of the obligatory report from which results the claim recognized by the executory title". Therefore, by the mentioned conclusion, the court considers that it is perfectly legal that an association has filed a request for enforcement on behalf of a creditor, omitting the stage of identifying an authentic mandate given by the creditor in the enforcement report, respectively the enforceable title in order to empower the association in this regard.

By the same sentence, the court even notes that "the request for enforcement was made by the association not in its own name, but in the name of former employees", as well as the fact that "as long as the association did not formulate the request for execution of the enforceable title in the name and for the association, invoking an own right of claim, but in the name and for the creditor (...) for the capitalization of his rights, recognized by the executory title, the creditor has active procedural legitimacy in the action based on the provisions of art. 906 alin. (1) C.pr.civ".

Also, regarding the procedural legitimacy of the association, which supposedly acted on behalf of its members, the court mistakenly refers to the executory title and also refers to the fact that, "regarding the possibility and conditions for the enforcement by the association on behalf of the creditors, it cannot be analyzed in the present proceedings, but only in the appeal proceedings to the enforcement itself".

For these reasons, by the Sentence from June 6th 2019, the Court of First District of Bucharest wrongfully rejected the exception of the lack of active procedural legitimacy, raised by the debtor, as unfounded.

On the other hand, by the Sentence from June 13th 2019, the Court of First District of Bucharest admitted the exception of the lack of active procedural legitimacy, raised by the debtor, and rejected the request as being made by a person without active procedural legitimacy.

In order to pronounce the aforementioned solution, the following arguments were retained: the court begins its reasoning by invoking art. 36 Code of Civil Procedure, according to which the procedural legitimacy must result "from the identity between the parties and the subjects of the disputed legal relationship".

Therefore, analyzing both the aforementioned article and the provisions of art. 906 Code of Civil Procedure, the court concluded that "*only the creditor in the enforcement file has the active procedural legitimacy to notify the court for the application of penalties as a result of non-enforcement of the obligation to do or not to do, which cannot be fulfilled by another person*".

Going further with the logic of the argument, the court also states that in no document, of course, except for the writ of execution, does the name of the creditor appear, only the name of the association. We exemplify, in this way, the documents retained by the court as part of the above statement: the request for enforcement, the conclusion of approval of enforcement, the summons sent by the bailiff to the debtor, and the rest of the documentation related to the enforcement file.

For these reasons, by the Sentence from June 13th 2019, the Court of First District of Bucharest rightfully admitted the exception of the lack of active procedural legitimacy, raised by the debtor, and rejected the request as being made by a person without active procedural legitimacy.

## 3. CONCLUSIONS

In view of the non-uniform practice in this matter, as well as the need to establish a unified opinion, since the rulings in such disputes are final from the first instance, in our opinion, we conclude that the correct approach to such situations is to admit the exception for the lack of active procedural legitimacy, since there is only one creditor in the enforcement file (the association), which has not been legally mandated by the other creditors to file the enforcement application and does not benefit in any way from a right of legal representation regarding the members of the association. Consequently, there is no identity between the parties and the subjects of the disputed legal relationship.

Even in the case of a mandate, we consider that an authentic one would have been necessary in order to introduce the request for enforcement on behalf of the members of the association, as creditors. The request for the enforcement of any ruling must benefit from the consent of the creditor. Therefore, we appreciate that accepting a view contrary to the latter thesis would give rise to at least hilarious situations since the will of the creditor must be the central component, clearly expressed and not diluted in any way by the interests of another person, natural or legal.

In conclusion, the confusion between the legitimacy of creditor as a whole or found in the enforcement file is not grounded or justified in any way, the two situations being, indeed, similar, but fundamentally different in relation to the effects that each of them can provide, regarding the legal potential in a litigation based on the provisions of art. 906 Code of Civil Procedure.

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# EUROPEAN TRENDS IN THE RIGHT TO EDUCATION DURING THE PANDEMIC. MEASURES TAKEN BY THE EUROPEAN COMMISSION DURING THE PANDEMIC TO ENSURE THE PROTECTION OF THE RIGHT TO EDUCATION

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**ABSTRACT**

*The aim of this paper is to describe the implications of the European institutions for the basic legal framework for the protection of the right to study and the development of education in the context of the pandemic, by supporting and complementing the actions of Member States by the European Union.*

*Since the onset of the crisis, the European Commission has made efforts to coordinate, supplement and initiate the necessary measures to address all aspects of the coronavirus pandemic.*

*The digital sector plays an important role in the educational process.*

**KEYWORDS:** *European institutions, fundamental rights, right to education, pandemic, action plan.*

## SHORT INTRODUCTORY ITINERARY

*The global Covid 19 crisis, with major and regional implications, has activated the spirit of solidarity of the Member States of the Union and required the intervention of the European institutions to stop the spread of coronavirus, to protect the lives of European citizens, but also to counteract the socio-economic impact.*

*Safeguarding European solidarity required joint efforts by the governments of the Member States, but also the reaction of the Union institutions.*

*Among the first measures to stop the spread of coronavirus we find the restriction of free movement of persons, but also the temporary transfer in the digital field of social and economic activities.*

*The Union institutions have intervened in several areas, including education, by supporting and complementing the acts of the Member States of the European Union.*

*The intervention of the European institutions was timely due to the magnitude of the negative effects of this crisis, but also due to the need for Member States not to resort to a strictly national and unilateral approach to combat the pandemic, as its consequences have cross-border dimensions.*

*The European Commission, by virtue of its role and responsibilities under the provisions of the Treaties, has taken action to coordinate, supplement and initiate the necessary measures to address all aspects of the pandemic in several areas, including education.*

# EUROPEAN TRENDS IN THE RIGHT TO EDUCATION DURING THE PANDEMIC. MEASURES TAKEN BY THE EUROPEAN COMMISSION DURING THE PANDEMIC TO ENSURE THE PROTECTION OF THE RIGHT TO EDUCATION

*The coronavirus pandemic has generated significant disruptions in educational, training and mobility activities for students and teachers in the European countries.*

*The digital infrastructure has allowed the continuation of learning and training activities in the field of education. To ensure the continuity of the teaching process, digital technology was used, using online platforms, video education systems, but also other digital tools (for example, stay at home digital toolkit) to access teaching materials and interact with pupils and students.*

*We will see below the legal framework of union interventions, the way to protect the right to study during the pandemic and the influences of digital technology on the field of education.*

## 1. THE GENERAL LEGAL FRAMEWORK OF THE EUROPEAN UNION. GENERAL PROVISIONS OF THE TREATIES ESTABLISHING THE EUROPEAN UNION

The European architecture includes an institutional framework aimed at promoting European values, pursuing the objectives set out in the Treaties, upholding the interests of the Member States, guaranteeing the fundamental rights of citizens, ensuring the coherence, effectiveness and continuity of cohesion policy and Union action.

According to the provisions of art. 6 let. e TFEU "The Union is competent to carry out actions to support, coordinate or complement the action of the Member States" in several areas. These include the education sector.

Article 165 (1) TFEU provides that "The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, where necessary, by supporting and supplementing their action, fully respecting the responsibility of the Member States for the content education and the organization of the education system, as well as their cultural and linguistic diversity ", and paragraph 2 regulates the competences of support, coordination and completion of the action of the Member States by the European Union" The Union's action aims: to develop the European dimension of education ; to develop the exchange of information and experience on issues common to the education systems of the Member States; to encourage the development of distance education".

In order to achieve the Union's objectives, institutions have been set up by the Basic Treaties. They act, in order to fulfill the objectives inserted in the content of art. 3 TEU, only within the limits of the powers conferred on it by the Member States, subject to the principles of subsidiarity and proportionality.

The European Commission has a role to play in promoting the general interest of the European Union and in the application of Union policies. At the same time, the Commission agrees with the Union's programs and ensures the proper application of the Treaties.

According to art. 17 TEU "The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties and the measures adopted by the institutions pursuant to them. The Commission oversees the application of Union law under the control of the EU Court of Justice. It executes the budget and manages programs. The Commission shall exercise coordination, enforcement and administrative functions in accordance with the conditions laid down in the Treaties".

The outbreak of the Covid pandemic 19 and the many unknowns related to the new virus have led to unexpected challenges for Member State governments, dramatic socio-economic effects for Europe, and forced extraordinary and unprecedented action in Europe.

The crisis caused by the coronavirus required an immediate and firm response from the Member States, but also the intervention of the Union institutions in its management and in finding solutions to combat the effects of the pandemic.

The European Commission has mobilized all the tools and resources at its disposal to enable Member States to cope with the effects of the pandemic, which has affected all areas, including education and training systems at European level, changing the ways of learning, teaching, communication and collaboration. the educational community as a whole.

The measures and means of intervention used by the European institutions are to be dealt with in full in a separate section of this paper.

At the same time, we will proceed to a brief analysis of the effects of the pandemic on fundamental human rights, with special reference to the right to study.

## 2. THE FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION AND HUMAN RIGHTS ENSHRINED IN THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, WITH SPECIAL REFERENCE TO THE RIGHT TO EDUCATION.

The consecration of fundamental rights initially at the level of the European Communities and then of the European Union has been achieved progressively, in line with the amendments and completions of the European Convention on Human Rights, through Protocols[1], but also through the jurisprudence of the ECHR and the CJEU which interpreted and applied it.

The Maastricht Treaty[2] is the first source of primary EU law to report these rights to the Convention, including them in the category of general principles of law[3].

Fundamental rights are guarantees by which the European citizen defends himself, among other things, from the power of the states, ensuring the protection of his private sphere[4].

According to Article 6 (2) TEU, the Union accedes to the European Convention for the Protection of Human Rights and Fundamental Freedoms, respecting the fundamental human rights provided for in the Convention and the EU Charter of Fundamental Rights[5].

The adoption of the Charter of Fundamental Rights of the Union unequivocally establishes a direct relationship to the Convention of the rights it guarantees, which does not preclude the identification of a direct relationship between fundamental rights under other European legal acts and human rights under the Convention[6].

The Charter reaffirms, in accordance with the competences and tasks of the Union and the principle of subsidiarity, the rights deriving from the constitutional principles and

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[1]The provisions of Protocol no. 1 and, in particular, of Protocol no. 15, 6,7,7,12,13 in Rome, 4.11.1950. Convenience and ratification of Romania by Law no. 30/1994, published in the Official Gazette No. 135 / 31.05.1994. Protocol no. 15, Strasbourg, 24.06.2013, Romania was ratified by Law no. 157/157/2014, public. In the Official Gazette no. 886 / 5.12.2014.

[2]7.02.1992, in force from 1.11.1993, http://eur-lex.europa.eu.

[3]I.Gâlea, Accession of the European Union to the European Convention on Human Rights. Critical Analysis, Ed. C.H. Beck, Bucharest, 2012, p.36.

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[5]7.12.2000, adopted in Strasbourg, 12.12.2007.

[6]O. M. Salomia, Legal instruments for the protection of fundamental rights at the level of the European Union, Ed. C.H. Beck, Bucharest, 2019, p.26.

traditions of the Member States[7], the European Convention for the Protection of Human Rights and Fundamental Freedoms and strengthens the individual rights of European citizens[8].

The United Nations and European bodies, through all adopted human rights documents, state that the right to education is a priority, because its exercise depends on the social maturity of the individual and the exercise of other rights. In this sense, it is recommended to all states to ensure at all levels of education access to formal education - institutionalized, non-formal - complementary to educational institutions, informal - through cultural institutions, access to information, training and professional development, access to culture.

The Convention stipulates the conditions under which the exercise of fundamental rights may be restricted by States, which undertake, in their legal order, to "guarantee to any person the exercise of fundamental freedoms"[9].

The Treaty or the general principles of European law developed by case law by the Luxembourg Court of Justice sometimes allow Member States to restrict fundamental rights, on grounds of public policy or for the protection of health.

Restriction of the rights conferred on European citizens must be provided for by law, respect the substance of the law and can be achieved at Member State level in restrictive situations, such as in a state of emergency, when measures are necessary to protect health, but respecting the principle of proportionality, provided in art.5 paragraph 4 TFEU.

The state of emergency decreed by most European states, justified by the Covid crisis 19, motivated by the need to ensure public health, affected the rights of nationals of Member States to free movement, but also other rights guaranteed by the above-mentioned regulations. With regard to the right to education, we can speak of a restriction on the exercise of this fundamental and individual right of the European citizen through the measures taken at Union level. However, the imposed measure passes the test of proportionality, as the objective of the measure imposed in the context of the pandemic was to respond, in exceptional circumstances, to a real, present and sufficiently serious threat to a fundamental interest of society, and the objective pursued in this way humanitarian purposes and is necessary to ensure a higher level of protection for European citizens. The Court of Justice of the European Union has ruled in this regard when examining the proportionality of the measures ordered by the Member States[10].

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[7]P. Craig, G De Burca, European Union Law. Comments, jurisprudence and doctrine, ed. VI, Ed. Hamangiu, Bucharest, 2017, p. 432.

[8]Art.14 "every person has the right to education, as well as access to vocational training and continuing education". This article is inspired by Article 2 of the Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms. "No one shall be denied the right to education. The state, in the exercise of the functions it will assume in the field of education, will respect… ". The right to education is guaranteed by art. 32 of the Romanian Constitution, revised, published in the Official Gazette of Part I, no. 758 / 29.10.2003.

[9]Fr. Rigaux, Human Rights Protection: The European Perspective. Protection HumanRights: The European Perspective, Ed. Carl Heymans Velang KG, Berlin, Bonn, Munich, 2000, p1206, apund O.M.Salomia, op.cit., p.107.

[10]C-331/16 and C-366/16, *K/Staatssecretaris van Veiligheid en Justitie and H.F/Belgische Staat,* ECLI:EU:C:2018:296; C-316/16 and C-424/16, *B/Land Baden-Württemberg and Secretary of State for the Home Department/Franco Vomero,* ECLI:EU:C:2018:256.

The principles established in the practice of the Strasbourg Court and the Luxembourg Court find their applicability also in the context of the pandemic, even with regard to Romania, even if our country has derogated from the obligations provided by the Convention, through the request registered at the General Secretariat of Council of Europe on 17.03.2020.

## 3. INVOLVEMENT OF THE EUROPEAN COMMISSION IN THE DEVELOPMENT OF EDUCATION AND COMBATING THE EFFECTS OF THE PANDEMIC IN THIS FIELD

According to the provisions of Article 5 paragraph 2 TEU, the European Union acts only within the limits of the competences conferred by the Member States by the Treaties, in order to achieve the objectives inserted in the content of the Treaties[11].

The above-mentioned provisions must be corroborated with the provisions of Article 13 paragraph 2 TEU, according to which each institution or body of the Union must exercise only the competences with which they have been invested, these having a limiting character.

In the field of education, the Union may have recourse only to encouragement, except for any approximation of the laws for which the Member States are responsible[12].

To this end, the European dimension aims to develop the European dimension of education, as well as the exchange of information and experience on issues common to the education systems of the Member States, and at the same time to encourage the development of distance education[13].

In order to achieve these objectives, the European Parliament and the Council shall take encouraging actions, acting in accordance with the ordinary legislative procedure[14] and after consulting the Economic and Social Committee and the Committee of the Regions. At the same time, the Council shall adopt recommendations on a proposal from the Commission.

The Commission, as a promoter of the general interest of the Union, may adopt recommendations.

In the context of the pandemic that broke out at the end of February 2020 and spread rapidly throughout Europe[15], the Commission decided to support Member States in combating the effects of the coronavirus pandemic on the education system as well.

Education and training are essential for Europe's future, as they play an extremely important role in stimulating growth, innovation and job creation.

The very assertion of European identity on the international stage is considered to be inextricably linked to European education and training systems.

The crisis triggered by Covid 19 at European level required the intervention of Member States, but also of the EU institutions in order to maintain the health and safety of students and teachers, in order to limit the spread of the virus. The school and educational communities must have accurate and detailed information on preventive measures. The closure of schools and higher education institutions creates major disruptions, affects the right to study, which is why effective measures were needed. Member State governments, together with education decision-makers, have called for joint efforts to identify ways in which the educational process can take place during the pandemic in optimal conditions, using digital

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[11]Art.5 paragraph 1 TEU regulates the principle of attribution of competences at the level of the European Union.
[12]M.Pătrăuș, *op.cit.,* p.62.
[13]Art.165 para. 2 TFUE.
[14]Art.294 TFUE.
[15]Art.17 para.1 TUE.

means and platforms, but also to protect data and information. personal rights of pupils and students, teachers and to prevent or minimize the risks associated with the use of technology[16].

Given the importance of education at EU level, at a Council meeting, EU education ministers exchanged information on their experiences in distance education and discussed possible solutions for assessing, obtaining diplomas and enrollment in higher education[17].

The Commission explained how it gets involved by mobilizing all the tools and resources at its disposal to provide assistance in the field of education. Thus, reference was made to the possibility of structural funding that can be used to support distance learning and to guarantee equal access to quality education for all.

Streamlining the learning process is also ensured through the use of digital technologies that provide learning opportunities and open access to a wealth of information and resources.

This technology must be accessible to pupils, students, graduates of higher education institutions, but also to teachers.

To this end, the European Commission has adopted an Action Plan for Digital Education which sets out how education and training systems can more easily access the innovation and relevant digital technologies so necessary in training pupils and students in a digital age[18].

This plan focuses on the initial education and training systems comprising schools, vocational education and training, as well as higher education.

From the Commission's point of view, education must be the backbone of economic growth and inclusion in the EU, so an important task is to prepare citizens to make the most of opportunities and meet the challenges of a globalized, interconnected worldmove fast[19].

In order to guarantee the right to study in the digital age, cooperation at EU level involves the wider introduction of innovation in the education and training systems of its Member States and must be achieved through the exchange of good practice, mutual learning and learning. exchange of concrete data.

Joint actions can help teachers to identify effective solutions, while common tools such as eTwinning will increase efficiency and increase impact.

At Union level, innovative practices are used in education, which are mainly digital, take various forms and involve public, private and non-governmental actors. However, innovation in education systems is not an end in itself, but a way to improve the quality and inclusiveness of these systems[20].

[16]Requirements imposed by Directive 2002/58 / EC of the European Parliament and of the Council of 12.07.2002 on the processing of personal data and the protection of privacy in the public communications sector (Directive on confidentiality and electronic communications), published in OJ L 201 of 31.07.2002 and Regulation (EU) 2016/679 of the European Parliament and of the Council of 27.04.2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 / EC ( General Data Protection Regulation), publ. in JOUE L 119 of 4.05.2016.

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[18]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Digital Education Action Plan, Brussels, 17.01.2018, https://eur-lex.europa.eu/legal-content/RO/ALL/ ? uri = CELEX% 3A52018DC0022.

[19]Idem, p. 2.

[20]Idem, p. 3-4.

The Digital Education Action Plan includes 11 actions to support the use of technology and the development of digital skills in the education sector and defines the measures by which Member States can be helped to meet the challenges and take advantage of the opportunities offered by education in the digital age.

The action plan is based on “three priorities for action:

a). better use of digital technologies in the teaching and learning process

b). developing digital skills and competences relevant to digital transformation

c). improving education through better data analysis and forward-looking vision”[21].

The 11 actions set out in the Commission's Action Plan are:

- better use of digital technologies in the teaching and learning process (actions 1-3- connectivity in schools; self-assessment tool and mentoring program for schools; digitally signed qualifications)
- development of digital skills and competences (actions 4-8- higher education center; open science competence; EU school programming week; cyber security in education; training in digital and entrepreneurial skills for girls)
- improving education with the help of a better data analysis and a prospective vision (actions 9-11- studies on information technology in education; artificial intelligence and analysis; strategic forecasts).

At the same time, the Commission stated that the Digital Education Action Plan will be updated to respond to the current Covid-19 crisis and counteract the negative effects of the pandemic.

The aim is to establish measures to support Member States and educational institutions in "equipping" teachers and learners with digital skills, so that maximum benefits can be obtained using these tools and approaches.

In this regard, the Commission has proposed two investment initiatives for the response to Coronavirus that address both the health emergency crisis and its socio-economic consequences. Cohesion policy funds have been redirected to help national health care systems, SMEs and workers, as well as education and training providers, as well as students.

The European Social Fund will, among other things, be able to support education and training institutions to provide distance learning opportunities, as well as advice and counseling on home schooling. Additional flexibility in the rules of the funds was also provided, allowing Member States to redirect resources quickly to the most urgent needs.

The European Social Fund[22] must commit itself to combating early school leaving, promoting equal access to quality education, investing in education and training, improving the relevance of the labor market for education and training systems and strengthening lifelong learning, including formal, non-formal and informal learning pathways.

To increase educational mobility, the European Commission and the European Investment Fund launched[23], on 22.04.2020, a new pilot facility - "Financial Facility for Skills and Education" (C&E Pilot Facility) - designed to provide new opportunities individuals and organizations wishing to invest in skills and education, especially in the context of the Covid pandemic 19[24].

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[21]Idem, p. 4.

[22]Art.162-164 TFEU and Regulation (EU) no. 1304/2013 of the European Parliament and of the Council of 17.12. 2013 on the European Social Fund and repealing Regulation (EC) no. 1081/2006 of the Council, publ. in OJ L 347/470 of 20.12.2013.

[23]For detailed information on the European Investment Fundhttps://www.consilium.europa.eu/en/policies/investment-plan/strategic-investments-fund/

[24]https://edu.ro

The C&E pilot facility will provide an EU guarantee fund of up to € 50 million, supported by the European Fund for Strategic Investments, which will trigger debt financing for skills and education projects in Europe, in order to mobilize Total funding of more than EUR 200 million. Eligible students and businesses will be able to access different types of funding (eg loans, deferred payments, income-related loans, etc.) through dedicated financial intermediaries, such as financial institutions. , universities and vocational training centers, guaranteed by the EU[25].

The issues presented demonstrate the active involvement of the European institutions, since the outbreak of the pandemic, in order to mitigate their consequences.

The EU institutions have not only managed the situation during the pandemic, but have also taken steps to manage the gradual exit from the crisis.

To this end, the European Council launched a coordinated strategy on 26.03.2020, and the Commission in cooperation with the President of the European Council drew up a common European roadmap towards lifting measures to limit the spread of COVID-19[26].

The roadmap also sets out concrete recommendations that Member States need to take into account when planning to lift isolation measures. Thus, referring to the activities of schools and universities, the roadmap recommended that meetings be progressively authorized with specific measures, such as lunch breaks at different times, stricter cleaning, lower classes, greater use of online learning tools, etc[27].

## 4. CONCLUSIONS

The European institutions have been actively involved in combating the effects of the pandemic, through concrete intervention measures, at various levels, to protect human health, but also for the right to study of European citizens to be effective, not an illusory right.

In particular, the Commission, taking into account its competences, was actively involved, in partnership with the Member States, in crisis management and made a set of recommendations for the gradual exit from the current situation triggered by Covid 19.

The Commission's action plan is part of this EU institution's ambitious project to create a European area of education and complements the recommendations on common values and key competences.

The role of cutting-edge technology in a digital age is undeniable, and the 11 actions to support the use of technology and the development of digital skills in education will help Member States take the necessary steps to meet the challenges and opportunities of digital education.

In the current context, the Commission's action plan needs to be amended and supplemented to respond to the current Covid-19 crisis and to counteract the negative effects of the pandemic, but also of the excessive and exclusive use of technology in the education sector.

Interaction is the essence of life, and the unilateral acceptance of digital technology in education would be a fake that replaces reality, a monetized illusion, with devastating long-term[28] effects. The element of physical presence, so important in the relationship between

[25]Idem.
[26]For detailed informationhttps://ec.europa.eu/commission/presscorner/detail/ro/ac_20_679.
[27]https://ec.europa.eu/commission/presscorner/detail/ro/ac_20_679.
[28]G.Agamben, Journal of the Crisis, Italian Institute of Philosophical Studies, 23.05.2020, https://www.iisf.it.

student and teacher, especially in the discussions during the seminars - the most lively part of teaching, cannot disappear permanently.

Therefore, we consider that digital technology is an important tool in the educational process, especially when we talk about professional mobility, because it facilitates distance education. However, this technology should not replace teaching and learning in classrooms, but only complement it.

Returning to the involvement of the Union institutions in the coronavirus crisis, although the competences in this segment are to support, coordinate and complement the actions of the Member States, in order to make the Member States accountable for the content of digital education and for the effective organization of the education system. European. The European Parliament and the Council should take stronger encouragement to contribute to the development of quality education, supporting and complementing the actions of the Member States, by developing the European dimension of digitized education, which cannot replace traditional forms of learning, but must fulfill them.

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# RESPECT FOR THE HONOR, PRIVACY AND DIGNITY OF THE HUMAN PERSON

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**ABSTRACT**

*The right protects the person against the touches brought to his image by the so-called "image right". The man, the natural person enjoys honor and dignity, moral values guaranteed and protected by the legislation in force.Art.72 of the new Civil Code, related to this right stipulates:*

*(1) Everyone has the right of respect for their dignity.*

*(2) Any prejudice to the honor and reputation of a person without its consent or without respecting the limits provided for in article 75 is prohibited."*

*Romania's constitution at art. 30 paragraph (6), provides: "Freedom of expression cannot harm the dignity, honor, private life of the person nor the right to one's own image." The right of each of us to protect our own image is undoubtedly the fruit of the jurisprudence and the protection is guaranteed both by the fundamental Charter, represented by the Constitution of Romania, as well as by the legal norms of civil law. Legal advisors concluded that the right of each one on our own image is a real, absolute, inalienable right of the holder, called the right to the image. Like the name, the image of the person finds protection as the identifier of the person. The image is a representation of the physical characteristics of the person, it is both a form and a substance, it is an external dimension of the human being.1 It is a privileged manifestation of personality.*

*This right designates the legal possibility of any natural person to request respect even if judicially of his honor and dignity if they have been violated. Both the honor and dignity have a particular feature which refers strictly to their holder; they also have a social dimension that aims at esteem, consideration and respect for the peers, granted to the holder of these rights. From a judicial point of view, the prejudice of the honor of a natural or legal person bears the name of insult (when the accusations are insulting, offending or when the language is licentious) or of slander (when they refer to certain facts, habits or behaviour of the holder, facts which can be true or not). Slander and insult were sanctioned by article 205 and 206 in the old Criminal Code, as offences, but in the new legislation, they do not represent offences, but are subject to criminal and civil sanctions because the injured party may request moral damages for the damage suffered.*

*In art. 74, the New Civil Code, legally regulates and stipulates the right of any natural person to have his/her private life respected, the right at free speech, at his/her own voice,*

[1] The image derives from the Latin imago and Fr. image; in a first sense, it evokes the sensory-type reflection of an object in the human mind in the form of sensations, perceptions or representations; (The explanatory dictionary of the Romanian language, Academiei Ed., Bucharest, 1984, p. 415).

*mentioning in this sense that any person has the right to free expression. The exercise of this right can be restricted only in the cases and within the limits provided by law. Everyone has the respect for his/her private life. No one may be sujected to any interference in the personal of family intimate life, nor in the domicile of his/her residence or mailing without his/her consent or without observing the limits provided by law. It is forbidden to use in any way the mailing of the manuscripts or other personal documents2 as well as of the information in the private life of a person without his/her consent ot without observing the legal limits. The following are considered to be detrimental to private life3:*

*-entering or remaining without right in the house or taking of any object without te consent of the person occupying it legally;*

*-the interception without any right of a private call by any technical means, or the use, in knowledge of the cause, of such interception;*

*-capturing or using the image or voice of a person in a private space without their consent. broadcasting or displaying of images that present interiors of a private space without the consent of the one who occupies it legally;*

*-keeping the private life under observation by any means except the cases expressly provided by law;*

*-dissemination of news, debates or written or audiovisual reports on personal or family intimate life without the consent of the person concerned;*

*-dissemination of materials containing images regarding a person undergoing treatment in the health care units as well as personal data, diagnostic problems, prognosis, circumstances related to the disease and other various facts including the autopsy result, without the consent of the person concerned;*

*-in case the person is dead, without the consent of the family or of the persons entitled;*

*using in bad faith the name, image, voice or likeness of another person;*

*-dissemination or use of mailing, manuscripts or any other personal documents, including the data related to the domicile, residence, as well as the phone numbers of a person or of his/her family members, without the prior consent of the person concerned or, according to the situation, without the consent of the person who has the right to dispose of them.*

**KEY WORDS***: the right to image, the contract of image, the right to private life etc.*

## 1. THE LEGAL REGIME OF ONE'S OWN IMAGE OF THE NATURAL PERSON

Everyone has the right not to have his image reproduced or published without his/her authorization. As the name, the image of the person finds protection as the identifier of the person. The image represents the physical characteristics of a person; it is both a form and a substance, it is an external dimension of the human being4. It constitutes a priviledged manifestation of one's personality. The right protects the person against prejudices caused to his/her image by means of the so-called ”right to image”. In art. 30, paragraph (6), the Romanian Constitution stipulates: ”The freedom of speech cannot prejudice the dignity, honor, private life of the person, not the right to his/her own image.” The right of every individual to protect his/her image is without any doubts the result of jurisprudence and the

[2] See provisions of art.71 to 77 of the New Civil Code.
[3] According to provisions of art.74 of the New Civil Code
[4] According to provisions of art.74 of the New Civil Code

protection is guaranteed both by the fundamental Chart represented by the Romanian Constitution and by the legal terms of the civil law. Legal advisors have reached the conclusion that the right of every individual over his/her own image represents an extrapatrimonial right, real, absolute, inalienable to its holder, refered to as the right to image. Along the years, several theories related to the right of image have been discussed. Therefore, the copyright idea has been conveyed, being supported by the anglo-american jurisprudence; the basic principle of this idea is the right to multiply it, as the copyright stiipulates. Another theory we agree with includes thir right in the category of extra-patrimony rights of the human personality, together with the most important and fundamental rights (the right to life, health, integrity, honor etc.).

Analyzing from the perspective of the media examples, in which great sports personalities (and not only) have marketed their own image in the media, we question the extra-patrimony aspect of the right to our own image. Related to this right, in art. 73, the New Civil Code stipulates: ”(1) Any person has the right to his/her own image.”

(2) In the exercise of the right to his/her own image, the person may prohibit or prevent the reproduction in any way of his/her physical appearance or voice, or, as the case may be, the use of such reproduction.” The right of every person to his/her own image, belongs to the right of each of us to respect the rights and freedoms conferred by the Constitution and by the laws in force. In other words, any violation of the right of each of us to his/her own image represents as a consequence, a serious violation brought to these rights. This right has certain limits regarding the public safety measures, the right of public authorities to supervise and video-monitor certain areas or certain institutions.

### 1.1. THE CONTRACT OF IMAGE

Following the rights and freedoms conferred by the legislation in force, the right to image of each holder may be transferred on the basis of the institution of the image contract, for free or for free to be publicized. The personalities from the political, social or private spectrum, artists, athletes, etc. are included in this category. The new Civil Code protects the dignity of the natural person even after his/her death, so art.78 to 80 stipulate that the deceased person must be reepected with regard to his/her memory, as well as his/her body.

The memory of the deceased person is protected under the same conditions as the image and reputation of the person in life. Every person can determine the manner of their own funerals and can arrange for his body after death. In the case of those lacking exercise capacity or those with limited exercise capacity, the written consent of the parents or, as the case may be, the guardian is also required. In the absence of the express wish of the deceased person, the will of the spouse, parents, descendants, relatives in the collateral line up to the fourth degree will be respected, including the universal or universal legatees or the disposition of the mayor of the commune, city, municipality or sector of the municipality of Bucharest in whose territorial range the death occurred.

## 2. THE INSTITUTION OF HONOR IN THE LIGHT OF THE NEW CIVIL CODE

The man, the natural person enjoys honor and dignity, moral values guaranteed and protected by the legislation in force. Art.72 of the New Civil Code, regarding this right provides:

(1) Everyone has the right to respect for his dignity.

(2) Any prejudice to the honor and reputation of a person is prohibited, without his/her consent or without respecting the limits provided by art. 75".

This right designates the legal possibility of any natural person to request even the judicial respect of his honor and dignity if they have been violated. Both the honor and the dignity have a particular character, which refers strictly to their holder, but they also have a social character that concerns the esteem, consideration and respect of the fellow members granted to the holder of these rights. From a legal point of view, the attainment of the honor of a natural or legal person bears the name of insult (when the accusations are offensive, or the language is licentious) or of slander (when they refer to certain facts, customs or behavior of the holder, facts that may be true or not). Calumny and insult were sanctioned by articles 205 and 206 of the old Criminal Code as offenses, but in the new legislation they no longer constitute offenses, but are subject to criminal and civil sanctions, because the injured party can claim material damages for the damage suffered.

## 3. RESPECT FOR THE PRIVACY AND DIGNITY OF THE HUMAN PERSON

The new Civil Code in art.74, legally regulates the right of any natural person to respect his private life at free speech, at his own voice, mentioning in this sense that every person has the right to free expression. The exercise of this right can be restricted only in the cases and the limits provided by law. Everyone has the right to respect for his private life. No one may be subjected to any interference in the intimate, personal or family life, nor in his/her domicile, residence or mailing, without his consent or without observing the limits provided by law. The use, in any way, of the mailing, manuscripts or other personal documents5, as well as of the information in the private life of a person, without his/her consent or without observing the legal limits is forbidden.

The following are considered to be detrimental to privacy[6]:

a) entering or remaining without rights in the dwelling or taking of any object without the consent of the person occupying it legally;

b) the interception without right, of a private conversation performed by any technical means or the use, knowingly, of such interception;

c) capturing or using the image or voice of a person, in a private space, without his/her consent.

d) dissemination of images presenting interiors of a private space, without the consent of the person who occupies it legally;

e) keeping privacy under observation, by any means, except in cases expressly provided by law;

f) dissemination of news, debates, investigations or written or audiovisual reports on intimate, personal or family life, without the consent of the person concerned;

g) dissemination of materials containing images regarding a person undergoing treatment in health care units, as well as personal data on the status of health, diagnostic problems, prognosis, treatment, circumstances related to the disease and other various facts, including the autopsy result, without the consent of the person concerned, and in case he/she is deceased, without the consent of the family or the persons entitled

h) the use, in bad faith, of the name, image, voice or likeness of another person;

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[5] See provisions of art.71 to 77 of the New Civil Code.

[6] According to provisions of art.74 of the New Civil Code.

i) dissemination or use of mailing, manuscripts or other personal documents, including address, residence and telephone numbers of a person or members of his/her family, without the consent of the person to whom they belong or who, as the case may be, has the right to dispose of them.

It does not constitute an infringement of the rights provided in this section the violations permitted by law or by the international conventions and pacts regarding the human rights to which Romania is a party. The exercise of constitutional rights and freedoms in good faith and in compliance with international pacts and conventions to which Romania is a party does not constitute an infringement of the rights provided in this section. When the person to whom an information or a material refers, makes it available to a natural person or legal person who is aware of his / her activity in the field of public information, the consent for their use is presumed, without a written agreement being required. Any processing of personal data, by automatic or non-automatic means, can be done only in the cases and conditions provided by the special law.

With regard to data, their importance is revealed on the form in which they are stored, while for information, their importance is revealed from the content. Personal data can be aimed at both the natural and the legal person and refers to his/her private life. Personal data is a large and wide category of data and information regarding the privacy of individuals, data and information that may affect the dignity, image and reputation of the owner. Their legal protection is important because their collection starts from birth and extends throughout the life of the holder. Special data are considered those referring to the social or ethnic origin of the holder, those regarding political, religious, philosophical, health status, crime data, genetic, biometric data, etc. It is worth noting Directive 2003/98 / C.E. of the European Parliament of 17.11.2003 regarding the re-use of information in the public sector, with the object of data protection, the right of access and expression. In this sense, the European Parliament provides for the imposition of security conditions for these data when a public authority makes them available to third parties for their commercial reuse.

The European Union Directive no. 95/46 / EC regarding the protection and processing of personal data provides for compulsory principles regarding their processing, such as:

- the principle of data finality, a principle that obliges the user to use the data received only for the purpose initially established and not to modify or replace it except in the case of a legislative change.
- the principle of accuracy, a principle that states that the data processed must be accurate, and updated, and the inaccurate ones must be deleted or updated.
- the principle of proportionality, a principle that implies that the operator in the work should be limited only to those data that are indispensable to achieve the aim pursued.
- the principle of limited preservation, a principle that limits the period of storage (preservation) of data belonging to individuals longer than the normal period and necessary to fulfill the purpose for which they were collected.
- the principle of data security, a principle that provides data protection against all unauthorized processing.
- data transparency, a principle that involves control over one's own data and the right to self-determination and is expressed through what we call information.

## 4. ESSENTIAL POINTS IN THE LOGIC OF THE THEME

- the constitution of romania guarantees in article 30, paragraph 6 the legal protection of their image, the dignity and the private life of the human being.
- the new civil code adopted on 01.10.2011, in art.75 provides the prohibition of prejudicing the honor, reputation, dignity, image and private life of the individual.
- the new civil code, under art. 71 to 77, provides as prejudice to the private life of a person, the following facts:
- entry or stay without right in the dwelling of a person;
- interception of private conversations or mailing;
- capture or use of the image or voice of a person;
- distribution of images of a private area belonging to a third party, person etc.

**CONCLUSIONS**

The right of each of us to protect our own image is undoubtedly the fruit of the jurisprudence, and the protection is guaranteed both by the Charter, represented by the Constitution of Romania, and by the legal norms of civil law. The legal advisors concluded that the right of each one on our own image is an extra-patrimonial right, real, absolute, inalienable to its holder, called the right to the image. Like the name, the image of the person finds protection as the identifier of the person. The image is a representation of the physical features of the person; it is both a form and a substance, it is an external dimension of the human being7. It is a privileged manifestation of personality. The law protects the person against the prejudices brought to his/her image by the so-called "right to image". The man, the natural person enjoys honor and dignity, moral values guaranteed and protected by the legislation in force. Art.72 of the New Civil Code, regarding this right states: "Everyone has the right to respect for his dignity. Any prejudice against the honor and reputation of a person is prohibited, without his consent or without respecting the limits provided in art. 75 ".

This right designates the legal possibility of any natural person to request even the judicial respect of his honor and dignity if they have been violated. Both the honor and the dignity have a particular character, which refers strictly to their holder, but they also have a social character that concerns the esteem, consideration and respect of the fellow members granted to the holder of these rights. From a legal point of view, the attainment of the honor of a natural or legal person bears the name of insult (when the accusations are offensive, or the language is licentious) or of slander (when they refer to certain facts, habits or behavior of the holder, facts that may be true or not). Calumny and insult were sanctioned by articles 205 and 206 of the old Criminal Code as offenses, but in the new legislation they no longer constitute offenses, but are subject to criminal and civil sanctions, because the injured party can claim material damages for the damage suffered.

The new Civil Code in art.74, legally regulates the right of any natural person to respect for his/her private life at free speech, at his own voice, mentioning in this sense that every person has the right to free expression. The exercise of this right can be restricted only in the cases and the limits provided by law. Everyone has the right to respect for his/her private life. No one may be subjected to any interference in the intimate, personal or family life, nor in his domicile, residence or mailing, without his consent or without observing the

[7] The image derives from the lat. imago and fr. image; In a first sense, it evokes the sensory-type reflection of an object in the human mind in the form of sensations, perceptions or representations; (The explanatory dictionary of the Romanian language, Academiei Ed., Bucharest, 1984, p. 415)

limits provided by law. The use, in any way, of the mailing, manuscripts or other personal documents8, as well as of the information in the private life of a person, without his consent or without observing the legal limits is forbidden.

The following are considered to be detrimental to privacy[9]:

a) entering or remaining without rights in the dwelling or taking of any object without the consent of the person occupying it legally;

b) the interception without right, of a private conversation performed by any technical means or the use, knowingly, of such interception;

c) capturing or using the image or voice of a person, in a private space, without his/her consent.

d) dissemination of images presenting interiors of a private space, without the consent of the person who occupies it legally;

e) keeping privacy under observation, by any means, except in cases expressly provided by law;

f) dissemination of news, debates, investigations or written or audiovisual reports on intimate, personal or family life, without the consent of the person concerned;

g) dissemination of materials containing images regarding a person undergoing treatment in health care units, as well as personal data on the status of health, diagnostic problems, prognosis, treatment, circumstances related to the disease and other various facts, including the autopsy result, without the consent of the person concerned, and in case he/she is deceased, without the consent of the family or the persons entitled

h) the use, in bad faith, of the name, image, voice or likeness of another person;

i) dissemination or use of mailing, manuscripts or other personal documents, including address, residence and telephone numbers of a person or members of his/her family, without the consent of the person to whom they belong or who, as the case may be, has the right to dispose of them.

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[8] See provisions of art.71 to 77 of the New Civil Code.