

THE INDIVIDUAL RIGHTS AND THE STATE

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Abstract

The concept of man's individual rights appeared a long time ago as a means of the individual's protection in relationship with the others. Living in a society, man interacts with other people, and these relations are regulated by certain rules. Once the state was formed, these rules become increasingly powerful while the concept of freedom is differently acknowledged.

What actually lay at the basis of individual rights' development was the concept of natural right which appeared in ancient Greece, and which can be traced throughout history like Ariadne's thread, guiding different thought schools. Human's fundamental rights are sanctioned only after being put down in the constitutions of different states, and once regional and international protection instruments are created. Nevertheless, in countries controlled by totalitarian regimes, human rights were infringed, the individual having to obey the collective community.

These regimes having collapsed, individual rights underwent a change for the better, but they also came to a standstill due to 9/11 or Ground Zero. After this event, and in the context of the fight against terrorism, individual freedom was limited in the name of freedom itself, and individual rights are currently regressing as to the possibility of being exercised.

Key words: *individual rights, fundamental rights, state, terrorism, private life*

Introduction

The fundamental human rights are an expression of the tremendous effort made to achieve the highest ideal of justice and good for everybody. Those rights came into being basing on the concept of natural law as a form of eternal truth, spread all over the universe and perceptible by the help of the reason of the human minds like the axioms in geometry.

Legal protection of human rights, a central idea to many current legal systems, has experienced a long and sinuous process of evolution throughout history, its purpose being that fact that today no one can deny their existence and their need for their defense.

From a historical perspective, "the human Rights (...) emerged as a tool to protect the individual in his relations with the community, whose primary function was the restriction of the political power in order to allow a free and full expression of the human being."¹

The individual lives in the society by establishing relationships with its peers, due to either natural aspects or forced by circumstances. Wherever people met, there have always been conflicts among them, resulting from the opposition of the ideas that people have, or the rivalry of desires. Therefore people reached the conclusion that there must be a sort of a moral code and some generally recognized rules followed by everybody, even by those who violate them and that those rules should represent both an impulse and a compulsion. These "rules" were originally various taboos, beliefs and practices, all gathered under the name of tradition, later on established through a powerful tool designed to protect the rules and to punish those who violate them - namely the State.

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¹ Muraru, I., Tănăsescu, E., S., *Constitutional and Political Institutions*, (All Beck Publishing House, Bucharest, tome I, 2005) p. 136.

The state is an indispensable tool to serve as an arbitrator, which must ensure compliance with the rules and punish violations. The state has an "historic mission"² to produce the right, then being itself subject to.

The State, as well as the law, is the product of an evolution in time and space, the individual giving up its own initial freedom in exchange of a body of laws that would ensure peace and its legal status. As society was divided into classes, the ruling minority was the one who took the prerogatives of designing and enforcing the law.

Paper content

It is said that, both the right, and the state, were born in the Ancient East, specifically in the region between the Tigris and the Euphrates rivers, nearly 6,000 years ago.

In fact, there were found the first written records of decrees carved on clay tablets by priests, found in the ruins of Ur.

Here, there was also discovered the first comprehensive body of law known in history, proclaimed by King Ur-Enguri (2112 BC-2095 BC), in the great Sumer, which regulates the habits of Ur. This code prepared the material from which Hammurabi, king of Babylon (1730-1686 BC), inspired in drawing of his more famous code.

Then the ancient Egypt, Babylon, Israel, the Persian Empire, the Ancient India and China followed, with various forms of state organization and also with the regulations, which revealed the fact that the state as well as the law depend on the social– historical changes.

In Europe, the first states and law based communities are in Sparta - The Laws of Lycurg (The Spartan code), in Greece - Dracon and Salon's Laws, in the Roman Empire - The Law of 12 slates.

In The Ancient Greece, by the help of its great thinkers - Aristotle and Plato - for the first time the natural law is mentioned and the fact that people have rights, they are free, of course not all concepts in the sense that we know today. Influenced by their thinking, Roman jurists develop ideas on human rights, an important step in the process of their establishment, being a creation of jus gentium as a system of rules by which certain rights are acknowledged to all people.

Subsequently, the ideas about existence and the need to protect the fundamental human rights are taken up by the School of the natural law thinkers (H. Grotius, Pufendorf S.) which implement them into the people's consciousness, grafted on the fight against the monarchical absolutism.

The crystallization of the idea of fundamental human rights and its legal recognition were obvious after the French Revolution, whose ideals were based on the concept of natural law, social contract and on the same necessity of resistance against the absolute monarchy and its arbitrariness.

Ideas about the fundamental rights were then taken over by the fighters for independence in North America, these ideas being at the basis of the struggle to establish and develop the United States of America.

Subsequently, the concept of fundamental rights was accepted and reproduced in most of the systems of law.

Even if the human rights exist and act as such, in a natural way, the legal, political or economic mechanisms, cannot be created, through which their protection to be ensured. A first step in solving this problem is to put these rights into national and international legal documents as an effective protection is only where there are legal mechanisms of protection and enforcement against their violation.

"Their establishment (n.n. of the essential rights) at the normative constitutional, level, guarantees them the most effective legal insurance, since they benefit both of the mechanisms of

² Kelsen, H., *Pure Theory of Law*, (Humanitas Publishing House, Bucharest, 2000), p. 339.

ensuring the supremacy of the constitutional standards and the legal mechanisms specific to the subjective rights protection".³

By signing the Constitution, the essential (fundamental) nature is acknowledged to these rights and guaranties are created as regards their exercise and protection.

As a definition, we call the fundamental rights as "those subjective rights of citizens, essential to their life, liberty and dignity, indispensable to the free development of the human personality, rights established by the Constitution and guaranteed by the Constitution and laws."⁴

What is worth mentioning about them is that both the national laws and the international instruments are recorded as "recognitions" or "statements", the concept of human rights being beyond their recognition through the texts.

As regards the two source – statements of the fundamental human rights protection (The Declaration of Independence of the United States of America, 1776 and The French Declaration of Human Rights and Citizen, 1789), it "deeply imbued with the ideology defined by Locke and Rousseau, ascertain the inherent rights of the human being and previous to the establishment of the society: they recognize <<rights to>> (live, movement, have an opinion) and not <<rights to>> (employment, social protection, a satisfactory standard of living) <<rights of resistance>>, which involve freedom of choice and individual action and abstention of the state, and not <<claim-rights>>, involving a claim of the individual against society and the positive allowance of the state."⁵ These rights cannot consist of debts from the state because they are pre-existent to the state.

The fundamental human rights are classified into several categories according to certain criteria. Thus, depending on the coverage, there are systems and hence regional rights (which apply in a given territory) and the rights of universal application (in the whole world). Depending on the recipient of their essential rights, they are classified into general (applicable to all individuals) and specific (applicable only to certain groups - women, children, employed persons). According to the same criterion, one can distinguish between individual rights (of every individual) and collective rights (which protect people communities, such as the minorities). As regards these latter rights we should specify that "the collective rights holders do not have mechanisms enabling them to guarantee their exercise, and on the other hand, it is no less true that by following the collective rights, such as the right to peace, the right to development, the right of peoples to a healthy environment, the essential premises of observing the individual rights are ensured".⁶

According to the criterion of content, the human rights are classified as civil and political rights and economic, social and cultural rights. From a historical perspective, the civil and political rights are those which imposed in the fight against the absolutism, being considered first generation rights, while the economic, social and political rights are considered as being part of the second generation.

Depending on the criterion of content we can also distinguish several categories, a first class being the one of inviolabilities⁷, which are those powers ensuring life, the possibility of free movement, physical and psychological safety and that of home safety, being part of the first generation of fundamental human rights. Besides these, depending on the chronological establishment through instruments of protection of the human rights, we can speak of first, second or third generation.

Although well known, established and individualized by protection instruments whose legitimacy is beyond doubt, there are many cases of restriction or infringement of individual rights, even in these circumstances.

³ Kelsen, H., [4], p. 138;

⁴ Muraru, I., Tănăsescu, E., S., [3], p. 140;

⁵ Sudre, Fr., *European Law and International Human Rights*, (Polirom Publishing House, Iași, 2006), p. 46;

⁶ Bîrsan, C., *European Convention on Human Rights. Comment on articles*, tome I *Rights and Liberties*, (All Beck Publishig House, Bucharest, 2005), p. 31;

⁷ Muraru, I., Tănăsescu, E., S., [3], pp.156-158;

In this context the communist and fascist regime should be mentioned and a new situation known by the generic name of fighting against terrorism.

Paradoxically, fascism and communism are antagonistic but similar and complementary movements. We believe that the analysis of the fascist regime and especially the communist one should be remade, taking into account the new data provided by the Soviet archives becoming public.

There are situations in human history, events that are not only exceptional but seem completely incredible and incomprehensible. Such events as the Holocaust or the Gulag have been maintained in a current of consciousness, the living memory of mankind, to prevent their repetition. If, in the case of the horrors of fascism, the infringement of individual rights is unanimously recognized, the crimes of Socialism in the Eastern European countries are far from acknowledging the negative role of the communist ideology and even further from recognizing the murderous nature of the communist regimes in Europe, the fact that these regimes turned terror into a method of government⁸.

While Fascism and especially the so called Nazism are characterized by a lack of ideal, Communism was very generous in this regard. The Communist discourse, from the early period of the Soviet Union, appears as one supporting the popular or socialist democracy describing itself as a regime that respects the individual rights and freedoms. The Communist totalitarian regimes proclaim the individual rights and freedoms without providing the means of protection, without creating those tools to provide effective legal protection. Although all the constitutions issued during the communist era, proclaimed the freedom of conscience, freedom of expression and choice of religion, the right to privacy and due process, many acts of lower legal force sanctioned any event of this type and the practice of the state institutions was towards this goal. Thus, the protection of the fundamental individual human rights and freedoms provided by the Constitutions adopted by communist regimes is a formal one, purely declaratory and contradicted by the actions of the state, having only a propaganda purpose. The totalitarian regimes defy all the positive laws going to those which it had promulgated itself or those that had not been taken the trouble to abolish⁹.

Beyond the particularities of each totalitarian system, there are common elements whose identification is required in order to characterize a regime as being considered totalitarian. What are the mechanisms helping a totalitarian party to gain the power, to hold the power in spite of the installed terror regime, what causes the collapse of these regimes, are all questions that we try to find answers. The formulation of these responses depends on preventing the recurrence of such phenomena, and consequently on ensuring the individual rights and freedoms.

The ideologies are not a sufficient explanation to determine the causes triggering the totalitarian passion. All in all the totalitarianism - in this case the fascism and the communism - have in common the priority given to the local communities against the individual, his rights and freedoms. The totalitarian regimes gain power and maintain it by the help of the masses. Hitler's coming to power was made possible by the help of the majority of population and he could not have kept this authority, neither him nor Stalin, if he would not have enjoyed the confidence of the masses. Theoretically, there are masses in every country and they make up the majority of those neutral people, seemingly indifferent, without the conscious of a common interest or of some specific objectives, a system of values. The mass individual is not a mere unskilled beast; it just lives in isolation without the normal social relationships, without belonging to a class consciousness.

Each totalitarian regime has its favorite victims. The Communism eliminated the "exploiters", in the Nazi regime "blood and race" prevails. What is characteristic is the lack of a strict doctrine or ignoring it so that a totalitarian regime can always change the criteria by which it identifies the victims without thereby alter the doctrine.

⁸ Furet, F., Nolte, E., *Fascism and Communism*, (Art Publishing House, București, 2007), p. 23;

⁹ Arendt, H., *The Origins of Totalitarianism*, (Humanitas Publishing House, Bucharest, 2006), p. 569;

The totalitarian regimes use propaganda to access the power, propaganda being replaced by indoctrination, as soon as a regime reached for the hoarding power, and violence being replaced by fear. The totalitarian movements, before conquering power, create a false and coherent world, in agreement with their doctrines, which is more responsive to the needs of the human mind than the reality itself¹⁰.

Regarding violence, it always accompanied the rise to power of the totalitarian movements and what is even more incomprehensible is that this violence was accepted. After coming to power the totalitarian forms of government establish a regime of terror where murders, hints and threats were present. These are the tools by which a totalitarian regime achieves and maintains power.

Currently, a new form of "totalitarianism" marks its presence, the Muslim one. Beyond the specific features, we can identify in its actions those elements characterizing such a system, its effects still being a restriction of the fundamental rights and freedoms of the individual.

Currently, a universal standard of time is predicted: before and after Ground Zero - World Trade Center destruction. Starting from this point we need to adjust our watches to see it as a new Greenwich meridian, which must adjust our mental pendulum. After September 11th, freedom became a sine qua non for peace and the protection of the future of humanity. Freedom became an international imperative, the coexistence pivot of peoples in the era of borderless terrorism. If you want to get rid of it, we should unite the world and not let it die.

In the name of freedom, each state tries to take the best steps to protect its citizens and their property. In the name of freedom different measures are taken in order to limit the fundamental rights recognized by international instruments of protection. In the name of freedom, freedom itself is limited. The entire process of recognition and standardization of the individual rights seems to know a setback, due to the invisible and impossible to locate danger of terrorism.

The international organizations are powerless in the face of the danger, being unable to protect the people against terrorism, coming from the fact that the war is not against a state, but against individuals, located anywhere in the world, communicating each other via the Internet, with all the benefits of democracy, to destroy it

The United States of America established a national security strategy, with the purpose of fighting and winning the war against the terrorism, of promoting and defending freedom, as an alternative to dictatorship and despair. "The idea - force that comes out of the contents of this document is thus formulated: "America is now before an alternative of choosing between fear and confidence, America chose the path of trust".¹¹

This excludes the isolationism and protectionism, the withdrawal, and limitation of the budget; this means taking over of the leading helms instead of isolation, a continuous encouragement and the development of the free trade and leading the fight against all the major challenges, primarily against terrorism".¹²

In the area of the human rights protection, all this fight against terrorism is grafted on the limitations of the exercise of certain recognized options the human being: the right to life, freedom of movement, freedom of conscience and expression, right of privacy.

As regards the European Convention on Human Rights, in Article 2, § 2, it contains an exception clause that is not included in the similar general agreements according to which "the use of force "that became absolutely necessary "to protect the public order (in some cases) and which caused death, is not a violation of the Convention."¹³ This exception was used in practice, checking

¹⁰ Arendt, H., [11], p. 438;

¹¹ Voicu, C. *Terrorism and Globalization*, in the volume "Globalization and National Identity", (Editura Ministerului Administrației și Internelor, Bucharest, 2006), p. 302;

¹² Idem, pp. 302-303;

¹³ Sudre, Fr., [7], p. 215;

whether the use of force was excessive, but strictly proportionate to achieving the authorized purpose:¹⁴ the terrorists suspected of planning to commit an attack were killed by the security forces during the actions of arresting them.

As regards restrictions on the right to freedom of movement, each state has the possibility to regulate how and to whom they apply, but "these restrictions must be" necessary in a democratic society "and to satisfy the requirement of proportionality."¹⁵ In the area covered by this law there are the restrictions and limitations which are subject to the citizens of certain countries that wish to enter the territory of another state, the imperative of getting an entry visa before leaving the national territory, the ban for certain people to enter the territory of another State.

The right to privacy and family is also marked by a series of violations and limitations, in the same context of the fight against terrorism. Knowing that the terrorists use the most updated means of communication, the legal tapping made on mobile phones, the interception of pager messages, of the messages sent over the Internet or the conversations of prisoners through the speaker, are considered as legal. All these violations and limitations must be firstly subject to the principle of proportionality and secondly, the need of doing all these for the sake of the national security to be established with certainty. Also, "national authorities are positively obliged to take steps in order to prevent their disclosure (by the mass- media)."¹⁶

Conclusions

The terrorism, the one imposing the states such measures as limiting the exercise of the fundamental rights of its citizens is an important issue as regards the following of the individual's legal sphere. As long as the terrorist - who deliberately kill civilians, relying on the defense of a cause - cannot be precisely identified in order to maintain the safety and security of each and every citizen, the states limit the rights and freedoms of the latter one, those rights and freedoms established before.

Given the purpose for which these limitations are imposed, namely the dismantling of the terrorist networks and regaining of freedom, we consider them as necessary, with the only amendment that the principle of proportionality between the measures taken and limited right should always be respected in taking these measures,. The fight against terrorism seems to have two phases: a short term one, the fight involves using the military force and other instruments of national power "to kill or capture the terrorists." On the long term, winning the war is conditioned by winning the battle of ideas."¹⁷

This battle of ideas, of imposition those man centered ones, with its fundamental rights and liberties, coming from the natural law, cannot be fully won but in democracy and "the democracy cannot be imposed by the help of guns ..." it does not rise from the ashes of the war and a history of endeavors, civic action and economic development. It is unlikely that democracy can be built with materials exported by a conquering, liberating, American army, or in the shadow of the American private sector companies and U.S. nongovernmental organizations. Democracy grows slowly and needs indigenous endeavors, the cultivation of local civil institutions and a healthy citizenship, which mainly depends on education."¹⁸

¹⁴ Case *McCann v. United Kingdom*, September 27, 1995, cited in Sudre, Fr., [7], p. 215;

¹⁵ Sudre, Fr., [7], p. 248;

¹⁶ Sudre, Fr., [7], p. 319;

¹⁷ Voicu, C. [13], p. 308;

¹⁸ Voicu, C. [13], pp. 311-312.

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