

THE CONSTITUTIONAL FRAMEWORK FOR DIGITALIZATION OF THE REPUBLIC OF MOLDOVA IN THE PERSPECTIVE OF INTEGRATION INTO THE EUROPEAN UNION¹

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Abstract

Digitization in the evolution of all societies, based on the concept of the "digital revolution", through its impact on social relations has become necessary at the level of public law, also establishing a constitutional imperative. In 2018 the adoption of the European Union program "Digital Europe for the period 2021-2027" establishes important national standards for the member states, which set rules for the institution of digitization regarding constitutional rights and freedoms such as, freedom of expression, private life, etc. Widespread implementation of technologies such as artificial intelligence, cyber security, etc. establish at the stage of constitutionality and constitutional law regarding the compliance with the Constitution of the legal norms in the field of digitization. As an example in this study, can be considered the Decision of the Constitutional Court of Romania no. 70 of 28.02.2023.

The conducted study proposes debates regarding digitization in the Republic of Moldova, which was established through the formation of multiple digital platforms, and after June 23, 2022, when the European Council granted the Republic of Moldova the status of a candidate country, the need to ratify the agreement with the EU regarding participation in the Union Program was created - "Mechanism for the interconnection of Europe", from May 9, 2023. The foundations of European digital constitutionalism in the Republic of Moldova were previously formed, after June 27, 2014, when the EU and Moldova signed the Association Agreement, drafts of revision of the Constitution being developed to solve power imbalances in the digital society, mitigated the risks of digitization for fundamental human rights and the values of an authentic democracy in the Republic of Moldova in the perspective of integration into the European Union.

Keywords: constitutional law, digitization, constitutional rights, digital constitutionalism, constitution.

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Introduction

Digitization has caused enormous social benefits to society, with information accessibility causing essential changes to social communication. Disrupting communication through increased capabilities based on new technologies, digitization has created rapid and cardinal changes in social relations, causing the so-called "digital revolution". The exposed sudden evolution of social structures determined changes in political institutions and caused the need for radical changes in the legal field. The study conducted directed us to the analysis of a new institution in the system of social relations and especially legal relations.

Revolution is a constitutional legal term, determining the essential change of values, political institutions, social structure, leaders and ideologies of a society. As a result, the "digital revolution" can also represent a constitutional term at the current stage of the evolution of societies. The term "digitalization" acquires the constitutional quality because it signifies fundamental social imprints of the communication channels at the technical and electronic level. The processing or storage of data or signals from different fields of activity of citizens and society as a whole, imposes on digitization activities implications regarding human rights and freedoms through the acts of the governing authorities. Digital activities based on the last two actions establish their constitutional footprint, without which it is impossible to benefit from supreme guarantees. Digitization from those exposed in the evolution of all societies based on the "digital revolution" in the modern period of development of societies is necessary at the public level, and in the legal field it becomes necessary at the level of public law, legally establishing the constitutional imperatives.

The constitutional legal framework of digitization in the Republic of Moldova

Based on the constitutional norms, the Republic of Moldova has at the initial level a minimum of supreme norms, which grant digitization and the respective activities guarantees of exercise. We currently have the constitutional norms of art. 30 – Secrecy of correspondence, art. 32 – Freedom of opinion and expression and art. 34 – Right to information from the Constitution of the Republic of Moldova [5] which for Romanian researchers correspond according to the content of the regulations of art. 28 – Secrecy of correspondence, art. 30 – Freedom of expression and art.31 – The right to information from the Romanian Constitution [6].

The Republic of Moldova, as a result of some government activities and political activities in 2014, started the actions of joining the European Union. On June 27, 2014, the Association Agreement was signed between the Republic of Moldova (hereafter -

Moldova) and the European Union (hereafter - EU). The Republic of Moldova submitted an application for accession to the EU on March 3, 2022, and on June 17, 2022, the European Commission issued its opinion on the application for the accession of the Republic of Moldova to the EU. On 23 June 2022, the European Council granted the Republic of Moldova the status of a candidate country, and on 23 March 2023, the European Council reaffirmed that the EU will continue to provide all relevant support to the Republic of Moldova to strengthen the resilience, security, stability and economy of this country and to help it towards EU accession.

The constitutional tendencies of the digitalization of the Republic of Moldova

International political activities established the need for us to take as an example and implement initial accession practices from EU member states such as Romania. The mentioned aspect can be confirmed by attracting Romanian specialists to government accession activities, the formation of similar institutions, etc. The last statement can be supported by the organization in the Republic of Moldova of the Ministry of Economic Development and Digitalization, whose minister is the vice-prime minister. This ministry and the minister are placed in the same position as the Authority for the Digitization of Romania, reformed in 2020, which represents a structure within the working apparatus of the Government and the coordination of the Prime Minister, having the role of realizing and coordinating the implementation of strategies and public policies in the field of digital transformation and the information society.

The formation of these governmental structures of such a level represents the current policy of the Republic of Moldova to join the European Union, and in relation to Romania, this policy is not only one of fraternity, but also of respect for the legislative framework adopted within the Union. The use as an example of the legislative sources of the member states of the European Union and the implementation through the harmonization of the EU legislative framework in the national legislation represents a positive way of exercising the accession procedure. In this sense, I support the opinion of some authors, according to which "It is always advisable to adapt foreign solutions to the context, to the internal legal and administrative environment. The same solutions may not always be implemented in different legal systems, regardless of the fact that the same language is used". [1, 103] More than that, the mentioned specialists are of the opinion that for the Republic of Moldova the use of Romania's normative solutions represents a choice obvious, but each time it is necessary to check whether the Commission has initiated any procedure or litigation against Romania for the improper transposition of the EU legislation under analysis. We do not support a moment in the opinion of these authors. They claim that this position is related to

"the fact that Romania is a member state of the EU and the Romanian language is an official language of the EU". In my opinion, it was necessary to mention the fact that the citizens of the Republic of Moldova and Romania are of the same nationality, with the same national traditions and customs implemented in society for centuries.

The harmonization of the legislation of the Republic of Moldova with that of the EU has already been applied much more intensively since this year, which has directed the government to carefully follow both the previous rules adopted in the EU and the new ones. In the field studied in this report, we found that in the EU more recently, on April 29, 2021, the "Digital Europe for the period 2021-2027" program was adopted[2]. In the evolutionary framework, this program is also nominated as the "Digitalization of Europe" Program [3]. This act established important national standards for the member states, establishing rules of the institution of digitization for the respect of constitutional rights and freedoms "in particular those regarding the protection of personal data, freedom of expression and information, freedom to carry out a commercial activity, prohibition of discrimination, healthcare, consumer protection and the right to an effective remedy and a fair trial. Member States should apply this Regulation respecting these rights and principles." [2, point 69]. The Digitization of Europe program was developed and established by the European Union through the European Commission. This program is generated by the digitization of all member states of the European Union and other European states. After the adoption, a series of discussions were held within the program of the meetings regarding the perspectives of the transition to a more digital world, called the digital transition both in our lives and in the technological business environment and infrastructure, where digital systems play an essential role both in private life as well as in public activities.

The Digitization of Europe program provides strategic funding from the EU budget to member states from the EU's governing authorities to meet the challenges of digitization, progress that can be achieved through electronic systems. Within the Program five key capacity areas of Europe in the field of digitization were formed:

1. High performance computing;
2. Artificial intelligence;
3. Cyber security and trust;
4. Advanced digital skills; and
5. Implementation and optimal use of digital capabilities and interoperability.

[2, art. 3]

For this purpose, the European Union planned to invest a capital of 7.5 billion euros. The investment aims to accelerate economic recovery and shape the digital transformation of Europe's society and economy, bringing benefits to all individuals and legal entities within the national framework of the states, including entrepreneurs who have invested in various enterprises, including small and medium ones

The Digitization of Europe program will also be invested through other programs of the European Union, such as the one known to researchers from Moldova and Romania - Horizon Europe. [2, point.19] This program will be established by the mechanism for the interconnection of Europe in the digital infrastructure. The Digital Europe Program will be established through the Recovery and Resilience Mechanism, as provided for in the name of the Digitalization of Europe program in the period 2021-2027.

Next year, the Republic of Moldova will celebrate 30 years since the adoption of the Constitution and 29 years since the formation of the Constitutional Court. In 2022, numerous issues related to the Protection of human rights and their Constitutional regulation, including through constitutional norms, were discussed. Analyzes carried out in society have shown that much is changing in society as a result of the stormy development of new electronic technologies and social and human connections in society.

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Thus, from the entire text of Article 30 of the Constitution, a single phrase seems more modern, based on which the state ensures the secrecy of correspondence through the secrecy of legal means of communication.

The development of information technologies at the current stage needs to be oriented towards satisfying important social demands, including information technologies. The evolving modern information technologies have developed so quickly and widely that they have formed new possibilities for information and communication of citizens as well as new possibilities for citizens to protect their rights.

Modern information technologies can also implement the broadening of the scope of human rights and the detection of new modern technologies for the protection of man and his rights, activities guaranteed by the Constitution, thus also being institutions in the field of constitutional law. Modern information technologies, however, can cause negative consequences for human rights by creating new possibilities to have access to illegal content and personal data of citizens. Nevertheless, it is necessary for the state and its authorities to detect the new technologies to remove the violations allowed to their use.

The contradictions exposed between positive and negative regarding the development of information technologies need to be resolved in the process of political and social relations by the holders of state power in the process of studies conducted at various research meetings.

Public and private structures in the network should be constantly implemented contributing for national authorities at the highest level of constitutional law to effectively develop and implement relevant international standards in the Internet space (for example: child protection, protection of individual data of members of society, etc.). The involvement of researchers and relevant electronics experts should be maximized. While avoiding constitutional gaps in the protection of human rights and freedoms, national laws and regulations on digital issues should reflect new developments in international and comparative law not only in the field of digitization, but also in the protection of human rights through digitization.

The protection of privacy and personal data in the digital space plays an important role in the current stage of development of society, especially in terms of disproportionate government access and control over such data. An important level of development of society in this sense is the assistance of the state and society towards the convergence towards a high level of protection against the automatic processing of personal data, taking into account positive examples such as the General Data Protection Regulation of the European Union [4].

Constitutional protection of human rights through the use of new electronic computing tools further prompts society to step up efforts to take advantage of new technologies for civil society, including online and distance learning, as well as a focus on reducing harm to human rights defenders. Supporting efforts to protect freedom of expression, freedom of the press and pluralism in the online environment has become an important necessity in any democratic society, including in Moldova. Education, accessibility of new electronic technologies for everyone, including people with disabilities, must be promoted in all sectors. This requires ensuring accountability in the use of these new technologies, including through legal access to electronic materials that provide opportunities for analysis and implementation.

At the national level, as already mentioned, the Constitution of the Republic of Moldova guarantees the highest protection measures for the fundamental rights and freedoms of citizens without dividing them into online or offline measures. Moldova has already ratified some regional international conventions adopted regionally in the Council of Europe on the protection of human rights in modern digital technologies, such as the Budapest Convention on Cybercrime [7], the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, the Convention on information and legal cooperation regarding "Public Information Services", etc. In the state of pandemic, government structures must take all measures to protect human rights not only offline, but also online.

In 2015, the Council of Europe, in its Report on the protection of human rights on the Internet, drew our country's attention to the need to adopt at the state level a national political act on the strengthening of human rights on the Internet, however,

so far our country has not adopted a such act as, for example, Government Decision no. 90 of 05.12.2011 regarding the approval of the National Action Plan in the field of human rights for the years 2011–2014, where only 2 measures found their place: in para. 44 "1) Ensuring the right of young people to receive information via the Internet, equipping libraries with modern equipment" and in paragraph 78 "3) Developing and implementing a mechanism to ensure the protection of children in the online space (Internet)." These rules appeared only after these comments of the Council of Europe.

Initiatives to review the Constitution

In Moldova there are two factors that influence the possibility of using modern digital technologies: the infrastructure of populated areas and the financial capabilities of the population. These factors influence the accessibility, feasibility and reasonableness of using modern digital technologies.

The normal further development of modern digital technologies requires the adoption of new regulations at the national level. This proposal applies not only to laws of Parliament, Government decisions and other normative acts, but also to the Constitution itself.

The Constitution of the Republic of Moldova included three norms (art. 30, art. 32 and art. 34), which constitutionally oblige government bodies to protect our citizens in terms of access and use of modern digital technologies. These constitutional norms were good and advanced at the time of their adoption, but now, thanks to the development of modern digital technologies, these norms can be interpreted in such a way that there is a danger of harming human rights in this area. As an example, we can cite the restrictions that were applied in the field of access to modern digital technologies at the beginning of the declaration of the pandemic.

In relation to the initiative based on this research to revise the Constitution, for clearer guarantees of citizens' access rights and the use of modern digital technologies, we submit two options for revising the Constitution.

Article 30

The Secret of Correspondence

(1) The state ensures the digital security of the individual and society, the secrecy of letters, telegrams and other postal items, telephone and electronic communications and other legal forms of communication when using information technologies and manipulating digital data.

(2) The provisions of paragraph (1) can be derogated by law in cases when this derogation is necessary in the interests of national security, the economic well-being of the country, public order and in order to prevent crimes.

Article 34**The right to information**

(1) The right of a person to access any information related to public affairs cannot be limited.

(1¹) Every citizen is guaranteed the right to participate in information networks. The state is obliged to provide the right and opportunity to participate in the formation, exchange and dissemination of information using modern digital technologies.

(1²) Every citizen is guaranteed protection against the collection, processing or use of personal data using modern digital technologies, in accordance with the law. The protection of personal data using modern digital technologies is guaranteed by an independent institution formed and operating in accordance with the law.

(2) The authorities, in accordance with their competence, are obliged to provide citizens with reliable information about public affairs and personal issues.

(3) The right to information must not prejudice measures aimed at protecting citizens or national security.

(4) The mass media, both public and private, are obliged to provide the public with reliable information.

(5) The media is not censored.

The second version of the initiative refers to the revision of the Constitution by adding a new article to it. Thus, we propose to revise the Constitution through an amendment, of article 341 after article 34, in the following version:

Article 341***The right to participate in digital technologies***

(1) The right of citizens to participate in information networks and digital technologies is guaranteed.

(2) The state is obliged to grant the right and opportunity to participate in the formation, exchange and dissemination of information using modern digital technologies, including secrecy of correspondence and negotiations.

(3) Every citizen is guaranteed protection against the collection, processing or use of personal data using modern digital technologies, in accordance with the law. The protection of personal data using modern digital technologies is guaranteed by an independent institution formed and operating in accordance with the law.

(4) The participation of citizens in digital technologies is ensured by the state with the security of the individual and society in the use of information technologies and in the circulation of digital data.

Conclusions

Digitization was established in the Republic of Moldova through the formation of multiple digital platforms, and after June 23, 2022, when the European Council granted

the Republic of Moldova the status of a candidate country, the need arose to ratify the agreement with the EU regarding participation in the Union Program - Mechanism for the interconnection of Europe, from 9 May 2023. Widespread implementation of technologies such as artificial intelligence, cyber security, etc. establish at the stage of constitutionality jurisprudence regarding the correspondence with the Constitution of legal norms, such as Decision of the Constitutional Court of Romania no. 70 of 28.02.2023 [9], Decision of the Constitutional Court of Romania no. 17 of 21.01.2015 [10]. In the Republic of Moldova, the legislative framework was less subject to constitutionality control regarding legislative regulations when corresponding to existing constitutional norms. Part of the constitutional jurisprudence of the Republic of Moldova was anyway directed to the existing constitutional bases, such as the Decisions of the Constitutional Court no. 36 of 23.11.2021 [11]; no. 10 of 16.03.2017 [12]; no. 6 of 10.04.2018 [13]; no. 13 of 22.05.2014 [14] et al.

The constitutional bases of the regulation of European digital technology in the Republic of Moldova were formed in 1994, when the Constitution was adopted, a relative starting period, prior to the rapid progress of modern digital technologies. For these reasons, the laws and other normative acts subordinate to the law must be normalized in accordance with the new digital technologies and the "digital revolution", carried out not only internationally but also nationally. The correctness of the changes made to the legislation is assessed by their correspondence with the national constitutional criteria. The exposed constitutional factor directs the constitutional assembly (Parliament of the Republic of Moldova) to revise the Constitution, as a result of which, in this research, initiative projects in this sense were presented.

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MITIOR LEX IN NATIONAL AND INTERNATIONAL CASE-LAW – (SECOND-HAND) FUNDAMENTAL PRINCIPLE OF CRIMINAL LAW?

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Abstract

Several recent rulings by the Court of Justice of the European Union, the Romanian Constitutional Court and the High Court of Cassation and Justice raise the issue of the supremacy/primacy of European Union law over national law, especially with regard to criminal or constitutional provisions in respect to mitior lex principle and its influence over criminal responsibility towards crimes against the financial interests of the European Union. The national courts supported the view that the legality and mitior lex principles constitute fundamental principles of constitutional law and also criminal law, barring, when applicable, prosecution irrespective of crime. However, the European Court ruled that limitation period has no connection whatsoever with these principles at EU level and as national standards, only the legality principle outweighs the effectiveness of criminal law measures in combating fraud against the financial interests of the European Union, while the mitior lex principle, despite being recognised as a fundamental principle stemming from the common traditions of Member States and also the Charter of Fundamental Rights of the European Union, falls short in comparison. In the following we will analyse the evolution of the problem, but also possible solutions.

Keywords: mitior lex, ECJ case law, Romanian Constitutional Court case law, Romanian supreme court case law, protection of financial interests of the European Union.

1. Facts

1.1. Situation in Romania and decisions of Romanian Courts

Recent judicial practice in the matter of the incidence of limitation period (time barring) has been reconfigured by two decisions of the Constitutional Court and a binding decision of the High Court of Cassation and Justice.