# ANNEX II

## EMERGENCY ORDINANCE NO. 31 REGARDING THE PROHIBITION OF FASCIST, RACIST AND XENOPHOBIC ORGANIZATIONS AND SYMBOLS

The juridical norm that has become, with its adoption, the pillar of combat against right-wing extremism in Romania is Emergency Ordinance no. 31, which was adopted by the Government of Romania on 13 March 2002.[249] The Senate Commission for Culture approved it on May 28, proposing the introduction in the text of the definition of Holocaust, i.e. "systematic mass extermination of European Jews in the Nazi death camps, during World War II" (Webster Dictionary definition).[250]

The ordinance is the most radical normative act after 1989 in terms of the issue of freedom of speech and the right to associate, two essential values for democracy. The ordinance should have, in principle, a strong impact on associative and political life, and on public discourse. It imposes a detailed evaluation, thus becoming the central piece of instruments directed against right-wing extremism. This analysis starts from the observation that the legislative instruments available in the fight against extremism, planned to be efficacious and valid for a long time, must be precise, legitimate and have the power of distinction. Otherwise, their arbitrariness could prevent the application of the law, and in time they could create a contrary reaction.

Emergency Ordinance no. 31 defines the organizations of fascist or racist character, or the xenophobic groups that aim to "promote fascist, racist or xenophobic ideas, conceptions or doctrines, such as ethnic, racial or religious hatred and violence, the superiority of some races and inferiority of others, anti-Semitism, incitement to xenophobia, use of violence to change the constitutional order or the order of democratic insti-

249 Published in the "Monitorul Oficial" [Official Gazette] of 28 March, 2002.

250 Another proposal was the introduction of Nazi manifestations in the issues raised by the law.

tutions, or extremist nationalism" (Art.2, (1)). Setting up a fascist, racist or xenophobic organization shall be punished with imprisonment from 5 to 15 years and the loss of certain rights (Art. 3, (1)). Dissemination, sale or manufacturing of fascist, racist or xenophobic symbols is punished with imprisonment from 6 months to 5 years, and loss of certain rights (Art. 4, (1)). Promotion of the cult of persons who are guilty of crimes against peace and humanity, or of promoting fascist, racist or xenophobic ideologies through propaganda, carried out through any means, in public, shall be punished with imprisonment from 6 months to 5 years, and the loss of certain rights (Art.5). Public negation of the Holocaust or its effects is punished with imprisonment from 6 months to 5 years, and the loss of certain rights. It is prohibited to erect or to maintain in public space, statues, statuary groups, or commemorative plaques celebrating persons guilty of committing crimes against peace and humanity (Art.12), as well as to name streets, boulevards, squares, parks or other public space after such persons.

We will stop to consider the stipulations above. We will analyze the "quality" of the normative act, meaning by this its coherence, and the relation of the stipulations with other principles and usages of the law.

The first issue views the "urgency" of the normative act. Emergency ordinances are exceptions to the legislative rule, which gives the parliament the status of "the sole law-making authority of the country" (Romania's Constitution, Art. 58 (1)). The Government gains the ability to make laws only through this exceptional case. The legislative activity of the Government is supervised by delegating this ability as a result of a Parliamentary vote. In addition, government ordinances cannot regulate the field of organic laws, which is an obvious measure to emphasize the reserve that the government is due to employ as regards law-making.

Emergency Ordinance no. 31 refers to crime, and they pertain to organic laws. The Government took advantage of Art. 114 (4) of Romania's Constitution, regarding emergency ordinances, which does not set conditions regarding the fundamental nature of the regulated domain. In a given situation, the adoption of a normative act by the Government must even more rely on a strong rationale as regards its "urgency". The constitutional wording which enables the Government to do so underscores the condition "in exceptional cases". Decision no.65/1995 of the Constitutional Court also emphasizes this condition, by stating that "legislation" of emergency ordinances, including in the domains that pertain to organic laws, can be justified "only in exceptional cases", for "the adoption of an immediate solution in order to avoid severe harm to the public interest". It is noteworthy that in 1997, the Constitutional Court declared the Emergency Ordinance regarding local public administrations unconstitutional because of the lack of "urgency".

Several references made in the press suggest that the Government of Romania judged the resolution of an external requests "urgent", because it conditioned Romania's integration in the North Atlantic Treaty Organization. This argument would be legitimate to the extent that the integration in NATO is, in conformity with the government's program and the attitude shown by the majority of Romania's population, the expression of national interest. One counterargument is that the Government has exceeded very much its sphere of anti-extremist measures that can be conditions of the North Atlantic integration. As regards the regulations that interfere with human rights and freedom, it is especially necessary for the Parliament to assert its status of "supreme representative body of the Romanian people".

As for the coherence of the normative act, it must be regarded as an issue of its internal consistency, but also from the standpoint of its agreement with the general legislation. Provision 3 91) raises a first issue, by the fact that it punishes 'setting up fascist, racist and xenophobic organizations". The first criterion should be fascist, racist and xenophobic *activities*, not the *intention* at the time of setting up the organizations. This, because, on the one hand, one can imagine gatherings of groups that might have set extremist objectives, but not acted at all to their accomplishment. On the other hand, an organization that is established without fascist intentions can be oriented, later on, by some of its members toward such incriminating manifestations. It would result that, according to Art. 3 (1), persons who have never shown any racist, xenophobic, etc. manifestations, could be punished, as could the founders that are in no way responsible for the evolution of their organization. It is true that the provision regarding the dissolution of legal bodies takes into account the specific activities of organizations, and not their setting up. But the articles of the ordinance do not make sufficiently clear distinctions.

Another issue is raised by Art. 9 (1) whose content is as follows, "Judicial decisions can lead to the dissolution of legal bodies that carry out one or more of the following activities:

a) Activities that are specific to organizations with a fascist, racist or xenophobic character, in accordance with Art 2.a;

b) Dissemination, sale or manufacturing of fascist, racist or xenophobic symbols, with the aim of disseminating such symbols or use them in public;

c) Promotion of the cult of persons guilty of crimes against peace and humanity, or of promoting fascist, racist or xenophobic ideology, through propaganda carried out by any means, in public..."

The wording "can be dissolved" shows that the courts also have the authority to refuse to rule the dissolution of such legal bodies, even if they were found guilty of the crime. In other words, although the legal bodies

are found guilty of such severe illegal activities that their members are imprisoned from 5 to 15 years, they can be allowed to continue to operate. In order to be consistent with the seriousness of the punishment, the ordinance should word Art. 9 (1) in the imperative: "The legal bodies that ... shall be dissolved by judicial decision". This because if the crimes are verified in the course of an equitable process, then the court *must* dissolve, not simply *be able to* dissolve an organization for the setting up of which its members are punished by a 5-year prison sentence, at least.

What is the point in keeping an association whose members are in prison for setting it up? The law of associations and foundations that entered in force in 2000 points out as a reason for dissolution the achievement of the goal which led to the setting up of the association; the impossibility to convene general meetings; the fact that the goal or the activities of the association have become illegal or contrary to public order. Since all these are implicitly in place when the members of the organization are sentenced, Emergency Ordinance no.31 should introduce an imperative formulation for the dissolution of the respective legal bodies. The legislators use terms such as "it is possible" or "may" when it asks the courts to take the opportune measures.[251]

To conclude, the Emergency ordinance empowers the courts with the subjective right to dissolve or not fascist organizations. Not only to establish the fascist nature of the organization, but also to decide on the *timeliness of their dissolution*. In the context, this should be the natural right of the legislation.

## Comparison with Other Legal Norms

As for "external coherence", we must take into account, first of all, Ordinance 137/2000 against the phenomenon of discrimination. This holds as a crime the acts which, according to the logic of an extreme right-wing ideology, would prevent the participation of people on the labor market, access to public administrative, judicial, healthcare and educational services, and inhibit social rights, freedom of circulation, and free choice for domicile. It also takes into account discrimination against the person's dignity, considering as such acts of incitement to racial or national hatred, or the creation of an intimidating, hostile atmosphere against a person or a group. The punishment for such crimes are between 1 million to 10 million ROL in the case of private persons,

251 Like in the expression, "the court can decide (...) that supervision of a minor be trusted to a person or an institution" (Art. 110, C.p.)

and double the amount in the case of legal persons. Obviously, the measures in Emergency Ordinance no.31/2002 are totally disproportionate to Ordinance no. 137/2000.

To this, we should add two provisions in the Criminal Law. Article 317 asserts, "Nationalist-chauvinistic propaganda, stirring racial or national hatred, unless the deed falls under the provisions of art. 166, is punished with imprisonment from 6 months to 5 years". Article 247 provides, "Limitation of the use or exercise of citizens' rights by a public servant, or the creation of situations of inferiority based on nationality, race, sex or religion is punished by imprisonment between 6 months and 5 years".

In the sense of Art. 317, nationalist-chauvinistic propaganda means 'incitement' (the legislators used the word "stirring"), and Art.247 has in mind an effective deed of limitation of rights – in the aggravating case, the action of a public servant – based on racial grounds. The two provisions partly cover the provisions of art. 1 and 2, but the scope of the punishments is narrower.

In this sense, we can state that Emergency Ordinance no.31 has a problem of compatibility with other provisions of the Romanian laws, which it extends a lot and whose punishments it enhances substantially.

However, the principal issue of the Emergency Ordinance is still its confrontation with other principles and values, first of all with the fundamental rights and freedoms.

## Cult of Guilty Personalities and Regulation of the Public Space

One of the provisions of the Ordinance which was applied almost immediately concerns the erection or maintenance in public spaces of statues, statuary groups, or commemorative plaques celebrating persons guilty of crimes against peace and humanity. Streets, squares, etc, cannot bear the name of such persons. The formulations in the law have a very precise subtext. For several years, in several towns across the country, streets and squares were named after, and statues were erected of Marshall Ion Antonescu, who was guilty of crimes against humanity. Of these statues, raised in Piatra Neamţ, Slobozia, Leţcani (Iasi), Călăraşi, Jilava, Sărmaşi, Bucureşti – six were taken down.

The measures that we mentioned regulate only the public space, which can and must be protected from extremist symbols. The need for such regulations can hardly be contested. The regulation also provides for the cases in which a private owner exhibits on her territory commemorative objects that are visible in the public space or in places where the public has access. The typical example is Ion Antonescu's statue erected in

the yard of the church that the Marshall himself ordered to build. The question rises whether Emergency Ordinance no.31 violates the relations between local autonomy and central power, especially in the context that the memory of Marshall Antonescu was promoted by some local authorities – for instance, the mayor of Piatra Neamţ. In the Romanian constitutional framework, at least, the local public administration is seen as an instrument of public services (art. 119). In this respect, the general political values served by the activity of the Parliament and the Government cannot be attacked by the authority of the local public administration.

Promotion of the cult of persons guilty of committing crimes against peace and humanity is also the subject of Art. 5 of the Emergency Ordinance; those who are guilty in this respect are liable to imprisonment between 6 months and 5 years, and the loss of certain rights. In this case, the issue does not pertain to the regulation of public space, but to a situation in which there is conflict with the individual rights and freedoms.

Taking into account the object of the Emergency Ordinance, which circumscribes the fascist manifestations, dictators such as Gheorghiu-Dej or Stalin do not seem to fall under the incidence of the law, especially since there are no sentences in this respect. From this perspective, also, the article clearly aims at the cult of Marshall Ion Antonescu. The issue is raised as to what extent the promotion of the Marshall's cult is or is not protected by the freedom of speech. The question is posed against the background of a relatively wide and certainly unconcluded debate referring to the ex-head of state. Free discussions on the responsibilities of Marshall Ion Antonescu could only take place after 1990, and information, as well as research, started penetrating in the public opinion only lately.

The analysis of Antonescu's case benefits from the decision that the European Court of Human Rights took in the case *Léhideux et Isorni v. France* (1998) and thanks to the parallel that can be drawn, up to a certain point, between Ion Antonescu and Philippe Pétain.

The French justice had condemned Léhideux and Isorni for publishing in "Le Monde" an advertisement that presented certain actions of Philippe Pétain as positive, which was interpreted as "an apology of war crimes or of crimes or delinquencies of collaborationism". The advertising reiterated for the French people that they had a short memory if they did not remember the deeds that the authors of the advertisement interpreted as favorable for Pétain and negative for other French personalities of the time. The list of data and the evaluation was contested by the French justice in terms of the accuracy of the facts, and of the interpretations.

In its analysis, the Court sustained that "it is not the Court's responsibility to solve this issue [regarding Pétain's role], which is the subject of debate among historians on the facts and interpretation of the events. From this point of view, it is not included in the clearly established his-

torical facts – such as the Holocaust – whose negation or revision would fall under the incidence of Art. 17 regarding the protection of Article 10 [freedom of speech]."

The Court also noted the "seriousness of criminal sentence for the apology of crimes and the crime of collaboration, bearing in mind the existence of other means of intervention, ... such as civil ways". To conclude, it condemned France for violating Art. 10 in a disproportionate and unnecessary manner.

The parallel between Antonescu and Pétain can be drawn quite well also from the perspective that both were condemned for crimes against peace and humanity. Another analogy results from the controversial, even contradictory, character of the two leaders. Of course, this does not mean casting doubt on their main historical responsibilities. But it shows that the historical public debate in this domain must be free. It cannot and must not be trimmed by the decisions of a tribunal.

In this respect, we sustain that Emergency Ordinance no. 31 takes a remarkable step forward in regulating public space, prohibiting the use of it for the cult of persons who were responsible for war crimes and crimes against humanity. Wishing to limit as severely as possible the cult of guilty personalities, Emergency Ordinance no. 31 penetrates on the territory of fundamental rights and freedoms, which raises a serious issue of legitimacy. The comments of the European Court on the case of *Léhideux et Isorni v. France* are valid, in our opinion, also in the debates around Marshall Ion Antonescu. Ensuring the freedom of public debates in the case of such historical personalities is a condition of a healthy democratic society.

## Hate Speech and Distinctions / Non-Distinctions of Emergency Ordinance no. 31

An important verification of Emergency Ordinance no. 31 are the applying international provisions in the field, the restrictions that they allow for as regards the fundamental rights and freedoms. When we discuss the restrictions of the freedom of speech, we have a few references, among which Art. 20 (2) of the International Covenant on Civil and Political Rights, which requires that the states prohibit hate speech:

"Any urge to national, racial or religious hatred that is incitement to discrimination, hostility or violence is prohibited by law".

We find the same wording in the European Convention of Human Rights.

The right of speech is legitimate until it "incites to discrimination, hostility and violence".

The International Convention regarding the Prohibition of All Forms of Discrimination added the criterion of "incitement" and "dissemination of ideas based on racial superiority or hatred", and it also extends to the freedom of assembly (art. 4, a). It is noteworthy that this extension led to Australia, Austria, Belgium, France, Italy, Malta, Monaco, Switzerland, Great Britain, Northern Ireland, the United States – to name just a few – entering reservations, and to a still non-concluded debate even within the UNO Committee regarding the elimination of racial discrimination.[252] As for the United States, they are known for their firmness in defending the freedom of speech and of assembly, from the perspective of the "First Amendment". However, for the first time in 2000, there were some limitations imposed on the Ku Klux Klan, introducing a frail jurisprudence and only as regards the "time, place and manner" of racist manifestations held by this organization.[253]

The European Court of Human Rights introduced a relevant distinction in this respect in the case of *Jersild Vs. Denmark*. The Court decided in favor of the defendant by distinguishing between the cases of "presenting" racism and "promoting" it.

The Special Rapporteur for UNO, the Representative of OSCE and the Special Rapporteur for the Organization of American states defined a number of conditions that the laws on hate speech should meet at least:[254]

– They shall not punish true enunciations;
– They shall not punish dissemination of hate speech without having demonstrated that it intended to incite to discrimination, hostility or violence;
– Journalists' right to decide on the manner in which they disseminate information shall be respected;
– No one shall be subjected to prior censorship;
– Any punishment should be in strict conformity with the principle of proportionality.

The British organization Article 119 – a prestigious organization for its attitude and analyzes in the field of freedom of expression – synthesized the principles that can be applied to racist manifestations as follows:[255]

252 "Memorandum on Freedom of Expression and Racism for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance", ARTICLE 19, London, August 2001: http://www.article19.org/docimages/1235.htm

253 Victor C. Romero, *Restricting Hate Speech Against 'Private Figures'*, in "Columbia Human Rights Law Review", vol. 33, No. 1, p. 2

254 *Ibidem.*

255 *Ibidem.*

- International law allows for the restriction of the freedom of expression with the purpose of preventing incitement to discrimination, hostility or violence;
- The laws that punish negation of the Holocaust are allowed only to the extent that the intention of the negationist attitude is to destroy certain rights and freedoms and to negate facts;
- The extent to which dissemination of ideas based on racial superiority can be prohibited is disputed, but not in what concerns incitement to discrimination, hostility or violence;
- Dissemination of racist ideas of a third party is guaranteed by the freedom speech unless it has a racial purpose and if it serves the public interest;
- Laws against hate speech must be subject to the minimum standards of the three international officials.

Of the limitations of the right to associate and speech introduced by Emergency Ordinance no. 31, one concerns "use of violence to change the constitutional order or the democratic institutions" (art. 2a). This is a classical restriction of the norms of CEDO or PIDP, borrowed by the Constitution of Romania and the Law of Political Parties. Its reiteration in the text of the Emergency Ordinance no. 31 is only natural and welcome.

In other respects, however, the text of the normative act raises problems. "Incitement to xenophobia" is not the same as "incitement to discrimination, hostility or violence", the latter type of incitement – which Article 19 considers a legitimate restriction, having in mind deeds, not feelings such as xenophobia. Then, Emergency Ordinance no.31 punishes "promotion" of ideas such as "the superiority of certain races and the inferiority of others". The formula is somewhat synonymous to the expression "dissemination of ideas based on racial superiority", whose status of legitimate restriction is, as we have seen, debatable. The formulation "promotion of fascist ideas, conceptions and doctrines" is even more ambiguous and therefore debatable, unless it is reduced exclusively to the typology enumerated in the exemplifying "such as...". The fact that these formulations that are not circumscribed enough constitute a limitation of including certain organizations affects the principle that "no one shall be subjected to prior censorship".

Nevertheless, setting the lower limit of punishment for this type of crimes at 5 years' imprisonment (and the upper limit to 15 years) violates flagrantly the principle of proportionality. It represents another indicator of the arbitrariness and disproportionateness of the normative act. Even more so, the condition of immaturity of the Romanian system of justice, the loose formulations of the Emergency Ordinance represent a danger for the freedom of expression and association in Romania.

## Negationism

The topic of Negationism requires a separate chapter. Negationism is punished by the German, French, Belgian and Swiss laws. Romania is the third ex-communist country, after Poland and Slovakia, that condemns negationism.[256] Note that in Poland negationism covers both Nazi and Stalinist crimes. In this respect, it can be stated that European countries were rather reticent to promote anti-negationist laws. As concerns reasons of principle, let us be reminded of the position taken by the organization Article 19, "the laws regarding the Holocaust are allowed by the international laws when negationism aims to destroy rights and freedoms, and deny facts".

The Romanian Law expands the sense of negationism. It punishes not only the negation of the Holocaust, but also the negation of "its effects". Let's compare this to the French law ("loi Gayssot"[257]), Article 24 *bis* of which stipulates 1-year imprisonment and a 300,000 Fr fine, or only one of these punishments for those who "have contested the existence of one or more crimes against humanity as defined by article 6 of the statute of the international military tribunal annexed to the agreement of London of August 8, 1945, and which were committed either by members of an organization that was declared criminal (...), or by a person recognized as guilty for such crimes by the French or the international justice".

As it can be seen, the French law is much more circumscribed in defining negationism. The German law, which was adopted in 1995, and punishes the propagation of racist, fascist, and anti-Semite ideas, bears in mind "negation or belittlement of Nazi crimes". The Belgian law, which came into force in March 1995, aims to "repress negation, belittlement, justification and approval of genocide committed by the German nationalist-socialist regime". As compared to all these, the wording of Emergency Ordinance no. 31, "contesting ... the effects of the Holocaust" is extremely vague, possibly leading to abuses. Taking into account the knowledge of the judicial body about the Holocaust, one can imagine any kind of absurd decisions in this respect. How will a court pronounce the sentence in the case of a person that denies the Holocaust may have resulted in the establishment of the state of Israel? As the normative act does not contain any reference that may help to distinguish between the contestations that aim, in accordance with

256 In the case of Slovakia, by an amendment of the Criminal Law (Michael Shafir, *Outright Holocaust Negation in Postcommunist East Central Europe: The Unexpected 'Globalization'*, in "East European Perspectives", vol. 4, No. 12, June 2002, p. 3).

257 Law no. 90-615 of July 13, 1990

Article 19, "to destroy the rights and freedoms and to deny the facts", and those that are the simple consequence of non-recognition or doubt, negationism in the Romanian variant affects severely the freedom of speech.

### Negationism in an Ex-Communist Country

Beyond the invoked aspects that result directly from the current formulation that Emergency Ordinance no. 31 gives to negationism, there arise two types of issues. One of them, which is specific of Romania and the ex-communist countries, is the appearance of a norm that punishes crimes against peace and humanity of the right-wing extremism, and does not do the same against crimes of the same nature committed by left-wing extremism (communism) regardless whether they were or were not declared as such by a tribunal.

The equation of the two types of crimes – the left-wing and the right-wing – is visible in the Constitution of Romania. In Article 30 (7), it is forbidden both to "urge to national and racial hatred", and to "class hatred"; a new syntagm in terms of limiting the freedom of speech linked directly to the communist regime's experience, which made class hatred what fascism had made national hatred. Article 37 regarding the right to associate sets as the *first* limit of association on civic or political basis, militating "against political pluralism", which is more characteristic of left-wing than right-wing extremism.

This is why it can be stated that in the spirit of Romania's Constitution, there is symmetry between the attitude toward fascist and communist crimes. As shown above, the need of symmetry was felt and codified in the legislation of Poland. We referred to the Polish laws before. On 9 November, 1999, Seim adopted the Law regarding the constitution of the Institute of National Remembrance, whose principal subject was to investigate the communist intelligence services. Art. 55 treated the case of public negation of the Nazi and Stalinist crimes of war against Polish citizens after 1 September, 1939. The punishment can be either a fine or imprisonment up to three years. It should be noted that the Wyborcza Gazette and its editor, Adam Michnik condemned the punishment of negationism.[258]

258 Debated in the international seminar "Monitoring and Combating Extremism in Central and Eastern Europe", Riga, 7–8 June, 2002, organized by the Latvian Center for Human Rights and Ethnic Studies and the Open Society Institute.

The only case that was judged based on the law of 9 November, 1999 was that of Dariusz Ratajczak, who signed a pocket edition of the volume "The protocols of Sion's Sages", and of some materials that negated the Holocaust. In its final decision, the Court excluded the application of punishment, considering that, though the deeds of the accused fell under the incidence of the anti-negationist law, they did not cause any social harm. The situation shows one of the problems created by this type of sanction. In order to make a decision that does not lead to a sentence – seen by the judges as exaggerated in comparison to manifestations of this type – a vicious argument was used, with a negative public impact. While the invocation of the freedom of expression in a case such as that of Dariusz Ratajczak could strengthen respect for democratic values, the refusal to see any social harm in negationist manifestations is confusing and treacherous.

If the punishment of negationism *only* relative to the Holocaust introduces an asymmetry, the question rises whether this asymmetry can or cannot be interpreted in the terms of discrimination.

Discrimination happens when a public service is provided for a certain category of people, but refused for another category with the same entitlement to it. Which would be the type of public service, provided by negationism, that leads up to the discrimination of those to whom sanctioning of communist crimes does not operate in relation to those for whom sanctioning of fascist crimes does operate? One suggestion is offered by the pronouncement on the alleged violation of the International Covenant on civil and political rights by the Gayssot law. The Geneva Human Rights Committee was notified in the case of Robert Faurisson, who was condemned in 1991 by a French court for his writings that dealt with the topic of gas chambers being a myth. In 1996 the Committee rejected the complaint of the claimant, arguing as follows, "Taking into account the fact that the author's opinions were meant to give rise to feelings of anti-Semitism, the restriction [of the freedom of speech] bore in mind **the right of the Jewish community not to fear** that they live in an anti-Semite environment" (emphasis added).[259]

In the sense of this motivation, we can say that the public service ensured in the case when the state punishes contestation of fascist crimes (and, more generally, of fascist manifestations) is "the right to personal safety", with special reference to those categories of persons that are the preferred target of fascist manifestations. Why did European states make sure to multiply the instruments of protection of the pre-

259 "Négation de l'holocauste", *Revue Universelle des Droits de l'Homme*, vol. 9, No. 1-4, p. 52

dominant targets of fascist threats? We find the answer to this in another analysis, this time of the European Court of Human Rights. In the case of *Hans Jörg Schimanek v. Austria* (Complaint no. 32307/96), the Court judged the contestation of the condemned (for fascist activities including setting up military camps that aimed to overthrow the government and include Austria in the large German nation) noting, "the interdiction of activities involving expression of nationalist-socialist ideas is legal in Austria, and, **from the perspective of its historical past** (...), it can be justified..." (emphasis added).

The direct, concrete and indelible disastrous experience of Nazism explains in practical terms, but also in terms of legitimacy, the adoption by different European states of anti-negationist legislation and, more generally, legislation against fascist manifestations. Several authors explain the refusal of the United States to limit to the same extent as the European community the freedom of expression and the right of association by the fact that America has never had to put up with a fascist regime. It is undeniable that the direct, concrete and indelible experience of communism validates the same type of arguments and reasoning for the target groups that are the most sensitive to the communist threat in the countries that put up with the system that collapsed in 1989 – social classes, intellectuals, groups defined by anti-communist ideologies, etc. In this respect, the persons that are vulnerable to the communist threat are fully legitimated to complain about the "discrimination" that the state applies when it condemns negationism of the fascist type, but does not punish communist-type negationism. Based on this reasoning, Emergency Ordinance no. 31 can be contested for posing the people vulnerable to the communist threat in a discriminatory situation as compared to the predominant "beneficiaries" of this normative act.

To conclude, a country that suffered the tragic consequences of communism must associate them with the tragic manifestations of fascism.[260] Otherwise, they can operate as an invitation to the reiteration of similar events – since they would not have the criminal effect of others, the very negation of which would be punished.

260 As an analogous, but reversed example, there occurred the issue of providing damages for the victims of fascism, by extending to them the stipulations of Law 118/1990, which had in mind the victims of communism. The adequate amendment of Law 118 was done in 1998.

## Is It Necessary to Adopt an Anti-Negationist Law?

The previous analysis showed that if we introduce in Romania, an ex-communist country, the anti-negationist law relative to the crimes of the extreme right, it leads to discrimination by not adding to it an anti-negationist law of the crimes of the extreme left. However, by this we do not answer the question of whether Romania needs to adopt an anti-negationist law or not.

What must be underscored, again, is the fact that to this day, the laws of the Holocaust are considered, in certain circumstances, violations of the freedom of expression in relation to international law. The European Court of Human Rights has made statements several times in the issue of contesting these laws, and the answer was negative.[261]

This jurisprudence does not oblige Romania – as it did not oblige other countries, either – to introduce anti-negationist legislation. The need for such a normative act depends on the context, resulting from the evaluation of the threats at the social level and of the equilibrium of rights. As a result of this evaluation, we pronounce ourselves for the non-adoption of an anti-negationist law, of the extremist nature of either the left wing, or the right wing.

The first reason is the need to let the discussion on the history of the events that included crimes against humanity of the regimes based on fascism and communism go on. In Romania, this discussion could not be carried out for 50 years, and the atmosphere after 1990 did not readily ensure a profound, responsible discussion. A convincing example is the position of the vice-president of the Commission on Culture in the Senate, PSD senator Grigore Zanc, on the margin of Emergency Ordinance no. 31. He supported the view that "neither the definition, nor the articles of the legislative text make reference to the existence of the holocaust in Romania", and that Romania "cannot be considered a country where the Holocaust took place, or that shared the blame for the Holocaust". In this way, the Commission for Culture wanted to remove from the incidence of the law the contestation of Romania's responsibility for the death of over 100,000 Jews (other evaluations push the figure toward 400,000) in Transdniester. Such an attitude would annul the substance of the anti-negationist stipulation. The big issue in Romania is the contestation of the crimes in Transdniester, not the Nazi ones. The attitude of the above-mentioned senator, as well as that of several other

261 See the cases of Kuhnen vs. Germania, D.I. vs. Germania, Honsik vs. Austria (Monica Macovei, Dan Mihai, Mircea Toma, *Ghid juridic pentru ziarişti [Juridical Guide for Journalists]*, Bucharest, 2002).

politicians, and more generally of the public opinion shows the need for a free debate of the topic of crimes in Transdniester and Romania's responsibility for them.

The second argument keeps in mind the important pressure that is exerted on the journalists and on the freedom of speech in Romania. The numerous criminal processes against journalists and especially the numerous criminal sentences for debatable press crimes have already created a difficult atmosphere for journalists. The cases showed that the deontological and professional issues of the judges establish through their decisions the equilibrium of the rights in relation to the legislative framework of Romania. The arbitrariness of several decisions, the tendency to use the law according to group interests, the mixture of politics in the system of justice can change the condemnation of negationism into a weapon. Instead of supporting it, it becomes a threat to democracy in Romania.

Finally, from a more general point of view, we consider that reference to the Holocaust, however dubitable, is not sufficient. The introduction of "truth" as a criterion represents an extremely risky operation. The "truth" is a "construct", almost never a fact. If we relate to the "truth" to punish opinions that could upset social relations, then a police of the knowledge can set in very easily. The most threatened category is probably that of the historical disputes. The national mythologies, the state frontiers, ethnic origin, once brought up in discussions, can generate conflicts and dangers. Thus, the question of the legitimacy of frontiers represents a theoretical level to make the population of the territory that is being disputed fear its future. This thing happens in truth, and it has a rich historical casuistic, it is not a simple theoretical fear. Do we have the justification to stop the controversies regarding the unification of Romania and the Republic of Moldova, or the old belonging of "Transylvania" to Hungary, since the contestation of certain uncontested facts creates threats? What happened in Yugoslavia could be an argument for those who want to control the political discourse. Practically, the logic of anti-negationist norms is an invitation to the old authoritarian regimes that might dominate the area to use the same arguments against the political persons that contest it, who read history in a less mythological or less nationalist sense. They will always have "truths" and "fears" to justify sanctioning the non-conventional approach to history.

## Conclusions

There are several legitimate attitudes toward Emergency Ordinance no. 31. One of them, a maximal one, has the objective of maintaining the present-day provisions as long as possible, by giving priority to the fight against fascist manifestations, ensuring at the same time the compatibility of international legislation and the recognized principles of law. At the opposite end, the minimal attitude would retain the regulations that take up the blank spaces of the Romanian legislation, giving priority to the freedom of expression and the right to associate, as fundamental values of democracy.

If the maximal solution were chosen, the following amendments to the law would be necessary:

– Imposing restrictions on the activity of extremist organizations that try to change democratic institutions by means of violence, and which incite to discrimination, hostility or violence;
– In the case of punishing negationism, the explicit reference to the motivation of these manifestations would affect the rights and freedoms, and would lead to the contestation of facts;
– Exclusion of prior censorship;
– Reevaluation of punishments in strict conformity with the principle of proportionality.

In the case of Romania, as an ex-communist country, to this we should add the necessity to introduce a norm on the sanctioning of the negation of communist crimes, so that the principle of non-discrimination is rescued.

The minimal formula would maintain only the regulation of public space that should not allow the cult of persons guilty of crimes against peace and humanity, and the take-over, in a coherent form, of the set of current stipulations in the legislation of Romania that regard the overthrow of the rule of law by violent actions, incitement to discrimination, and to hostility or violence. By such an analysis, the normative act would obtain an enhanced coherence and efficacy, and an implicit respectability.

However, the major problem of fight against fascist, racist or xenophobic manifestations in Romania is the application of the already existing norms. A multiplication and radicalization of the norms will not help the constitutional state, but rather make the institutions the more arbitrary, and as a result less appropriate for democratic functioning. Although Emergency Ordinance no. 31 came into force on May 31, 2002, it has not been applied to a lot of situations, which would clearly have fallen under its incidence. Further on, political formations with an evidently extremist character – such as the Greater Romania – operate as if

the Ordinance did not exist. Incitements with racist and xenophobic character have occurred with no reply. The present situation after the adoption of the Emergency Ordinance represent a serious reason to fear that the normative act we analyzed above will sooner be used in the fight against some adversaries with group or ideological interests. This is one more reason for us to choose for the amendment in the sense of minimization of the Emergency Ordinance no. 31 and to lay emphasis on the application of the laws in force, and development of public policies[262] meant to prevent extremisms.

Combating extremism needs honorable norms that all the citizens can respect for their justness, balance and rationality. Any excess in this field could lead, in the long term, to contrary effects. In this sense, I would like to mention the attitude of Cas Mudde, one of the analysts of European extremism, on the occasion of the Riga seminar on extremism in central and eastern European, which has been mentioned before: "a good democracy is a democracy that has space for extremists, too. A good democracy is a democracy that can defend itself against extremism by respecting the freedom of speech and right to associate".

262 In the case of F.P. vs. Germany (19459/1992), a German citizen denounced CEDO for the violation of art. 9 and art. 10 by the Military Court, which – in its decision in 1989, condemned him for indiscipline by retrograding him, and by the Federal Administrative Court, which considered that the opinions of the German officer affect its attitude toward the constitutional order of the Federative Republic of Germany, and the way in which it carries out his military duty, and dismissed him. F.P. had declared, in the presence of German and American soldiers, on 15 September 1987, that the Holocaust was a lie and that, in reality, the Jews had neither been persecuted, nor killed, and that all was a Zionist and communist strategy, and other negationist enunciations of the kind. The European Court declared the complaint inadmissible. This shows that the administrative actions against public servants – in accordance with some public policies of the state authorities – that have fascist manifestations are legitimate.