

THE CONCEPT OF HUMAN RIGHTS AND THE LEGITIMACY OF FUNDAMENTAL RIGHTS REFLECTED IN THE ROMANIAN CONSTITUTION

(i) Fundamental Rights

The revision of the Constitution (Revision Law No.249 published in Official Gazette of Romania of 22.09.2003) was made with the declared purpose of improving the constitutional democracy by proclaiming new fundamental rights. In practice, the evolution of the concept of human rights by transforming it into the “*fundamental rights*” institution was essentially changed by approaching traditional elements as “*rights and liberties of citizens*”. The European Commission for right and democracy (the Vienna Commission) adopted in its 54th session of 14-15 March 2003 the approval for the revision of the Romanian Constitution and made, among others, the recommendation to maintain the universal character of human rights so that the system of guarantees is not interpreted solely under the aspect of citizenship, which could only be joined by the internal laws exclusively.

(ii) Guarantees

Considering the importance of constitutional norms that have the legal power over other subjective rights, the Romanian Constitution should have an *obvious system of guarantees for the fundamental rights stated*. In practice, it guarantees *the right to life, the right to physical and mental integrity of the person, the right not to be subjected to torture of any other punishment or inhuman or degrading treatment* as part of the imperative norms, but also as a result of ratifying important documents after 1989 (the Convention against Torture, Second Protocol of the Convention for Civil and Political rights, the European Convention for the protection of human rights and fundamental freedoms, the European Convention for the prevention of torture). It also guarantees the *equality of chances between men and women for public roles* (art. 16, item 3), as well as *the right to identity of persons belonging to national minorities* (Art.6). Rights resulted from human rights instruments ratified by Romania during communist dictatorship times were guaranteed in the Constitution as a result of the decisions made by the European Court of Human Rights - i.e. *right to ownership*. The pressure of the European Union in the period before Romania’s adhering to the European Union to dis-institutionalize the underage persons and suspend international adoptions as a masked form of human traffic, became concrete in art. 45, with the avoidance to express guarantees (“*the children and young persons enjoy a special regime of protection and assistance in enjoying their rights*”). Other categories of rights are considered “*inviolable, respected, protected, cannot be limited, are recognized, are a state obligation, are set in organic laws, etc.*”. The Romanian Constitution also contains provisions on *conditioned guarantees* (“*the access to culture is guaranteed, under the law*”- art.32) and in some cases the clear expression of guarantees is replaced with *have the right to* (“*employees have the right to strike..- art.40*). The consecration of the system of guarantees for the rights proclaimed by the Constitution would contribute to their full exercise and would prevent major social events such as abuses by governants.

(iii) Regime of Treaties

In art 11, item 3, the Romanian Constitution states the following: “if a treaty to which Romania is to become part to has dispositions that are contrary to the Romanian Constitution, the ratification can only take place after the revision of the Constitution”. Moreover, the attributions of the Constitutional Court also include decisions on the constitutionality of treaties or other international agreements. *In our opinion, the law makers did not envisage the distinction between human rights treaties that raise the legal force of fundamental rights stipulated in the constitutions of democratic states and the bilateral agreements.* In reformulating the articles we should remind that the legal regime of treaties is regulated by two international documents namely: the Convention on the rights of Treaties made by the States (Vienna 1969) and the Convention on the right of treaties between States and international organizations (Vienna, 1986).

(iv) Constitutional Justice

“The Constitutional Court guarantees the supremacy of the Constitution”(art.140). Starting from this we should once more appeal to *extending the system of guarantees* expressed in the articles of the Romanian Constitution. Otherwise, the value of art.11 (“the Romanian states abides to fulfill as such and in good faith the obligations resulted from the treaties it is part to”; “the treaties ratified by the parliament, according to the law, are part of the internal right”) and art.21 (“the constitutional dispositions on the *rights and liberties of the citizens* - !!! will be interpreted and applied according with the Universal Declaration of Human Rights, with the pacts and other treaties Romania is part to”; “if there is a mismatch between the pacts and treaties on fundamental human rights to which Romania is part and the internal legislation, the international regulations have priority, except for the cases where the constitution of the internal laws contain more favorable dispositions”), will not contribute to the jurisprudence of constitutional justice in order to rationalize power.

The most important functions of the Constitutional Court related to the mechanism of protection of fundamental rights are: *“the control of the constitutionality of laws and decisions over exceptions of non-constitutionality of the laws”* (art.144 item a) and *“it decides on the exceptions of non-constitutionality on laws and ordinances raised before court or commercial arbitration instances “* (art.144 item c).

Until present it is a fact that the infringement of certain rights is massively caused not by the provisions of laws, but by the unconstitutional interpretation of parts of the law by the competent authorities. According with the provisions of the Constitution and of the organic law of the Court, the access to constitutional justice is possible through institutions qualified by law with a right to claim (e.g. Ombudsman). Therefore, the legal consequences of human rights in the case of physical persons are inexistent in constitutional acts. Considering the serious human rights infringements materialized in cases where Romania was sentenced by decisions of the ECHR in Strasbourg, it is imperative for Romania to *introduce the constitutional* complaint as a means of direct access of the person to the constitutional justice for the protection of fundamental rights. The revision of the Constitution in this sense would be an added-value as the function of constitutional claim is not consumed by the individual protection of the fundamental rights. In defending their rights, the citizens initiate a procedure that serves the objective constitutional law, as well as its development by interpreting the Constitution in concrete

cases. If we accept the definition of the specialists that consider *the constitutional claim as a subsidiary form of recourse*, accessible to every person and applied within the constitutional jurisdiction, by which a person claims to have been infringed by a local authority their constitutional right, then Romania would be prepared for the normative acts of the Council of Europe (e.g. the Recommendation Rec (2004) 6 of 12 May 2004, 114th Session of the Committee of Ministers of the Council of Europe for member states on the improvement of internal recourse). The statistics of the European Court reveal the alarming rise of claims against Romania, and also the high number of decisions by which the Romanian state is sentenced in serious offences, such as those related to the infringement of the right to a fair trial, of the right to ownership, of the right of not being subjected to torture, etc., which resulted in the State paying moral repair from public finances.

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