

THE INDIVIDUAL HUMAN RIGHTS AND THE STATE – CONTEMPORARY CHALLENGES

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Abstract

Since ancient times people have felt that each of them has a number of rights to be followed by everyone else. The basis of this recognition is the natural law, an old idea, which was first mentioned in the philosophical writings of the ancient Greece and Rome, then resumed by the Natural Law School, with its leading representative - Hugo Grotius. After a troubled period of history, the human rights are valued during the French Revolution and then during the Independence War in the United States of America. The enforcement of the two Declarations is connected to these two historical events, the two legal papers being related to a common source – the Natural Law.

After the 19th century, the idea of fundamental human rights gains even greater powers, their existence being interrupted in only two countries governed by totalitarian regimes - of right or leftpolitical orientation. Simultaneously, countries that experienced a normal historical development, without non-democratic regimes being imposed by any political minority, laid the foundations of the international instruments of human rights, imposing, however, such levers in their own legal systems.

After the fall of the totalitarian regimes in Europe, and based on this very fact, the human rights knew a real renaissance, in the contemporary period of time, several generations being identified, and becoming a real necessity the protection of their own citizens and the protection of the foreigners in a territory other than the one of the State whose nationality they have. Finally, in order to achieve efficient and effective protection supranational courts were created, whose purpose is to check the relationship between the state and the individual, as regards the following of the fundamental rights of the latter one.

Keywords: individual rights, human being, fundamental rights, state, private life

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Introduction

Being the result of the idea of natural right, as a form of the eternal truth, spread all over in the Universe and perceived by human reason the same as the geometric axioms, the fundamental rights of the human being are the expression of the huge effort made for the fulfilment of the highest ideal of justice.

Starting with the members of the Natural Right School, influencing the whole Century of Lights, until nowadays, the followers of this theory knew how to impose it in all the political regimens to protect the freedom of people and the individual, to learn how to respect the given word in order to discharge the assumed duties through conventions, to protest against the ferocity of the unjust laws or of the religious persecution, thus creating the international notions of law and constitutional right, which consecrates and guarantees the present rights and liberties.

From the historical point of view, „the human rights appeared (...) as an instrument of protection of the individual in its relationship with the community, having as a primary function the limitation of the political power in order to allow the free and absolute expression of the human being.”²

The improvement of the individual rights is marked both by its foundation – the two ”Declarations”, the American and French one – and by the context of the 20th century existence and, later on, the falling of the totalitarian regimes in some European countries.

The two previously mentioned „Declarations” had many proselytes, but they put up special resistance, having both the Conservatives but also the Liberals and the Marxists against them. Without any doubt this hostility is nowadays much reduced. The content of the ”Declarations” was nowadays brought to date, in many stages. The first one took place in the 50s born from the horrors caused by the Nazi disaster and its allies. On December the 10th 1948, ”The Universal Declaration of Human Rights” of the General Meeting of UN, then on November the 4th 1950, ”The European Convention Of Human Rights” sets the base, in a first stage, of the modern conception about the declaration and protection of the natural rights of each person.

The second stage, in the 70s, is connected with the public revelations orchestrated by Aleksandr Solzhenitsyn on “The Gulag Archipelago”³, caused by the Soviet regime. In the democratic countries, the revelation started a new up-to-date of the ideology and politics of the human right.

Nowadays, provisions of the fundamental and natural human rights, as well as the means of defending them are found in the constitutions of all developed countries from the democratic point of view. In most of them, as it is the case of Romania, we can notice the pre-eminence of the international treaties regarding the human rights towards the inner legislation. This vision is lawful, resulting from the fact that people have certain natural rights, imprescriptible and indefeasible. Once this title was acknowledged the international community proceeded to the

² I. Muraru, E. S Tănăsescu, *Drept constituțional și instituții politice*, vol. I, Editura All Beck, București, 2005, p. 136;

³ Soljenițan, Al., *Arhipelagul Gulag*, 3 vol., Editura Univers, București, 2009;

elaboration of some documents that led to the existence of an international system of protecting these rights, being imperative for each state to admit their existence and to put them into practice.

The Legal Protection of the Human Rights in the Contemporary Era

Due to the fact that the human being acts in a society, establishing relations with his fellows, his activity must be regulated by the legal norms. Their ensemble – the right –in its birth and development can bear many influences from the part of the „components of physical environment and the components of the social system (economical, political, ethical etc.)”.⁴

The human factor is the one of the biggest interest for the legislator, because the human being has the largest influence for the surrounding facts. Since birth, each person learns to be social, follows different rules of living together and develops skills to meet all the external requirements. The judicial standards are the one shaping each one’s behaviour, so that there will be no violation of the rules involved in the cohabitation. The fundamental rights of the person are in the centre of attention and concerns of the legislator- in its quality of rightful creator- rights that guarantee absolute equality to all people, their possibility of boundless manifestation in the account of dignity and freedom, because the human being, according to its nature, is respectable and free.”⁵

The attitude that allows society to progress and the individual to gain from the social advantages, is the respect of the natural law, accomplished through a double imperative: the person must do all that is in agreement with the social solidarity on one side and he must do nothing against it, on the other side.

The state cannot create an arbitrary right, the legislator being forced to create a system of responsibilities of the public powers which must guard the citizens from the arbitrary of the governess. On the other side, the citizens must abide the law, not necessarily as an effect of constraint, but as a respect of the social solidarity. The individual has a judicial area that the state can not ignore, the fundamental freedoms are necessary for harmony in society.

The state has also duties towards its citizens, regarding health, social support, education, the support of elder persons or the ones having different physical or mental dysfunctions. All these obligations are correlated with the rights of the individuals that form that state. Starting from the idea of social solidarity, we can discuss about the natural right, which is superior to the positive one, going through the writings of Grotius, the theory of individual freedom mentioned in the Declaration of the French Revolution and, then, through the other instruments of protecting the human rights, created after the event. ”The notion of human rights transcends the recognition by the help of texts: international texts (or national) do not *create* the human rights, but admit their existence, and some of them put these rights into juridical categories, giving them protection.”⁶

⁴ Popa, N., *Teoria generală a dreptului*, Editura All Beck, București, 2002, p. 51;

⁵ Popa, N.,[4], pp. 58-59;

⁶ Sudre, Fr., *Drept european și internațional al drepturilor omului*, Editura Polirom, Iași, 2006, p. 46;

Since birth, the individual, through its quality of a human being, has certain subjective rights that are natural, individual rights. The individual is born as a free being, bearing a physical and mental freedom, and this freedom causes the obligation for the others to respect the free, physical and mental, intellectual and ethical development; this *erga omnes* duty actually constitutes the foundation of the right. By the very birth, the individuals have the same rights, being free persons, and this freedom must be followed by the state.

The obligation of the state to follow the rights and fundamental liberties of the individuals “is the same in all periods of time, in all countries, for all peoples; it is founded on the natural and individual rights of the individual, which were, are and will always be the same rights everywhere, for all the human beings”⁷.

As far as the relations among states are concerned, their preoccupation is obvious in the cooperation on the subject of essential human rights. The recognition of the fundamental human rights has deep roots, starting from the Aristotelian ideas about the natural law, going through the writings of the Saint Parents, the ones of J.J. Rousseau and the other supporters of the Enlightenment materializing, as we showed before, by the help of the French Revolution and American Declaration of Independence.

The first legal instrument of putting those rights into practice appeared in the 19th century, and in the inter-war period and mostly after the 2nd World War, the legal protection of the human rights appeared as an imperative of the international community. This was settled in „the times that followed, in an imposing regulation with universal, regional or sectorial character, as a result of mostly the perpetuation of the practice of breaking the human rights in those states with communist regimes”⁸.

In 1948, the General Meeting of the United Nations Organization adopted the Universal Declaration of the Human Rights, which followed a number of over 60 conventions and declarations. The Universal Declaration of the Human Rights was proclaimed and adopted by the General Meeting of the United Nations Organization on December the 10th 1948, being the instrument which marked the beginning of a new stage in the field of legal protection of the human rights, of their fundamental rights. The Universal Declaration of the Human Rights is the first document with universal title in this field, whose purpose was the unification of the concepts concerning the legal protection of the human rights. ”The philosophical sources of the Declaration, to which its Preamble refers, are the concepts of an <inherent human dignity> and the inalienable nature of the human rights.”⁹

Likewise, in the same Preamble one can also find the historical sources of the Declaration, with reference to” inobservance and disrespect for the human rights” which generated „acts of violence, that outraged the human consciousness”

⁷ Duguit, L., *Manuel de droit constitutionnel*, Anciennes Maisons Thorin et Fontemoing, E. de Boccard, Editeur, Paris, 1923, p. 4;

⁸ Miga-Beșteliu, R., *Drept internațional. Introducere în dreptul internațional public*, Editura All, București, p. 172;

⁹ Selejan-Guțan, B., *Protecția europeană a drepturilor omului*, Editura AllBeck, București, 2004, p. 9;

so that the end of it, to bring recognition to the fact that the rights and freedoms comprised in the Declaration represent „a common standard of fulfilment for all people and nations”.

The Declaration also shows that the rights composing it do not have an absolute status, the states are able to adopt normative acts which limit their exercise. But this limitation can be made only to „ensure the adequate recognition and to follow the rights of the others, and the compatibility with the rightful requirements connected with ethics, public order and general wellness in a democratic society”.¹⁰

The Universal Declaration of the Human Rights became ”a basis for different bodies of the United Nations Organization, regarding the protection of rights”. The declaration meant however, just the beginning of a process, the one of the elaboration of some international treaties which constitutes the base of the international right of the human rights.”¹¹

The same reasons, that led to the formation of the United Nations Organization and to the elaboration and adoption of the Universal Declaration of Human Rights led, at the European level, to the formation of some structures and documents meant to ensure legal protection of the human rights. The reaction against the political fascist systems was one of the most important factors which determined the European states to proceed to the identification and creation of some instruments which led to the protection of the individual.

After the 2nd World War, another type of political system also appeared - the Nazi one - which determined the expression of the necessity to protect the fundamental human rights and liberties.

In the 1950, the European Convention of Human Rights was signed in Rome (Convention for the Protection of the Human Rights and Fundamental Freedoms), which was implemented in the 1953. Due to this convention an institutionalised system of protection of the human rights was settled and “by this, the human rights became effective, in the European area, in the field of the positive right; a legal regime of the right was created, as well as, a system of protection through bringing action into justice. In time, the significance of European Convention of Human Rights was noticeably enriched by the vast jurisprudence of the European Court of Human Rights.”¹²

”The object of the European Convention of Human Rights is the human rights and fundamental liberties, their protection, whose base is represented by two fundamental documents in the field: the French Revolution in 1789 and the Universal Declaration of Human Rights: ”one is inner and has universal value, the other is adopted by an international organization with universal title by its mission”¹³.

The observance and defence of the human rights constitute the essence of the democratic society, with the consequence that all the components of the state

¹⁰ art. 29, alin. 2 din Declarația Universală a Drepturilor Omului;

¹¹ Selejan-Guțan, B., [9], p. 11;

¹² Selejan-Guțan, B., [9], p. 30;

¹³ Bîrsan, C., *Convenția europeană a drepturilor omului. Comentariu pe articole*, vol. I *Drepturi și libertăți*, Editura All Beck, București, 2005, p. 6;

will contribute to their protection. The fundamental human rights, as well as the necessity of their defence, firstly appeared in the politic battle, as a result of some ideologies, for later on to become positive and legal by constituting rightful norms.

This notion, of fundamental or essential rights, can be approached from various perspectives: philosophical, political and legal. But “if the jurist is directly interested in the positive right of the human rights, he can not ignore, sometimes, on the way of interpretation, the philosophic and moral fundamentals of this syntagm and can not make abstraction of the ideological and political <environment> in which the problem of defence is discussed.”¹⁴

The notion of “human rights” has a broader significance, resulted from the idea of natural right, according to which the individual, due to the fact that he is a human being, by its very birth, has a legal sphere, composed of essential rights. This must not necessary be established by the positive right, because they have an existence through themselves, being closely connected to the human being so they can not have an independent existence.

As far as the internal right is concerned, these essential human rights are public rights and liberties, provided and protected by the laws of the national and positive right, and from the international point of view they constitute the human rights, as fully acknowledged universal values.

The school of the natural right, whose conceptions can be found at the bedrock of the European Convention of the Human Rights, was the one which detached the human being from the cosmic order and from the divine one, considering it as a value by itself, and being in the centre of the social life. The social practice led to the conclusion that if the defence of the human rights is let only in the the competence of the states, the protection can not be effective. Due to this fact, even the states, through their representatives, decided the establishment of some instruments, some systems of international protection, through which, to bring to a limitation of the national sovereignty in favour of the individuals.

By concluding some treaties or adopting some conventions, as the European Convention of the Human Rights, the states bind themselves, not one to another, but to their individuals, irrespective of their legal quality. Moreover, the states assume the obligations, to follow the fundamental rights towards the other component states of the international community, and thus “the obligation of the states for following these rights is assumed towards the international community itself.”¹⁵

In the Romanian system of law, the European Convention of the Human Rights, through No. 30/1994 Law, became the integral part of it, having constitutional and super legislative force. If there are inconsistencies between the internal legislation and the dispositions of the European Convention of the Human Rights, the internal standards against it will not be applied, the dispositions of the Convention being those to prevail.

The Enactment of the Fundamental Human Rights

¹⁴ Bîrsan, C.,[13], pp. 7-8;

¹⁵ Bîrsan, C., [13], p. 16;

Due to the fact that the law, in its whole, has a profound human dimension, which concerns, above all, the essential rights of the individuals, it is normal that we turn attention towards to the very analysis of these essential rights of the individuals, after the analysis of some international instruments of protection. Even if the rights of the individuals exist and manifest as such, in a natural way, there is the necessity of the creation of legal, political or economical devices to insure their protection and guarantee. A first step in solving this problem is the establishment of these rights in inner and international legal documents, because protection is effective only if there are legal devices of defence and enforcement in the case of these rights being violated. "Their establishment (of the essential rights, our note) at a normative and constitutional level, ensures them the most effective legal guarantee, so that they benefit both of the mechanisms of guaranteeing the supremacy of the constitutional norms, but also of the legal mechanisms specific to the protection of subjective rights."¹⁶

By introducing them in the Constitution, the feature of being essentials (fundamentals) is acknowledged to those rights and guarantees are created concerning their exercise and protection. As a definition, we name fundamental rights "those subjective rights of the citizens, essential to their life, freedom and dignity needful for the free development of the human personality, rights established by the Constitution and guaranteed by the Constitution and laws"¹⁷.

The remarkable aspect of these rights is that, both the national laws and the international instruments record them as "recognitions" or "declarations", the notion of human rights being beyond their acknowledgement by the help of texts.

As regards the two declarations-source of the protection of the fundamental rights, these are "profoundly impregnated by the ideology defined by Locke and Rousseau, establishing the inherent rights of the human being and former to the establishment of the society: they acknowledge <the right to>(live, circulate, have an opinion) and not <rights to> (work, social protection, a good living), <rights of resistance>, which presume a liberty of option and action of the individual and an abstention of the state, and not <rights-claims>, which can assume a claim of the person against the society and positive performance of the state".¹⁸ These rights can not consist of claims of the society, because they pre-exist it.

The fundamental human rights are classified in different categories, based on certain criteria. Thus, based on the area of coverage, there are systems and, implicitly, regional rights (which are applied on a certain territory) and rights with universal title (applicable all over the World). According to their addressee, essential rights are classified into general (applied to all individuals) and particular (only for certain categories –women, children, employed persons). According to the same criteria, we can distinguish individual rights (acknowledged to every person) and collective rights (which protect the persons as a whole, like the minorities). As regards these later rights, we have to mention that "the bearers of the collective right do not dispose of mechanisms that allow the guarantee of their exercise, and, on the

¹⁶Muraru, I., Tănăsescu, E., S., [2], p. 138;

¹⁷ Muraru, I., Tănăsescu, E., S., [2], p. 140;

¹⁸ Sudre, Fr., [6], p. 46;

other hand, it is not less true that by respecting certain collective rights, as the right to peace, development, the right of people to a healthy environment, the essential premises of acknowledging the individual rights are guaranteed”.¹⁹

As regards the criteria of content, the human rights are classified into civil and political rights, and economical, social and cultural rights. From at the historical point of view, the civil and political rights are those that imposed themselves in the context of the battle against absolutism, being considered rights of the first generation, and the economical, social and political rights considered as part of the second generation.

Based on the criteria of content, we can also distinguish several categories, a first one being of that of sacredness²⁰, which are those prerogatives that ensure life, the possibility of free movement, physical and mental safety, and the one of the domicile, being part of the first generation of fundamental rights.

A special situation, that the legislator can not ignore, is the one related to the protection of foreigners, which, from the ancient *jus gentium*, have earned the possibility to benefit of the protection instruments, although they are not always clearly highlighted in the content of conventions which establish the protection of human rights.

Although they are strictly stipulated and applied, the foreigners’ rights to enter, stay or settle on the territory of a state do not benefit of the same strong guarantees as the rights of the citizens belonging to that state. Nevertheless, “the state in the exertion of its powers regarding the foreigners’ situation must not violate the guaranteed rights of the persons”.

The decision of removing a foreigner from the national territory can not constitute the cause of violating a right (of not being deported or extradited) which is not guaranteed by the Convention (the European Convention of Human Rights) but can be accused of violating other rights protected by the convention, and thus, under the control of the authorities of the European Court for Human Rights (...). It is enough for the foreigner to pretend the fact that the incriminatory measure (being sent back to the birth territory) is liable to breaking one of the rights protected by the Convention in order to benefit of the indirect protection, whose main vectors, but not exclusive, are the right of not being subject of inhuman and debasing treatments and at the right to respect the private and family life.”²¹

Not only in Europe special importance was and is still given to this problem. The other continents, based on each one’s particularities, admitted the necessity of respecting the individual rights, Conventions being adopted at a regional level, into which these rights are statuted such as on the American continent (North America and South America) :

- *O. A. S. Charter (the Organization of the American States) 1948;*
- *The American Declaration of Human Rights and Duties (1948)*
- *The American Convention of Human Rights (1969);*

¹⁹ Bîrsan, C., [13], p. 31;

²⁰ Muraru, I., Tănăsescu, E., S., [2], pp.156-158;

²¹ Sudre, Fr., [6], p. 390;

- *The Additional Protocol to the American Convention of Human Rights Regarding the Economical, Social and Cultural Rights (1988);*
- *The Second Protocol to the American Convention of Human Rights Regarding the Death Penalty Abolition (1990).*

On the African continent the following regulations were adopted:

- *The Charter of the African Unity Organization (1963)*
- *The Universal Declaration of the Peoples Rights (1976);*
- *The African Charter of Human and Peoples Rights(1981);*
- *The Protocol to the African Charter Regarding the Women Rights in Africa (2003);*

The Islamic right acknowledges, in its turn, settlements regarding the protection of the human rights, although it is a juridical system with certain particularities, being strongly influenced by religion:

- *The Arabic Charter of Human Rights (1994 but not applied);*
- *The Universal Declaration of Human Rights in Islam (1981);*
- *The Cairo Declaration of Human Rights in Islam (1990);*

As regards the protection of the human rights in East and South-East Asia, there is no document to settle this matter. Although at the level of the Association of the Nations in the South-East Asia (ANSEA) the settlement of a mechanism of protecting the human rights was brought into discussion.

Conclusions

Being rights inherent to the human beings, that they are born with it, their recognition by official documents was however necessary, for the abuses known in history, the collective dramas and the individual ones resulted from the ignorance of these rights, not to be repeated, and the individual to respect exactly these fundamental rights. We consider that this branch of the legal life regarding the individual rights is a living organism which must adapt to the technical and medical evolution, to the discoveries of the outer space, the evolution of knowledge in general, to the circumstances which could affect these rights, such as terrorism and other criminal activities, the economic crisis etc.

The defence of the human rights represents a first rank priority because the human being is actually protected, together with its representative attributes irrespective of sex, religion, nationality. After all, the individual rights represent a set of values which place us on the evolution scale, this criterion providing relevant information about the evolution degree of one society.

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