MATTERS REGARDING THE HUMAN RIGHTS' PROTECTION IN THE LEGAL SYSTEM

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Abstract

Under the conditions of the existence of the division and balance of the state powers, it arises the human rights' protection issue by each of the titular authorities of the state functions. It is, therefore, asserted an analysis of the judiciary and its enforcement bodies' role in connection to the effectiveness' assurance of the legitimate rights and interests of the holders who bore them and request their defence, observance and protection. At the same time, we propose a comparative approach of the regulation level of the fundamental human rights at international, regional (federal) and national level.

Keywords: *human rights, protection, judicial authority.*

1. Introduction

The human rights issue represents a fundamental pillar of the internal and international public life and, as consequence, the observance of the human's fundamental rights and freedoms embodies a *sine qua non* condition for any democratic governance as well as for any political party, organization, institution or public authority.

The importance of the analysed concept is sustained by the commitment at national, regional and international level of the fundamental rights and freedoms; between the three regulation levels one can observe differences only as formal matter and not as substantive one. Also, the complementarity between the subsidiarity of the commitment and international guarantee of the human rights towards their commitment and guarantee at the domestic level, on one hand and the superiority of the international norms with regard to the human rights towards the domestic regulations, on the other hand and the direct applicability of the international norms with regard to the human rights in the domestic law represent as many arguments in the sense of showing the primary nature of the human rights concept[1].

By approaching the issues regarding the observance of the human rights in the judiciary, we propose to identify the contribution of the legal authority to the human rights' defence and protection, noticing, within this sense, that within the protection guarantees' mechanism of the human fundamental rights, a particular role is given to the judiciary, due to the constitutional commitment of the division and balance of the state powers as well as of the functions assured by the judiciary and the principles on which its establishment and performance is based[2].

Understood as „the general status of the society which is accomplished through the assurance for each individual and for all the individuals, collectively, of the satisfaction of the legitimate rights and interests"[3], the judiciary has as aim the assurance of a similar legal treatment to all the legal entities which are found in similar legal situations, contributing, therewith, to the achievement of the purpose of the legal norms in force[4], being able even to dominate them in certain situations[5] within a historical and philosophical approach too. In other words, the ambivalent relationship between the judiciary and the human rights' protection is supported by the belief had by the humans that the judiciary defends their legitimate rights and interests when these are broken.

In the legal dogma, the term of ‚judiciary' was analysed having two meanings respectively, the legal bodies system on one hand and the activity of solving the legal trials, delivering the sanctions,

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[1] Corina Florenţa Popescu, Maria-Irina Grigore-Rădulescu, *The legal protection of the human rights*, (Bucharest: Universal Juridic Publishing Company, 2014), 38 and foll.

[2] See, Ion Suceavă, Nicoleta Diaconu, Nicolae Purdă, Laura Macarovschi, Roberto Ştefan Ababei, Daniela Gavril, *The observance of the human rights within the activity of the police departments*, (Bucharest, 2015), 46.

[3] Nicolae Popa, *General Theory of Law*, 3rd Edition, (Bucharest: C. H. Beck Publishing Company, 2008), 100. To the same sense, Octavia Maria Cilibiu, "Reflections regarding the justice, the judiciary and the administrative judiciary", *Annals of "Constantin Brâncuşi" University from Târgu Jiu, Legal Sciences Series*, 4 (2012): 66.

[4] Maria-Irina Grigore-Rădulescu, *General Theory of Law*, The second edition, reviewed and amended, (Bucharest: Universul Juridic Publishing Company, 2014), 69.

[5] Iulia Boghirnea, *General Theory of Law*, (Craiova: Sitech Publishing Company, 2011), 47.

resettling the broken legitimate rights and interests[6], on the other hand. We consider that both meanings are complementary because the activity described in the explanation of one of the term's meanings cannot be made but by the legal bodies system, as an independent and disinterested state authority.

Interrelated with the judiciary's idea and spirit, there have been developed the jurisdictional bodies which run jurisdictional activities, whose aim is to solve the legal conflicts and assure the laws' observance, on basis of special procedures characterized by an absolute objectivity and impartiality, the most representative type of bodies being the Constitutional Court and the Ombudsman[7].

2. The capacity of the physical person to invoke the rights acknowledgement in front of the judicial bodies

The acknowledgement of the human rights can be invoked in front of the judiciary by the physical person which can be either victim or defendant, the two perspectives offering a different range of rights.

Therefore, if found in the victim hypostasis, the physical person is provided with social and protection rights, as well as with the right to an equitable remedy[8]; one must keep in mind for the purpose of defining the concept of victim and, at the same time, the recognised rights, the distinction operated in the Statement of the Fundamental Legal Principles referring to the victims of criminality and the victims of power abuse, enacted in 1985 by the General Assembly of the United Nations by the Resolution 40/34.

As pointed out in the statement's title, within its content is established a difference between the victims of criminality and the victims of power abuse, a difference noticed in the definition of the concepts and special treatment applicable to each cathegory of victims.

At the statement's first point, the victims of criminality are defined as persons which, individually or colectively, suffered a damage, especially a prejudice of the physical or psychic integrity, a moral anguish, a material loss or an important prejudice of the fundamental rights, by means of actions or omissions which break the criminal laws in force from a state- party, being included here also the ones which sanction the power abuses, no matter of the race, colour, gender, age, religion, nationality, political or any other kind of opinion, faith, opportunity, birth, family status, ethnic and social background and physical capacity.

Within the meaning of the statement, the term of ‚victim' includes, both the person who suffered the prejudice and the family's closest members, the persons found in the direct care of the victim as well as the persons who suffered a prejudice by intervening to help the victim or to stop the victimisation.

Therewith, from the statement's analysis it follows that a person is considered a victim no matter if it suffered as consequence of a deed whose criminal is unknown, prisoner, chase or declared guilty and regardless of its kin relationships with the criminal.

The victims of the power abuse are the persons which endured a pain, a material loss, a severe prejudice of the fundamental rights, a prejudice of the physical or psychic integrity, by means of actions or inactions which do not constitute violations of the judicial legislation but represent violations of the judicial norms recognised with regard to the human rights[9].

As we mentioned, the victims of criminality and the victims of power abuse benefit of the freedom to access the justice and the right to recover the endured prejudice, according to the legislation of the state on whose territory was committed the criminal act and they have to be informed in relation to their acknowledged rights in order to receive the remedy.

As a guarantee for the accomplishment of the victims' acknowledged rights, the mentioned statement committs action directives in the activity of the national judicial and administrative body, represented by: the information of the victims about their role within the procedures and the available possibilities regarding the data and the procedures' run, especially when it is about severe crimes and when this information is requested; the easing of the presentation and examination by the court of the victims' concerns regarding the accomplishment of their interests in question, without being prejudiced their right to defence during the criminal trial; the assistance provision for the victims during the entire period of the trial; measures taken to limit as possible the hardships of the victims, by protecting when needed their private life and assuring the security of their family's members against the disincentives and revenge acts; the avoidance of the unjustified delays regarding the effective grant of remedies to the victims.

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[6] Nicoleta Diaconu, Nicolae Purdă, Laura Macarovschi, Roberto Ştefan Ababei, Daniela Gavril, *The observance of the human rights within the activity of the police departments*, 45.

[7] Regulated in the domestic law of the states, these bodies or institutions can have different names but bear the same meaning of the jurisdictional function.

[8] Ionel Cloşcă, Ion Suceavă, *Treaty of human rights*, 2nd Edition, (Bucharest: V.I.S. Print Publishing Company, 2003), 177; Nicolae Purdă, Nicoleta Diaconu, *Legal protection of the human rights*, The second edition, reviewed and amended, (Bucharest: Universul Juridic Publishing Company, 2011), 166.

[9] Ionel Cloşcă, Ion Suceavă, *Treaty of human rights*, 2nd Edition, 179.

The second capacity under which a physical person can invoke in front of the judiciary the acknowledgement and the observance of its rights is the one of defendant, concept by which is understood, according to the art. 82 from the Civil procedure code, the person against whom was proceeded the criminal trial. Within an extended meaning of the dogma, by criminal is understood the person who is investigated or judged for the committment of a crime, without restriction of freedom or with restriction of freedom[10].

The mechanism of the international judicial and administrative guarantees regarding the protection of the human rights asserts the displayed concerns regarding the formation of a special regime applicable to the defendants, among the rights[11] which can be pleaded by them, one can keep in mind: the pressumption of innocence, the life right, the right to not be subject to torture and inhuman or degrading treatments, the right to defence, the right to an equitable trial, the right to an effective appeal, the right to a double degree of jurisdiction with regard to the criminal offence, the right to not be judged twice for the same offence, the right to receive remedies in case of judicial error[12].

Without conducting an analysis of each of the mentioned rights, we consider necessary to point out that the presumption to innocence embodies the most important guarantee of the human dignity and freedom, starting from the fact that it represents a constitutional principle and, in the same time, the principle under which is subordinated the entire judicial and jurisdictional activity. By virtue of the presumption to innocence, any person is considered not guilty as long as against it was not delivered any final sentence of a judge regarding its conviction, giving therefore, a complete guarantee of the persons' protection during the criminal trial against the arbitration, with regard to the ascertainment and the call to criminal account[13].

In the Romanian law, according to the provisions of the art. 4 par. (1) from the Civil procedure code, „any person is declared not guilty until the establishment of its guilt by a final judge's decision".

Hereinafter, at the second paragraph of the mentioned article, it is shown that 'after the use of all the evidence, any doubt of the judicial bodies to make an apprehension about the trial is understood in favour of the suspect or defendant", confirming the credibility of the logical argument *in dubio pro reo*.

Intercorrelated with the presumption to innocence, the right to defence represents both a fundamental civic right as well as a judiciary's fundamental principle, benefiting of a complete system of guarantees set up during all the stages of the civil and criminal trial and in relation to all the judicial bodies.

The right to defence is regulated at international, regional and national level and, in-line, was the object of some ample doctrinary debates, basically keeping in mind the use of the term with two meanings, a substantive respectively a formal one[14].

Substantially, the right to defence represents the entirety of procedural rights and guarantees regulated by the law which gives to the person (party) the possibility to defend its legitimate rights and interests; formally, the right to defence embodies only the possibility of the person (party) to hire for itself a defender, a purpose taken in consideration by the judicial and constitutional regulation (art. 24) provided in the Law no. 304/2004, republished, with the further changes and completions (art. 15).

Another right with an indisputable value and which benefits of a regulation upon all three levels[15] – international, regional and national – is the free access to judiciary, based on which, any person can approach the judiciary about the defence of its legitimate rights, freedoms and interests. The access to justice cannot be restricted.

Ultimately, all persons have the right to an equitable trial and to the solving of all the causes as soon as possible and expected, by a disinterested and independent court, established according to the law. The concept of „equitable trial" is regulated by the

[10] Nicolae Purdă, Nicoleta Diaconu, *The legal protection of the human rights*, The second edition, reviewed and amended, 167.

[11] According to the art. 83 from the Civil procedure code „During the criminal trial, the defendant has the following rights: a) the right to not make any statement during the criminal trial, its attention being drawn that if it refuses to make statements it will not bear any unflattering consequence and if it will make statements these will be used as evidence against it; a^1) the right to be informed regarding the offence for which it is investigated and the judicial framing of the offence; b) the right to see the file, under the conditions of the law; c) the right to have a chosen lawyer, and if it does not appoint one, for the cases in which is required the mandatory assistance, the right to be granted a public defendant; d) the right to propose the use of evidence under the conditions provided by the law, to claim exceptions and to conclude; e) the right to express any other requests which are in connection to the solving of the criminal and civil angle of the offence; f) the right to benefit for free of a translator when it does not understand, does not speak properly or cannot speak at all Romanian; g) the right to ask for a mediator, in the cases allowed by the law; g^1) the right to be informed regarding its rights; h) other rights provided by the law.

[12] For a detailed analysis of the listed rights, see, Raluca Miga-Beșteliu, Catrinel Brumar, *The international protection of the human rights*, Lecture notes, 5th Edition, (Bucharest: Universul Juridic Publishing Company, 2010), 132-170.

[13] Nicoleta Diaconu, Nicolae Purdă, Laura Macarovschi, Roberto Ștefan Ababei, Daniela Gavril, *The observance of the human rights in the activity of the police departments*, 48.

[14] Maria Fodor, *Civil procedural law*, (Bucharest: Universul Juridic Publishing Company, 2014), 107.

[15] See, for this purpose, art. 8 and 10 from the Universal Declaration of Human Rights, art. 6 par. 1 from the European Convention of Human Rights, art. 21 from the Romanian Constitution and art. 6 from the Law no. 304/2004, republished, with the further changes and completions.

art. 10 from the Universal Declaration of Human Rights, art. 14 point 1 from the International Pact regarding the Civil and Political Rights, art. 6, par. 1 from the European Convention of Human Rights, art. 47[16] from the Charter of the Fundamental Rights of the European Union as well as by the art. 21 par. (3) from the Romanian Constitution and the art. 6 par. (1) from the Law no. 304/2004, republished, with the further changes and completions.

3. The concept of judicial authority. Conceptual confinements.

The judicial authority represents a concept which is widely witnessed within the debates regarding the principle of division and mutual control of the powers, to the support of this idea one should keep in mind the comparison between the three powers embodied in the Essay 78 from the series of the American Constitutional Essays (Federalist Papers) according to which: the executive body bears the community's sword; the legislative approves the budget; the judges have only the mind and the judgment[17].

Preserving the comparative approach of the relationship between the state powers, in the dogma it was assessed that the „Judicial power does not have neither the Strength nor the Will, but only the Judgment (Discernment); and has to, eventually, depend on the support of the Executive power so that its decisions can be put into practice"[18].

Within the regulation of the Romanian Constitution, reviewed, the system of the judicial bodies embodies: the judicial courts (art. 124-130), The Public Ministry (art. 131-132) and the Superior Council of Magistracy (art. 133-134).

The justice is achieved by the judicial bodies, also commonly named judicial courts[19].

According to the disposals of the art. 126 from the Romanian Constitution, the justice is accomplished by the High Court of Cassation and Justice and by the other judicial courts provided by law. The capacity of the judicial courts and the judgment procedure are provided only by law.

With regard to the enforcement of the constitutional norms, according to the disposals stated in the Law no. 304/2004[20] regarding the judicial settlement, republished, with the further changes and completions, the judicial power is enforced by the High Court of Cassation and Justice and by the other judicial courts provided by law. The Superior Council of Magistracy is the guarantor of the judiciary's independence.

The headnote of the Law no. 304/ 2004, republished, sets up the general objectives of this regulatory document; therefore, the judicial settlement is set up having as purpose to assure the observance of the fundamental rights and freedoms of the appointed person stated, mainly, in the following documents: The International Charter of Human Rights, The Convention for the defence of the fundamental human rights and freedoms, The Convention of the United Nations upon the Child's Rights and The Charter of the Fundamental Rights of the European Union, as well as to certify the observance of the Constitution and the country's laws. The judicial settlement has also as primary objective the assurance of the right to an equitable trial and the judgment of the trials by law courts, impartially and independently of any extraneous influences.

The Law no. 304/2004 in connection to the judicial settlement, republished, establishes the cathegories of judicial courts, i.e.: The High Court of Cassation and Justice, courts of appeal; courthouses; special courthouses; judicatures.

By the Law no. 56/1993[21] was regulated the settlement and the functioning of the High Court of Cassation and Justice. Hereby, this court is set up in five departments, a panel of nine judges and the united departments, each having its own expertise. In the art. 1 of this law it is shown that the supreme court follows up the correct and united enforcement of all the laws by all the judicial courts.

Each of the appellate courts executes its inherent expertise within a district which embodies a series of courthouses. Therefore, there have been set up 15 courts of appeal, respectively at: Alba Iulia, Bacau, Brasov, Bucharest, Constanta, Cluj, Craiova, Galati, Iasi, Oradea, Pitesti, Ploiesti, Suceava, Timisoara and Targu Mures. They adjudicate, in the first instance, the cases received by them by law. As courts of appeal, they judge the appeals claimed against the sentences delivered in the first instance by the courthouses and as recourse courts, the recourses stated against the decisions delivered by courthouses with regard to the appeal as well as other cases provided by law.

The courthouses act only in the county seats and in Bucharest city. They judge by their expertise, in the first instance, a series of trials given to them expressly, as courts of appeal in the appeals stated

[16] Art. 47 refers to "the right to equitably solve the issue".

[17] http://www.constitution.org/fed/federa78.htm

[18] Traian Cornel Briciu, *Judicial institutions. Judiciary's settlement principles. Magistracy. Law practice.* (Bucharest: C.H. Beck Publishing Company, 2013), 42.

[19] With regard to the meaning of the concept of 'court', see, Maria Fodor, *Civil procedural law*, 172-173.

[20] Published in the Official Gazette of Romania, Part I, No. 576 from 29 June 2004 and republished in the Official Gazette of Romania, Part I, No. 653 from 22 July 2005.

[21] Published in the Official Gazette of Romania, Part I, No. 159 from 13 July 1993 and republished in the Official Gazette of Romania, Part I, No. 56 from 8 February 1999, with the further changes and completions.

against the decisions delivered by the judicatures in the first instance. As recourse courts, the courthouses judge the recourses against the decisions delivered by judicatures which, according to the law, are not submitted to appeal.

The judicatures represent the conventional courts, which run in every county and in Bucharest city.

Within the limits provided by law, the military courts are also settled and run, respectively the Military Courthouse, The Territorial Military Courthouse and The Military Court of Appeal.

According to the art. 131 from the Romanian Constitution, reviewed, within the judicial activity, the Public Ministry represents the society's general interests and defends the order of law as well as the rights and freedoms of the citizens.

The Prosecutor's Offices act nearby the law courts, run and control the criminal research activity of the judicial police, under the law. The Public Ministry executes its responsabilities through the prosecutors, established in prosecutor's offices, nearby each judicial authority, under the authority of the Ministry of Justice[22]. The responsabilities of the prosecutors are regulated by the disposals of the Law no. 304/2004, republished, with the further changes and completions.

As we mentioned, with reference to the disposals of the fundamental law, the Supreme Council of Magistracy[23] is the guarantor of the justice's independence, bearing the role to ensure the balance within the judicial system, as well the one between the judicial system and other state powers provided by the Romanian Constitution. In other words, the Supreme Council of Magistracy contributes to the assurance, by means of mechanisms specific to the division of state powers, of the independence of the magistrates' activity and its assurance, for the benefit of the democracy and state subject to the rule of law[24].

In the context of a complete analysis of the bodies with attributions and capacities with regard to the justice's achievement, we consider necessary to also mention the activity of the National Anticorruption Directorate[25], which runs as an independent structure, with legal personality, within the Prosecutor's Office nearby the High Court of Cassation and Justice, being independent in relation to the judicial courts and the prosecutor's offices nearby them as well as in the relationships with other public authorities, as well as the activity of the Terrorism an Organized Crime Investigation Department[26], which runs within the Prosecutor's Office nearby the High Court of Cassation and Justice, as a structure with legal personality, specialized in combating activities of terrorism and organized crime.

According to the art. 124 par. (2) from the Romanian Constitution, reviewed, the judiciary is unique, disinterested and equal for all, fact which assumes that there is only one judiciary, accomplished by the same bodies, being prohibited the existence of some extraordinary courthouses, under the constitutional disposals of the art. 126 par. (5) according to which „it is prohibited the settlement of extraordinary courts".

The constitutional principle of the uniqueness, disinterestedness and equalty of the judiciary assumes the use in similar causes of the same procedural rules and the grant of the procedural rights equally to all the trial's participants.

By the art. 21 of the Constitution is made a differentiation between the right to a trial in judiciary, whose titulary can be any person and the obligation to protection which goes to the judicial authorities, only in relation to the legitimate rights and interests, the legitimate or illegitimate character of the claims submitted to the judiciary arising after the case's judgment and being ascertained only by an order of a court.

Against the orders of a court, the concerned persons and the representatives of the Prosecutor' Office can carry out remedies at law, under the law's conditions, which represent procedural means by which it is requested and obtained the cancellation or the partial or total amendment of an order of court[27].

4. Conclusions

The protection and the observance of the human rights represent one of the main scopes of the state subject to the rule of law, a fundamental and

[22] The Ministry of Justice contributes to the proper working of the judicial system and to the assurance of the conditions required for the justice's achievement as public service, the defence of the order of law and civic rights and freedoms, according to the disposals of the art. 2 from the Government Decision no. 652/2009 regarding the establishment and the functioning of the Ministry of Justice, published in the Official Gazette of Romania, Part I, No. 443 from 29 June, with the further changes and completions.

[23] The High Council of Magistracy was established by the Law no. 317/2004, published in the Official Gazette of Romania, Part I, No. 599 din 2 iulie 2004, republished in the Official Gazette of Romania, Part I, No. 827 from 13 September 2005 and, afterwards, in the Official Gazette of Romania, Part I, No. 365 from 30 May 2012.

[24] Traian Cornel Briciu, *Judicial institutions. Judiciary's settlement principles. Magistracy. Law practice.* 61.

[25] The National Anticorruption Directorate runs its activity on basis of the Government Emergency Ordinance no. 43/2002, published in the Official Gazette of Romania, Part I, No. 244 from 11 April 2002, with the further changes and completions.

[26] The establishment, the settlement and the functioning of the Terrorism and Organized Crime Investigation Department was regulated by the Law no. 508/2004, published in the Official Gazette of Romania, Part I, No. 1089 from 23 November 2004, with the further changes and completions.

[27] Nicoleta Diaconu, Nicolae Purdă, Laura Macarovschi, Roberto Ștefan Ababei, Daniela Gavril, *The observance of the human rights in the activity of the police departments*, 49.

extremely important role being referred to, in this sense, to the judiciary. The international, regional and national commitment of the fundamental human rights and the settlement of a system of guarantees with regard to the protection of these rights in the judiciary leads to the conclusion that the essence and the substance of the state of law can be ascertained also from the perspective of the relationship between the activity of the judicial authorities and the accomplishment degree of the fundamental human rights.

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