

ABOUT DATA PROTECTION AND DATA RETENTION IN ROMANIA

by

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Romania has a relatively short democratic experience in the protection of individual rights, including the right to privacy which was expressly stated for the first time in the 1991 Constitution. The lack of legal protection of the most intimate aspects of a human being for so many years is quite explainable, as a totalitarian state, which was the case with Romania, usually exhibits the so-called “social rights”, and inhibits the natural and indefeasible rights as privacy. Human rights became really significant primarily not because of their intrinsic value naturally acknowledged by the Romanian legislators, but especially due to external obligations related to the potential membership in international organizations such as the Council of Europe or the European Union. The right to personal data protection was subject to the same process of legal “transplant” and internal acceptance. The European Union rules related to data protection were transposed by national laws, as part of the “acquis communautaire”, which have become the core elements of the Romanian legal regime on data protection, no local particularities being added. However, another act to transpose, the directive on data retention, encountered difficulties in entering the Romanian legal system, due to constitutional considerations on individuals’ rights.

KEYWORDS

right to privacy, right to personal data protection, constitutional development, EU law, data retention, Constitutional Court jurisprudence

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1. INTRODUCTION

The right to data protection was recognised as such by the national and international legal instruments a few decades ago; it is one of the most modern rights, arising out of the right to privacy subject to risks and changes generated by the unprecedented rhythm of technological developments that have a globalizing effect.¹ Both legislative systems, and legal doctrine admit its existence as a fundamental right in those States that conferred such a value upon it, but mostly at the level of international organizations, the most relevant being the case of the European Union (EU). Nevertheless, in Romania, while the right to privacy is a constitutional right, there is no natural recognition of the right to data protection, the context of its legal embracement being strictly determined by the envisaged accession to the EU. As a result, the legal “transplant” of this right into the Romanian legal space was produced by assimilating the *acquis communautaire*, as it was necessary to transpose the EU acts regulating this right (as the Directive on data protection, 95/46/EC). Following the EU joining and the entry into force of the Lisbon Treaty, the right to data protection began to be valued (even if slowly) both in the national legal culture and in the public eye; this is especially evident in relation to the constitutional dispute and the civic society debate over the law transposing the Data Retention Directive (Directive 2006/24/EC). The present paper will scrutinize the present status of the right to data protection in Romania, and the perspective on data retention, taking into account the applicable regulations, but also the relevant caselaw of the Romanian Constitutional Court (RCC).

2. THE EVOLUTION OF THE CONSTITUTIONAL REGULATIONS AS REGARDS THE RIGHT TO PRIVACY AND RIGHT TO DATA PROTECTION IN ROMANIA

The legal safeguards of fundamental rights in a State are influenced by the evolution degree of that society and by the democratic level where the “rule of law”² is manifested. All the more so, since a right such as the right to privacy is specific to those law systems which recognize the importance of the free development of the human personality, with no dictatorial constraints, where the individual can fully exercise his/her autonomy and personal rights. The authorities’ use of secret means, intrusive in the private life of

¹ See, Cannataci, J.A., 2008, *Lex Personalitatis & Technology-driven Law*, SCRIPT-ed, Volume 5, Issue 1.

the citizens of a State in order to achieve objectives of alleged public interest, involves the reduction till annihilation of the intimacy of the private life of a person. The private life is fundamental for personal integrity and remains one of the fewest means of defense available to a person in case of a conflict with the public power.³ From this perspective, a totalitarian State as Romania during '40-'90 of the 20th century, when most human rights were merely formal statements, did not conceive the admittance of a constitutional right to privacy. On the other hand, not even before this eve the Romanian constitutional legislators consecrated *expressis verbis* this right. Nevertheless, collateral aspects of protection of the private life, such as the secrecy of correspondence and inviolability of domicile were still enacted in all Romanian modern constitutions, from 1866 to 1965.⁴ The first post-communist Constitution⁵ (1991) settled specific provisions for the rule of law, while the second title consists of a true catalogue of fundamental rights, freedoms and duties, which also reflected the main international rules that Romania previously adhered to. Human dignity, citizens' rights and freedoms and free development of the human personality were declared supreme values guaranteed by the Art. 1 (3) of the fundamental law, next to justice, political pluralism, rule of law, and the features of a democratic and social State. A number of fundamental rights and freedoms were provided for the first time,

² As for the RCC, the exigencies of the rule of law "refer to the major objectives of the State activity, pre-figured for what is mostly known as the rule of law, which implies the subordination to the law, ensuring those means allowing the law to censor the political options and, within this framework, to limit the potential abusive, discretionary tendencies, of the State structures. The rule of law ensures the supremacy of the Constitution, the correlation of the laws and all the legislative acts with the Constitution, the existence of the regime of separation of the public powers, which have to act within the limits of the law which expresses a general will". (RCC Decision no. 70/2000, OJ 334/19.07.2000). This opinion is also shared by constitutional law authors: "(...) the main exigencies of the rule of law are the admittance of and safeguarding the human rights, the constitutionality control, the observance of the constitutional legislation (...)" - Muraru, I., Constantinescu, M., Tănăsescu, S., Enache, M., Iancu, Gh., 2002, *Interpretarea Constituției. Doctrină și practică (Constitution Interpretation. Doctrine and Practice)*, Lumina Lex, Bucharest, pp. 102. As for the same, "(...) there is rule of law where: the rule of law is evident, the content of this right values the citizens' rights and liberties at their real dimensions; the equilibrium, collaboration and mutual control of the public powers (public authorities) are accomplished; the free access to justice is achieved" - Muraru, I. & Tănăsescu, E.S. (co-ordinators), 2008, *Constituția României. Comentariu pe articole (Romanian Constitution. Commented by Articles)*, C. H. Beck, Bucharest, pp. 9.

³ Campbell, D., Connor, S., 1986, *On the Record. Surveillance, Computers and Pivacy – The Inside Story*, Michael Joseph, London, pp. 12.

⁴ Muraru, I. & Iancu, Gh., 1995, *Constituțiile române (Romanian Constitutions)*, Regia Autonomă Monitorul Oficial, Bucharest.

⁵ The Constitution was published in OJ, Part I, no. 233/21.11.1991 and approved by referendum on 8th December 1991.

among which the right to intimate, family and private life (Art. 26⁶). Unlike the international legal instruments admitted by Romania (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, European Convention on Human Rights), elements specific to the inviolability of domicile and the secrecy of correspondence are not included in the content of the fundamental right to privacy, as the 1991 Romanian Constitution provides these fundamental rights in three distinct but consecutive articles (Art. 26-28). The 2003 revision of the Constitution preserved the same architecture of these three rights and thus, strengthened the autonomous nature of the right to privacy. Unlike other European States, the Romanian Constitution did not include in the catalogue of fundamental rights and freedoms a fundamental right to the protection of personal data, neither by separate provisions (as in the case of Poland or Slovenia), nor by a constitutive part of the right to privacy (as in the Netherlands or Switzerland). This state of play continued even after the 2003 revision, when proposals to raise the rank of this right to a constitutional one did not have a long life.⁷ However, due to Romania's obligation to transpose the *acquis* before its accession to the EU, a number of important laws were enacted adding specific legal safeguards to the constitutional right to intimate, family and private life, as part of the State's general, positive obligation, stated by Art. 26 (1) of the Constitution, to take action in protecting this right. For the purpose of this article the most relevant legal instruments are the framework-law for data protection (Law 677/2001⁸ transposing Directive 95/46/EC⁹), the law on privacy in the electronic communications sector (Law

⁶ Art. 26 – Intimate, family and private life

(1) The public authorities shall respect and protect the intimate, family and private life.

(2) Any natural person has the right to freely dispose of himself unless by this he infringes on the rights and freedoms of others, on public order or morals. (http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=2#t2c2s0a26)

⁷ For instance, the "Report of the Presidential Commission for the Analysis of the Political and Constitutional Regime in Romania – for the Strengthening of the Rule of Law" of 2008 (available at http://www.presidency.ro/static/ordine/CPARPCR/Raport_CPARPCR.pdf) based the proposal of the introduction of the right to personal data protection in the constitutional text on the importance of the right to personal data protection at the European level. The same kind of a proposal was also formulated by the National Supervisory Authority for Personal Data Processing, within its first activity report in 2006 (available at <http://www.dataprotection.ro/?page=Rapoarte%20anuale&lang=ro>). However, the latest initiative for revising the Constitution, formulated in 2011, did not submit this proposal again.

⁸ OJ, Part I, no. 790 of 12.12.2001

⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995).

506/2004¹⁰ transposing Directive 2002/58/EC¹¹) and the law on data retention (former Law 298/2008¹² and current Law 82/2012¹³ transposing Directive 2006/24/EC¹⁴).

3. CHARACTERISTICS OF THE RIGHT TO PRIVACY IN ROMANIA

Considering the content of the constitutional right to intimate, family and private life, several characteristics of this right can be noted, as derived from the provisions of Art. 26 of the Constitution:

- this *inviolable* right is treated as a *complex* right with a *three-layered content* having as object the protection of the intimate life, family life and private life.¹⁵ No other additional rules defining separately all these three elements (whose limits can hardly be established) are present in the Constitution's text; therefore, the actual content of these rights is to be settled by the jurisprudence and doctrine. However, bearing in mind the authentic meaning of the concept of *privacy* and the practice of the ECHR based on Art. 8 of the Convention,¹⁶ we think that the notion of the *right to privacy* reunites in a holistic way the characteristics of the three notions used by the Romanian constituent power. This is why we consider that *de lege ferenda* an amendment of the Constitution is necessary. Another argu-

¹⁰ OJ, Part I, no. 1101 of 25.11.2004

¹¹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002)

¹² OJ, Part I, no. 780 of 21.11.2008

¹³ OJ, Part I, no. 406 of 18.06.2012. Both these laws (Law 298/2008 and Law 82/2012) transposed Directive 2006/24/EC.

¹⁴ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ L 105, 13.4.2006)

¹⁵ Muraru, I. & Tănăsescu, S., 2005, Drept constituțional și instituții politice (*Constitutional Law and Political Institutions*), Vol. I, All Beck, Bucharest, pp. 168-169.

¹⁶ Based on the ECHR jurisprudence, a judge of this court says that the notion of the „private life” is comprehensive and cannot be put into an exhaustive definition (Bîrsan, C., 2010, Convenția europeană a drepturilor omului. Comentariu pe articole (*European Convention on Human Rights. Commented by articles*), C.H. Beck, Bucharest, pp. 604). According to the same author, „the jurisprudence of the national and European courts reveal that the notion of „privacy” is under permanent evolution and contains today traditional aspects – such as the right to image, civil status of the person, identity, health, religion, his/her physical and moral integrity, intimate life etc., as well as modern aspects related to the new perceptions in social life – concerning abortion, homosexuality, transsexuality, and some developments of the communication means: interceptions of the phone or electronic correspondence, utilisation of the automatic personal databases etc.”.

ment that can be brought in support of such necessity is the fact that references to the same fundamental right, i.e. right to privacy, are contained in other articles where a different terminology is employed. For instance, within the limits of the freedom of expression, next to dignity and honour, “the particular life of the person” and “the right to one’s own image” are mentioned, the latter being already established by the doctrine as inseparable from the respect of privacy.¹⁷ This heterogeneous approach is also visible at the level of the ordinary legislation, as regards the construction given by the Civil Code to the rights of personality;¹⁸

- a general *positive obligation* is incumbent upon State, in order to adopt legislative and coercive measures for defending the right not only against public authorities, as the Constitution provides, but also against any other subject; in addition, the content of this right also entails the *negative obligation* of refraining from interferences contrary to the law;
- as regards the *holders* (and beneficiaries, at the same time) of this right, Art. 26 (2) of the Constitution uses the notion of “individual”, and not “citizen” as in the case of other rules on guiding principles for fundamental rights and freedoms (universality and equality) or on other constitutional rights (right to freedom of movement, right to a decent standard of living, right to petition). This terminology is appropriately and not accidentally used, having in mind that the right to privacy has to be ensured to every individual, regardless of the nature of his/her relationship with the Romanian State.¹⁹ For the same matter, the ECHR jurisprudence is also relevant: Romania was condemned for the infringement of Art. 8 of the Convention, including in cases where the complainant was not a Romanian citizen,²⁰

¹⁷ Muraru, I. & Tănăsescu, S., *supra note 15*, pp. 169.

¹⁸ The new Civil Code of 2011 (Art. 58) includes in the scope of the rights of personality the right to life, the right to health, the right to physical and moral integrity, the right to dignity, the right to one’s own image, the right to private life, and the list is not closed.

¹⁹ The Romanian citizenship was defined as „the quality of an individual, that expresses the permanent social-economic, political and legal relations between the individual and the State, proving his/her affiliation to the Romanian State and attributing to the individual the possibility of being the holder of all the rights and duties provided by the Romanian Constitution and laws” (Muraru, I. & Tănăsescu, S., *supra note 15*, pp. 116.)

- only one of the *elements* composing the right to privacy is provided by the constitutional text: the right of a person to dispose of himself/herself (the so-called “bodily freedom”²¹), seen by some authors as a “corollary of the right to life and physical and moral integrity”²² which is closely related to the German right to self-determination, but does not cover all the aspects of the right to privacy;
- the admissible *limits* settled by the Constitution are also put into relation to the single (sub-)right to dispose of himself/herself: rights and freedoms of others, public order and morals. It was not necessary to establish here the limits of this (sub-) right as Art. 53²³ of the Constitution sets out anyway the general rules for restraining the exercise of certain rights and freedoms, and even in a more comprehensive manner. However, the admissibility of an interference in the exercise of any relative right is to be interpreted in the light of the international instruments on human rights and especially, according to the ECHR jurisprudence.

Having regard to the above considerations, we consider that the wording of the current provisions of Art. 26 of the Constitution should be amended as to the content and limitations of this right.

As a partial conclusion, the right to privacy (although incompletely structured) is clearly a constitutional right in Romania, the right to personal data protection being safeguarded only as an infra-constitutional right, adopted as a consequence of the international obligations.

²⁰ For instance, in its decision of 15.02.2011, case *Geleri v. Romania* (no. 33118/05), ECHR held that the Romanian law did not allow the claimant (a Turkish citizen) to defend himself against arbitrary measures of expulsion, based on motifs related to national security, which affected his private and family life.

²¹ Muraru, I. & Tănăsescu, S., *supra* note 15, pp. 169.

²² Drăganu, T., 1998, *Drept constituțional și instituții politice. Tratat elementar (Constitutional Law and Political Institutions. Elementary Treaty)*, vol. I, Lumina Lex, Bucharest, pp. 158.

²³ Art. 53

(1) The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.

(2) Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom. (http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=2#t2c2s0a53)

4. ROMANIA'S ADHESION TO INTERNATIONAL ORGANISATIONS – LEGAL IMPACT ON THE RECOGNITION OF THE RIGHT TO PRIVACY AND RIGHT TO DATA PROTECTION

4.1 GENERAL REMARKS

According to Art. 148 (2)²⁴ of the Constitution, all public authorities (belonging to the legislative, executive and judicial powers) must respect the principle of prior application of the entire EU *acquis*. As a result, the internal acts which do not correspond or violate the EU law will not be applicable to national legal order; such internal acts are not automatically invalidated or annulled, being still capable of producing legal effects, but in other situations, not specific to the EU law. As regards the international instruments on human rights, the Romanian Constitution consecrated the principle of *lex mitior*,²⁵ which requires the application of the provisions most favourable for the individuals' rights, the domestic or external legal nature of the act being irrelevant.

As of the 1st of December 2009, when the Lisbon Treaty amending the constituent treaties of the EU came into force, all the fundamental rights set out by the Charter of Fundamental Rights of the European Union gained legal force for all the Member States, in relation to the activities where the EU law is implemented. As a direct consequence, the right to privacy (Art. 7²⁶ of the Charter) and the right to personal data protection (Art. 8²⁷ of the Charter) consolidated or gained their fundamental value, as the case may

²⁴ Art. 148 – Integration into the European Union

(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

(http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=6#t6c0s0a148)

²⁵ Art. 20 – International treaties on human rights

(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to.

(2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions. (http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=2#t2c1s0a20)

²⁶ Art. 7 - Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

²⁷ Art. 8 - Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.

be, in each Member State. In addition, Art. 16 TFEU recognised the right to personal data protection as opposable to the EU bodies and institutions and the Member States, in the exercise of their activities falling within the scope of the EU law.

The above considerations will be taken into account in order to assess how the right to privacy and the right to personal data protection are legally reflected at the level of national law, by reference to the international legal instruments on human rights (especially, of the Council of Europe) ratified by Romania, on the one hand and to the EU law, on the other hand.

4.2 RIGHT TO PRIVACY AND RIGHT TO DATA PROTECTION, IN RELATION WITH THE COUNCIL OF EUROPE ACTS

The acts of the Council of Europe became part of the Romanian law system by ratification of certain conventions and by implementation of the Committee of Ministers' recommendations and resolutions. As for data protection, Romania ratified the Convention for the protection of individuals with regard to automatic processing of personal data of 1981 (Convention for data protection) and its additional protocol²⁸ of 2001 by Law 682/2001 and Law 55/2005. The declarations Romania made upon the deposit of the ratification instrument of the Convention for data protection concern the scope of the law and the competent national authority (the Ombudsman, at that time). As the Convention for data protection and Directive 95/46/EC contain similar provisions on principles and general rules of processing personal data, the national laws ratifying or transposing these acts ensure a uniform framework on data protection, as well, and they have to be interpreted together (even if the origin acts come from different legal orders). However, a systematic review of the two laws (Law 677/2001 and Law 682/2001) reveals certain differences as for their scope: whilst Law 682/2001 excludes from its application the processing of personal data obtained from public documents, this exception cannot be found in the provisions of Law 677/2001.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

²⁸ Additional Protocol to the Convention for the protection of individuals with regard to automatic processing of personal data, regarding supervisory authorities and transborder data flows, CETS 181, 2001

Taking into account the primacy principle of the EU law and looking at the recent ECJ jurisprudence on the matter,²⁹ internal laws have to admit the rules on personal data protection even when these data are contained in public documents, so the provisions of Law 677/2001 should take precedence over Law 682/2001. Recommendation R (87) 15 of the Committee of Ministers to Member States regulating the use of personal data in the police sector, although is a nonbinding legal instrument, became part of the accepted “hard law”, as part of the Schengen *acquis*; as a consequence, Romania implemented it by Law 238/2009³⁰ which sets out rules almost identical to the origin act.

4.3 RIGHT TO PRIVACY AND RIGHT TO DATA PROTECTION, IN RELATION WITH THE EUROPEAN UNION ACTS

The right to privacy was already recognized as a fundamental right at the time the Lisbon Treaty entered into force, as an element of the right to intimate, family and private life (Art. 26 of the Constitution), therefore, in this respect, the Charter provisions (annexed to the Treaty) only reiterated the value of this right, as regards the Romanian law system. The content of the right, as regulated by Art. 7 of the Charter, is reflected by the elements of the three fundamental rights provided by the Romanian Constitution (the right to intimate, family and private life, the inviolability of domicile and the secrecy of correspondence). Once Directive 95/46/EC was transposed by Law 677/2001, the premises for respecting the right to personal data protection were created, even without expressly consecrating it as a term. Otherwise, the first article of Law 677/2001 clearly sets out the scope of the regulation, no references being made to data protection: “the purpose of this law is to guarantee and protect the individual’s fundamental rights and freedoms, especially the right to intimate, family and private life, with regard to the personal data processing”. Nevertheless, as a consequence of the obligations Romania had to assume during the period of pre-accession to the EU and the Shengen Area, the legislative framework was enriched by transposing the relevant *acquis* that expressly refers to the “protection of

²⁹ Joined cases C-92/09 and C-93/09, Judgment of the Court of 9.11.2010, Volker und Markus Schecke and Eifert v Land Hessen (2010 I-11063 ECR); Joined cases C 468/10 and C 469/10, Judgment of the Court (Third Chamber) of 24.11.2011, Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) and Federación de Comercio Electrónico y Marketing Directo (FECEMD) v Administración del Estado (not yet published in ECR)

³⁰ OJ, Part I, no. 405 of 15.06.2009

personal data”.³¹ Anyhow, the notion of “right to personal data protection” is obvious in almost all the administrative acts (with normative function) issued by the National Supervisory Authority for Personal Data Processing (NSAPDP).³² The legislative acts Romania adopted in order to tackle the exigencies of legislative approximation with the Schengen *acquis*, contain detailed rules outlining the legal regime of personal data protection. In all the other legal acts, the common characteristic is the single and general reference norm for the framework-legislation (Law 677/2001), as regards the compliance with the confidentiality and security rules of the personal data processing operations.

The new framework for reforming the legislation on personal data protection proposed by the European Commission in 2012,³³ replacing the current Directive 95/46/EC with a mandatory and directly applicable regulation, will ensure an equivalent level of protection of this right in the whole EU by eliminating the differences and possible restrictions likely to impede the free movement of personal data. Otherwise, the first paragraph of the preamble to this proposal envisages the affirmation of the fundamental character of the right to the “protection of natural persons in relation to the processing of personal data”, taking as a reference Art. 8 (1) of the Charter and Art. 16 (1) TFEU. Therefore, Romania will have to embrace the same view as regards the fundamental nature of the right to personal data protection³⁴ for all the activities falling within the scope of the new-proposed regulation (exceptions are currently provided by Art. 2 (2) of the proposal).

³¹ For instance, Title III of Law 161/2003 (OJ, Part I, no. 279 of 21.04.2003) provides the prevention and combating cyber crime by specific measures of prevention, discovery and sanctioning the crimes committed by IT systems, and ensuring at the same time the observance of human rights and the protection of personal data. Other similar regulations in this respect (using the term “data protection”): Law 271/2010 (OJ, Part I, no. 36 of 14.01.2011) for visas regime, Agreement of 2.12.2005 on cooperation between Romania and Eurojust, ratified by Law 58/2006 (OJ, Part I, no. 300 of 4.04.2006).

³² For instance, Decision 132/2011 on the conditions for processing the personal identification number and other identifiers of general application (OJ, Part I, no. 929 of 28.12.2011).

³³ Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 25.01.2012, COM(2012) 11 final, 2012/0011 (COD)

³⁴ The developments at international level tend as well to expressly establish the fundamental right to data protection, due to its universal value (see the proposal of the national authorities for data protection of adopting an international legal instrument with a view of setting common principles on data protection: “Joint Proposal for a Draft of International Standards on the Protection of Privacy with regard to the processing of Personal Data”, made by the International Conference of Data Protection and Privacy Commissioners, held in Madrid on 5 November 2009).

5. LEGAL FRAMEWORK ON DATA RETENTION IN ROMANIA

As all the other Member States, Romania had to transpose Directive 2006/24/EC by 15 September 2007. Romania adopted Law 298/2008³⁵ after the deadline imposed by the Directive, and used the extension norm which allowed the Member States to postpone application of this Directive to the retention of communications data relating to Internet Access, Internet telephony and Internet e-mail, until 15 March 2009. The strong public debate around the law soon resulted in a legal action filed by an NGO which challenged the constitutionality of the law. The Romanian Constitutional Court (RCC) was the first to decide³⁶ a law on data retention as contrary to the Constitution (see below), the decision being seen as a success of the civic society. On the other hand, this constitutional event produced a legislative gap on Romania's obligation to transpose Directive 2006/24/EC, as one of the major reasons of unconstitutionality stated by the RCC referred to the providers' obligation to continuously retain traffic, localization and identification data for six months. The Romanian legislator was thus confronted with two types of apparently incompatible obligations: the constitutional obligation of the Parliament (art. 147³⁷) to comply with the RCC decision and amend accordingly the legal provisions; the obligation of double nature based on the Constitution (art. 148³⁸) and the EU treaties (art. 258³⁹ of TFEU), to observe the compulsory character of directives, as concerns their estab-

³⁵ OJ, Part I, no. 780 of 21.11.2008

³⁶ Decision no. 1.258/2009 (OJ, Part I, no. 798 of 23.11.2009)

³⁷ Art. 147 (1): The provisions of the laws and ordinances in force, as well as those of the regulations, which are found to be unconstitutional, shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case may be, cannot bring into line the unconstitutional provisions with the provisions of the Constitution. For this limited length of time the provisions found to be unconstitutional shall be suspended *de jure*.

Art. 147 (4): Decisions of the Constitutional Court shall be published in the Official Gazette of Romania. As from their publication, decisions shall be generally binding and effective only for the future.

(http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=5#t5c0s0a147)

³⁸ Art. 148 (2): As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

Art. 148 (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.

(http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=6#t6c0s0a148)

³⁹ Art. 258 TFEU: If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

lished core-objective.⁴⁰ As Romania faced with the threat that the European Commission would bring infringement proceedings against it,⁴¹ after more than two years since the RCC decision and the implicit revocation of the Law 298/2008, the Parliament passed a new law for transposing Directive 2006/24/EC (Law 82/2012)⁴², in order to avoid a negative decision of the CJEU. This put an end to a long and difficult legislative process due to the dissents on the previous drafts expressed by both the Parliament commissions and by the NSAPDP. Law 82/2012 improves some technical provisions previously criticised by the RCC, but still does not ensure a satisfactory level of protection of individuals' rights as the procedure for obtaining the retained data is not very clearly regulated (especially as concerns the rights of the national security agencies). Although the new law was contested by a number of NGOs, no legal action or request for a decision on constitutionality was submitted so far.

6. THE ROLE OF THE ROMANIAN CONSTITUTIONAL COURT IN SAFEGUARDING THE RIGHT TO PRIVACY AND THE RIGHT TO PERSONAL DATA PROTECTION. THE PARTICULAR CASE OF "DATA RETENTION".

Romania unlike other European States neither created a right to personal data protection (or some other similar right of the same species) in an innovative fashion, as the German judges from Karlsruhe did, nor identified the right to personal data protection prior to its integration into the national law system by way of transposing EU law. In several cases, Art. 26 of the Constitution had been invoked as legal basis for finding the unconstitutionality of certain legal acts, but only in those cases where the RCC had to take a decision in relation to some components of the constitutional right to intimate, family and private life, other than the protection of personal data (right to one's own image, right to dispose of himself/herself). On the other

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

⁴⁰ Art. 288 (2) TFEU: A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

⁴¹ The European Commission initiated the procedure for the infringement by letter C(2011) 4111 of 16 June 2011, in the case 2011/2089, for not implementing the data retention directive, in which Romania was asked to communicate the measures for national transposition of Directive 2006/24/EC, within two months.

⁴² OJ, Part I, no. 406 of 18.06.2012

hand, the jurisprudence of the RCC does not seem to be constant with regard to the notional references on personal data protection, before and after the entry into force of the Lisbon Treaty. As a general rule, the relatively few decisions where the notion of “(right to) protection of personal data” is used are those judgments referring to the ECHR jurisprudence⁴³ or analysing the constitutionality of laws transposing EU rules.⁴⁴ In other cases, the RCC avoided to put this right into question, even if the legal provisions under debate were clearly related to it. As an example of this conduct, by Decision no. 415/2010⁴⁵ on Law 144/2007 on the setting up, organisation and functioning of the National Integrity Agency,⁴⁶ the RCC declared the unconstitutionality of some legal provisions imposing integral publication of public officers’ assets declarations on the Internet pages of the said agency and public institutions. Therefore, the RCC held that “the legal obligation to publish the assets and interests declarations on the Internet pages of the entities where the individuals have the legal obligation to submit them, and to transmit them to the National Integrity Agency in order to be published on its Internet page infringes the right to respect and protect the private life, as stated by Art. 26 of the Constitution and by Art. 8 of the Convention for the protection of human rights and fundamental freedoms, due to the objectively and rationally unjustified exposure, on the Internet page, of the data on assets and interests of the individuals having a legal obligation to submit the assets and interests declarations”. This decision was taken after the Lisbon Treaty and Charter entered into force; the publication of the assets and interests declarations was closely connected to the utilisation of personal data as an element of the right to privacy (according to the ECHR), notably, the right to data protection. Despite all this, the RCC did not make any reference to the right to personal data protection, as a fundamental right provided by the European treaties or the CJEU (or ECHR) jurisprudence, nor as an instrument of interpretation (as the case concerned a purely internal situation).

However, a notorious decision in relation to the right to data protection is a strongly debated⁴⁷ Decision no. 1258/2009,⁴⁸ which placed RCC next to the

⁴³ See RCC Decision no. 162/2008 (OJ, Part I, no. 263 of 3.04.2008).

⁴⁴ RCC declared unconstitutional the Law 298/2008 which transposed Directive 2006/24/EC (RCC Decision no. 1258/2009).

⁴⁵ RCC Decision no. 415/2010 (OJ, Part I, no. 294 of 05.05.2010)

⁴⁶ OJ, Part I, no. 535 of 3.08.2009

constitutional courts of Germany,⁴⁹ Czech Republic,⁵⁰ or Cyprus⁵¹ that also declared the partial or total unconstitutionality of their national laws transposing the same Directive 2006/24/EC (although the reasons stated by the German Federal Constitutional Court, for instance, are visibly different from the ones pronounced by the RCC). By this decision, the RCC declared Law 298/2008 unconstitutional, as concerns the nature and scope of the obligation to retain data. In the RCC' opinion, the obligation of data retention was ruled as an exception from the "principle of personal data protection and their confidentiality" safeguarded by Law 677/2001 and Law 506/2004,⁵² but, by its scope and extent, would make void this principle. Although the RCC did not prove a creative role as regards the legal regime of the right to personal data protection (as the German Federal Constitutional Court in-

⁴⁷ See on this subject: De Vries, K., Bellanova, R., De Hert, P., Gutwirth, S., The German Constitutional Court Judgment on Data Retention: Proportionality overrides unlimited surveillance (doesn't it?), *Privacy and data protection : an element of choice*. Ed. S. Gutwirth, Y. Poullet, P. De Hert & R. Leenes. Springer, 2011, available at: http://works.bepress.com/serge_gutwirth/53; Larionescu, L., 2010, Curtea Constituțională a României. Decizia nr. 1258 din 8 octombrie 2009. Excepție de neconstituționalitate admisă. Reținerea datelor privind telecomunicațiile. Drepturi individuale (*The Romanian Constitutional Court. Decision no. 1258 of 8 October 2009. Admitted exception of unconstitutionality. Retention of telecommunications data. Individual rights.*), in *Curierul Judiciar (Judicial Courier)*, no. 3, pp. 152; Toader, C. & Safta, M., 2010, Transpunerea Directivei 2006/24/CE a Parlamentului European și a Consiliului din 15 martie 2006 privind păstrarea datelor generate sau prelucrate în legătură cu furnizarea serviciilor de comunicații electronice accesibile publicului sau de rețele de comunicații publice și de modificare a Directivei 2002/58/CE în legislația română (*Transposition of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC in the Romanian legislation*), in *Curierul Judiciar (Judicial Courier)*, no. 5, pp. 295-299; Șandru, S., 2011, Analiză critică a jurisprudenței de contencios constituțional din România și Germania cu privire la declararea neconstituționalității legilor naționale de transpunere a Directivei nr. 2006/24/CE privind reținerea datelor generate sau prelucrate în legătură cu furnizarea de servicii de comunicații electronice destinate publicului sau de rețele publice de comunicații, precum și pentru modificarea Directivei nr. 2002/58/CE (*Critical analysis of the constitutional jurisprudence in Romania and Germany on the unconstitutionality of national laws transposing Directive 2006/24/CE on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC*), in *Pandectele Române (Romanian Pandects)*, no. 4, pp. 137-153.

⁴⁸ Decision no. 1.258/2009 (OJ, Part I, no. 798 of 23.11.2009)

⁴⁹ Judgment of the German Federal Constitutional Court of 2 March 2010 - Bundesverfassungsgericht [BVerfG], 1 BvR 256/08-1 BvR 263/08-1 BvR 586/08

⁵⁰ Judgment of the Constitutional Court of the Czech Republic of 22 March 2011, Pl. ÚS 24/10 (it cites several arguments from the similar decisions of the constitutional courts in Romania and Germany)

⁵¹ Judgment of the Supreme Court of Cyprus of 1 February 2011

⁵² The Romanian constitutional judges gave as examples Law 677/2001, Law 506/2004 and Directive 2002/58/EC, in order to reveal the State obligations "mostly negative, of abstention" on human rights as the right to privacy and freedom of expression and protection of personal data, where the "unanimous rule is of their safeguarding and observance, including of their confidentiality".

vented the right to informational self-determination⁵³), this decision marked an original evolution with respect to the interpretation of the EU law in the context of the constitutional provisions. The RCC criticised the object matter of Law 298/2008; but the object matter is identical with the one laid down by Directive 2006/24/EC (the obligation of the electronic communications providers to retain data, in order to put them at the disposal of the law enforcement public authorities), as a result of the transposition obligations undertaken by the Member States. In view of the provisions of Art. 148 of the Constitution and of Art. 288 TFEU, the obligation to retain data could have been subjected to constitutional control in only one case: the RCC would have embraced by its argumentation the *Solange*⁵⁴ German doctrine (the EU law primacy is admissible as long as it does not contradict fundamental principles such as the individuals' rights enshrined by the Constitution). This decision contains references to the result of the directives that must be attained by the Member States, but the RCC avoided basing its arguments on the supremacy of the constitutional provisions over the EU law, in cases of infringement of fundamental rights. Recently, an RCC judge expressed for the first time an opinion on the necessity that the RCC should state its position as regards the relation between the EU and the Romanian constitutional law.⁵⁵ In supporting her opinion, the judge mostly cited the CJEU caselaw affording the EU law primacy even over the constitutional provisions of the Member States, in order to ensure the efficiency and uniformization of the EU law.

In taking its decision, the RCC based on criteria taken out from the rich ECHR jurisprudence on Art. 8 of the Convention. Thus, RCC considered that: continuous retention of data can raise in the individuals' conscience

⁵³ Judgment on the unconstitutionality of the Law on population census, 1984 (Bundesverfassungsgericht, volum 65, p. 1). See Hornung, G. & Schnabel, Ch., 2009, Data protection in Germany I: The population census decision and the right to informational self-determination, in Computer Law&Security Review, no. 25, pp. 84-85.

⁵⁴ After *Solange I* (BVerfGE 37, 271 of 29 May 1974), in *Solange II* judgment (BVerfGE 73, 339 of 22 October 1986), the German Federal Constitutional Court held that, so long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law.

⁵⁵ RCC Decision no. 1656/2010, OJ, Part I, no. 79 of 31.01.2011 (concurrent opinion of the Judge I. A. Motoc)

the legitimate suspicion of breaking their intimacy and committing abuses; the legal safeguards on using data are not sufficient or adequate; and the limitation of the exercise of personal rights in the name of public interest has to be fairly balanced between diverging interests. Even if the decision may be criticised for ignoring certain principles of the EU law (primacy of the EU law, including of directives),⁵⁶ merits of this judgment can be mentioned: the essential role of the human rights, and in particular, of the right to privacy in a democratic law system, is reaffirmed as a fundamental value, which takes precedence over other legal norms.

In both the above cited decisions, the RCC did not feel comfortable to expressly refer to the right to personal data protection or to create a specific right, similar to the German fundamental right to informational self-determination. We think that the RCC could have used the model of the EU institutions (including CJEU) that used the Charter as a reference norm⁵⁷ even at the time when they were not legally bound by its provisions.

Analysing the RCC jurisprudence one can find that the right to personal data protection, even in the absence of a concrete terminology in this respect, is considered as a component of the right to intimate, family and private life, guaranteed by Art. 26 of the Constitution, but also as a mean of achievement of the protection of the rights therein.⁵⁸ The legislative acts on data protection (in particular, Law 677/2001 and Law 506/2004) are cited by the RCC as representing the legal basis for guaranteeing the “principle of the protection of personal data and their confidentiality” which may only be qualified, in this context, as a principle of *ius commune*, inferior to a constitutional principle.

⁵⁶ After more than two years since the RCC decision, a new law was enacted in order to transpose Data Retention Directive (Law 82/2012, OJ, Part I, no. 406 of 18.06.2012), under the spectre of an infringement action taken by the European Commission against Romania. The new act preserves many elements of unconstitutionality of the former Law 298/2008, so we think that its destiny is predictable in case of another proceeding before the RCC.

⁵⁷ On the characteristics of the Charter, see Tănăsescu, E.S., 2010, Carta drepturilor fundamentale a UE: avantajele și efectele ei pentru cetățenii europeni (*The EU Charter on fundamental rights and its advantages and effects upon European citizens*), in *Revista Română de Drept Comunitar (Romanian Journal of Community Law)*, no. 4, pp. 15-33.

⁵⁸ For instance, here is an argument of the RCC held in its Decision no. 162/2008: „(...) The Court held that the criticised legal provisions concern (...) information on individuals' health conditions, part of the notion of the right to privacy, thus being a mean of achievement of the protection of the rights provided by Art. 26 of the Constitution, equally safeguarded by Art. 8 of the Convention; in this sense, it is to be noted the ECHR Judgment in “Z. v Finland (1997)” where “the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Art. 8 of the Convention””.

7. CHARACTERISTICS OF THE RIGHT TO PERSONAL DATA PROTECTION IN ROMANIA

The Romanian legislation on personal data protection rather than innovating the specific rules is remarkable by its mimetic adoption of the Council of Europe's or European Union's legal norms.

In view of our above considerations, we can resume the following characteristics of the right to personal data protection in Romania:

- it is a right *derived* from the fundamental right to intimate, family and private life, provided by Art. 26 of the Constitution, and having as constitutional *basis* the human dignity and the free development of the human personality, safeguarded as supreme values by Art. 1 of the Constitution; however, it is not yet a constitutional right;
- it is a right which was *arose* in the *context* of the European legislation defending the privacy against the risks raised by the progress of the modern techniques of information processing; from this point of view, it is an *autonomous* right from the right to privacy; it is not a creation specific to the Romanian legal space, as it was first *adopted* by way of transposing the EU directives, and then (after the accession to the EU and entry into force of the Lisbon Treaty and the Charter), *developed* by the way of direct effect of the EU treaties. Presently, the legal norms providing this right are part of the national law, according to Art. 11 and Art. 148 of the Constitution;
- it can be considered a *fundamental* right only in relation to the implementation of the EU law, in accordance with Art. 16 TFEU and the interpretation rules of the Charter (Art. 51). As a result, in all the situations where Law 677/2001, Law 506/2004, or Law 82/2012, for instance, are applicable, as they transpose EU directives, the interested particulars could directly invoke the right to personal data protection and could benefit from all the safeguards established by this legal regime. Its nature of fundamental right can be opposed to any public authority (executive, legislative, judicial authorities), to the Constitutional Court, and to private entities in those cases where the EU law entails horizontal direct effects;⁵⁹

⁵⁹ See ECJ, Case 26/62, Judgment of the Court of 5.02.1963, Van Gend en Loos v Administratie der Belastingen, ECR 1963.

- it is also a *personal* right, according to the provisions of the new Civil Code;
- it is a *relative* right, but its *limitations* have to respect the requirements laid down by the Constitution and identified by the ECHR caselaw.

As regards the personal data processing related to the activities on national security and defence, the legal safeguards laid down by Law 677/2001 and Law 506/2004 are not applicable, as they are expressly exempted from their provisions.⁶⁰ In this respect, the interested parties will have to make recourse to the general legal guarantees correlated with the right to privacy (Art. 26 of the Constitution), notably to the judicial review, as the ECHR in Rotaru case⁶¹ already underlined.

Retention of personal data is a particular case of exemption from the rules on data protection, so the implementation of Directive 2006/24/EC should have included a larger range of legal safeguards of the individuals' rights. Unfortunately, the current law on data retention does not meet all these requirements, especially with regard to the procedure of obtaining and storing data by the law enforcement authorities.

8. CONCLUDING REMARKS

The right to privacy in Romania is clearly a constitutional and fundamental right, established by Art. 26 of the Constitution, with all the related safeguards. As concerns the right to personal data protection, by its terminology and specific legal regime, it is a right created within the European law and transplanted into the Romania's legal system, due to its international obligations, as a member or potential member of certain organisations like the Council of Europe or the European Union. The right to personal data protection has still a long way to run before being accepted as an autonomous right distinct from the right to privacy, both in the legislation and the jurisdictional practice.

The right to personal data protection is not a constitutional right and its fundamental value was only acquired by way of implementation of the EU law. Its legal regime is quasi-identical to the one derived from the EU acts

⁶⁰ NSAPDP does not have any jurisdiction over these processing operations.

⁶¹ Judgment of 4.05.2000, case Rotaru v Romania (no. 28341/95). Similar judgments (on the individuals' rights on personal data kept by the secret services) were taken by ECHR in other cases like: Judgment of 19.07.2011, case Jarnea v Romania (no. 41838/05), Judgment of 27.10.2009, case Haralambie v Romania (no. 21737/03).

transposed in Romania, without evident elements of novelty or specificity; the holders benefit, as a result, from the same subjective rights and means to exercise the control over their personal data as in any other Member State. The new Civil Code, for the first time in Romania, created the legislative framework for including the right to privacy and the right to personal data protection within the personality rights area.

The constitutional and ordinary courts rather show certain reluctance to the recognition of a distinct legal regime of the right to personal data protection, most of the jurisprudence references being made to the right to privacy, as provided by the Constitution and the Convention; the right to personal data protection is considered at most a principle related to the confidentiality of information or a safeguard for the exercise of the right to privacy.

In our opinion, the right to personal data protection should benefit of an autonomous legal regime, based on the constitutional provisions, by integrating it into the catalogue of the fundamental rights, as it is at the international level, with a full set of rules completely separate in the context of personal data processing, having its own provisions and evolving dynamic. We think that this change would contribute to avoiding the application of double standards for defending the same right in two kinds of situations: implementation of the EU law and exclusive application of the national legislation.

Therefore, a future revision of the Constitution could also have as object:

- the amendment of Art. 26 of the Constitution by unifying the three elements (intimate, family, private life) under a single title (right to privacy) and by clarification of its current limitations;
- the introduction of a new fundamental right in the Constitution, on personal data protection, in a consecutive article after Art. 26, with content similar to the Charter.

The new regulation proposed by the European Commission will bring also for Romania the strengthening of the current legal regime on personal data protection, by the recognition of new rights (the right to be forgotten, the right to data portability) and by enhancing the NSAPDP competence regarding the administrative sanctioning and imposing additional tasks upon data controllers in order to increase the level of their responsibility towards the individuals' personal data.

As regards data retention, Romania, unlike other states (Germany⁶²), proved to be more attached to its obligations as a Member State to transpose a directive (EU law primacy) rather than to follow the mandatory RCC decisions (Constitution supremacy). Therefore, we think that a new legal action against Law 82/2012 (if favourably solved) will have a limited effect. A suitable option for the RCC would be to request in such a case the advice of the CJEU⁶³ by way of a preliminary reference, unless the EU Court already decided in similar cases brought to its attention by the High Court of Ireland and by the Constitutional Court of Austria.⁶⁴

⁶² Germany has become the object of an infringement action for its alleged failure to implement the Data Retention Directive in time (Case C-329/12, pending case).

⁶³ The legal doctrine already stated its position with regard to the failure to comply with the right to privacy and right to data protection as provided by the Charter, in case of Directive 2006/24/EC. (see Feiler, L., 2010, The Legality of the Data Retention Directive in Light of the Fundamental Rights to Privacy and Data Protection, in „European Journal of Law and Technology”, Vol. 1, Issue 3)

⁶⁴ The High Court of Ireland (case C-293/12 - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:258:0011:0011:EN:PDF>) and the Constitutional Court of Austria (http://www.vfgh.gv.at/cms/vfgh-site/attachments/2/7/9/CH0003/CMS1355817745350/press_release_data_retention.pdf) made references for a preliminary reference asking the CJEU if Directive 2006/24/EC is compatible with certain fundamental rights provided by the Charter and by the Convention. The cases are pending.