

FUNDAMENTAL RIGHTS AND FREEDOMS, A POSSIBLE TRIGGERING FACTOR OF RETHINKING THE LAW IN THE CONTEXT OF NEW MIGRATION CRISIS IN EUROPE

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ABSTRACT

With the adoption of the Lisbon Treaty, the European Union reaches a new generation on the interpretation of human rights in relation to the action taken to achieve the objectives of social inclusion, economic growth and competitiveness.

The European Union law is a relatively new legal construction in which human rights occupy a constantly developing position.

In the light of recent events caused by the refugees' crisis in the European Union, the EU law tends to be marginalized in favor of national restrictive measures that put national safety first at the expense of free movement. Ideally, it would be that both EU and Member State to rally simultaneously visible to the universal values of human rights and focus to identify fair and equitable balance between protection of human rights and security of the citizens.

Migration is charactering the entire history of mankind, but in recent years has acquired a universal dimension.

Key-words: *rights and freedoms, migration crisis, social inclusion, competitiveness, the right of asylum.*

The creation and enforcement of law is a sovereign right of a state. In this framework are drafted laws, other normative acts and are highlighted the formal sources of law. Law making process is based on the needs of population and the need to respect human rights and the survival of national being.

On national and international level, human rights are divided into fundamental rights, freedoms and duties and they are submitted to fundamental laws, international and European regulations. Romanian Constitution devotes Title II to fundamental rights, freedoms and duties. At European level, it operates the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. There are identical relations between the national and European regulations but also inconsistency in implementation of those provisions. Sometimes it is considered that the application of European provisions

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cannot defeat national constitutional provisions, while respecting other rights enshrined in national law shall be subject to the principle of subsidiarity, according to the rules established by the accession treaties to the European Union.

The European Union law is a relatively new legal construction in which human rights occupy a constantly developing position.

The ordination and guarantee of human rights in the European Union enjoys an independent legal nature as to legal will through which the European Union acts.

Starting from the extended concept of human rights, the European Union, from its beginnings, took over from the catalog of constitutional traditions of the Member States, the principles and values that are within the scope of general law, namely those universal rights that matched its functioning and organization.

In the European Union, the term "fundamental rights" is used to express the concept of "human rights", in a specific internal EU context. In this sense, the Treaty of Rome (1957) sets up the legal framework for the protection of individual human rights in the economic context of the European Union founding, namely non-discrimination based on grounds of nationality (art. 7), free movement of persons (art. 48) and equal pay between man and women (art. 119).

In full accordance with the constitutional terms, Deleanu (2006) often talks about "fundamental rights and freedoms". This raises a sign of equality between fundamental rights and fundamental freedoms. Such rights and freedoms are characterized by the fact that they are enshrined by the fundamental law and they are protected and guaranteed through national and European courts. Consequently, human rights and fundamental rights have a similar content that interprets differently according to the Charter of Fundamental Rights of the European Union, European Convention on Human Rights or the European Social Charter. In the context of Union law, the fundamental rights set out minimum standards to respect and guarantee human rights at regional level.

With the adoption of the Lisbon Treaty, the European Union reaches a new generation on the interpretation of human rights in relation to the action taken to achieve the objectives of social inclusion, economic growth and competitiveness. Moreover, the Charter of Fundamental Rights became legal basis that ensures the promotion, respect and guarantee of fundamental rights in the European Union, around certain basic social values: human dignity, fundamental freedoms, human equality, solidarity, citizenship and justice. Therefore, we can say that the new "generation" is characterized by the fact that all EU policies have a solid component of fundamental rights. Correlatively, Dausés (2006) considers that "fundamental rights have not only individual defense character, but also a political position". In other words, the general principles of the European Union does not specify only the legal pattern for the evaluation of the Union constitutional order and national legal orders, but is also a political commitment from Member States.

The Charter does not specifically distinguish between fundamental rights and fundamental freedoms or between fundamental rights and principles. But these distinctions are highlighted through the structure and content of the Charter, and also through European Union' essence of existence.

Establishing a single market of the European Union was accomplished through the free movement of persons, goods, services and capital. In case of *Omega Spielhaus*, C-36/02, the Court of Justice distinguished between the concept of fundamental freedoms and fundamental rights indicating that it can derogate from a fundamental freedom in order to respect a fundamental right. Subsequently in *Torfaen* case, C-145/88 and *Stichting Collectieve*, C-288/89, the Court of Justice notified the existence of a distinction between a fundamental right and a fundamental freedom in the context of cultural diversity.

Apetriei (2010) considers that the non- inclusion of European fundamental freedoms in the Charter may be interpreted as "a silent differentiation operated between these and fundamental rights and not a mere omission". On the other hand, the relationship between fundamental rights and principles requires a hierarchy of the human rights catalog of instruments. The principles enshrined in the Charter are diversified, comprehensive, general and there are imposed to states as obligations of means. Therefore, the principles and rights provided for in the Charter have the same legal status and produce the same effects. The exception to this rule occurs with the provisions of Art. 52 and 53 of the Charter, which refers only to the rights and fundamental freedoms. Apetriei (2010) considers that this omission is deliberate, in order to limit the scope of some principles. Thus, subjective rights shall be respected, whereas principles shall be observed as the main guidelines in adoption of national laws. The coherent functioning process of the European Union is the rule of law. The rule of law concept presents an important distinction to guarantee fundamental rights, since it has a wide margin of discretions, ensuring both legal security for economic operators, boosting investments, jobs and growth, as well as independent, impartial, effective and responsible legal systems. There is a interdependent relation between promoting the rule of law and ensure fundamental rights – each, by the other, increases legal security and contributes to deeper regional integration. The rule of law is a prerequisite to protect all other fundamental values and to support all the rights and obligations arising from treaties.

In the light of recent events caused by the refugees' crisis in the European Union, the EU law tends to be marginalized in favor of national restrictive measures that put national safety first at the expense of free movement. Ideally, it would be that both EU and Member State to rally simultaneously visible to the universal values of human rights and focus to identify fair and equitable balance between protection of human rights and security of the citizens.

Migration is charactering the entire history of mankind, but in recent years has acquired a universal dimension. At first, the European Union, faced with problems

related to decreasing labor, birth rate and decreasing working population observed indulgently or even encouraged this phenomenon. During the phenomenon, it was found that self-direction of the migration towards certain Member States could endanger their security. Migration itself revealed that she gives birth also to dangerous phenomena, among those who migrate for humanitarian purposes and infiltrate terrorists, particularly members of Jihad, who indulge in violent actions in the member state that enter.

Through the European Agenda on security, the European Commission agrees that the responsibility for internal security is primary for the Member States but points out that cross-border challenge are testing the ability of different countries to act individually, which requires support of the Union to create a trust climate and facilitate cooperation, exchange of information and joint actions. European agenda on security identifies as priorities the following areas: counter-threats regarding security and the fight against terrorism, criminal organizations and digital crime.

Due to the adoption of agenda on security, measures have been taken which regulates the regime of firearms and explosives, which reinforces the fight against financing terrorism and to creating solid and intelligent systems to ensure border security etc.

In April 2016, the European Commission proposed an effective and real UE union on security, identifying a series of solutions to the terrorist threat:

- Fight against foreign terrorists threat;
- Preventing and combating radicalization;
- Terrorist punishment and those who support them;
- An improvements in information exchange;
- Strengthening the European Counter Terrorism Centre;
- Suppression of terrorist access to firearms and explosives;
- Suppression of terrorist access to funds;
- Protect citizens and critical infrastructures.

A different document that has a strong impact on the amendment of EU law is "the European Agenda on migration".

The issue of migration on different territories is not a new problem. It has a long historic journey. Since ancient historical times, wars, hunger, ethnic and patrimonial violence generated population exodus from a specific territory to peaceful territories. Nowadays the same causes generate major population migration from North Africa, from Middle East, from Asian countries to Europe. This part of the world has become an *El Dorado* of those who want to escape the bombings, other violence, hunger and insecurity.

On this background, the European Union member states started to put questions on migration and terrorism. Is this process affecting the security of its own citizens or not? The answer is variable in space and time.

In those circumstances, the European debate arises between migration and security, fundamental rights and freedoms of citizens and their benefit for migrants. In Romania, the basic law, art. 18 alin. (1) establishes that *“Aliens and stateless persons living in Romania shall enjoy general protection of persons and assets, as guaranteed by the Constitution and other laws”*.

In these circumstances the only legal problem arises when it comes to entering the national territory. Art. 3 para. (4) of the Romanian Constitution has triggered controversy in light of recent events on the world political scene in terms of crisis. Our fundamental law provides that, *“No foreign populations may be displaced or colonized on the territory of the Romanian State”*. However, at the same time, we must take into consideration art. 11 para. (1) and (2) in conjunction with art. 148 of the Romanian Constitution. The constitutional provisions enshrines that *“The Romanian State pledges to fulfill as such and in good faith its obligations as deriving from the treaties it is a party to”*, that the treaties ratified by the Parliament, according to the law, are part of national law, and that, following the accession of Romania to the constituent treaties of the European Union, the provisions of the constituent treaties of the European Union, as well as other binding Community rules take precedence over the contrary provisions of any domestic laws, with compliance with the provisions of the Act of accession. Thus, on the one hand, Romania cannot neglect its obligations from membership nor to remain deaf to the humanitarian S.O.S. launched at European and worldwide level.

To this problem is related the current process of migration and the protection of human rights. The general rule in this matter is considering the way it is established the legal status of strangers in the Member States of the European Union, putting an emphasis on granting the right of asylum. In this regard, through the term of "asylum seeker" we understand that it's a person who has applied for refugee status and who expects his application for asylum to be accepted or rejected or resolved, respecting the provisions of the law.

In terms of concrete measures that the Member States wanted at the start of the crisis of migrants, the Agenda on migration do not constitute anything more than yet another political speech, which comes in response to the crisis with immediate solutions.

But from the standpoint of conceptualizing the law, broadly, and the exercise of fundamental rights, narrowly, the European Agenda on migration establish for Member States and for the European Union as a whole, the test of double solidarity in the context of the humanitarian crisis caused by the situation of asylum seekers in the European Union.

Through the "test of double solidarity" we can understand the insurance and protection of freedom of movement within the Union and securing of the borders. At the test of double solidarity participate Member States, voluntarily or as a result

of the measure imposed¹ relating to the relocation of asylum seekers, according to which rates are established as by which each Member State gets a number of asylum seekers in proportion to population, GDP, number of requests for asylum made during the last year and the unemployment rate.

In addition, the European Commission has nominated the Home States that are considered safe in the sense that their citizens no longer need international protection and proposed a plan for the repatriation of the illegal immigrants. The test of double solidarity does not only concern aspects concerning the humanitarian law, but also the reciprocity between Member States, which can or cannot assume the same position.

The Concrete measures, following the European Agenda on migration, is acting for the future through the solutions on the medium and long term, as well as the consecration of a legal framework to ensure employment, access to social services and educational opportunities for displaced persons. We believe that it goes without saying that the "present" is dealt with the legal and physical protection of these vulnerable people², namely food and lodging. In the same vein, the European Council of 17-18 December 2015 goal was conjured up the "control" of migratory flow, not it's stopping and accelerating the implementation of mandatory quotas.

Behold, we are facing a dilemma: how do we find a balance between the safety of the citizens of the European Union and to ensure basic rights of vulnerable individuals who, "beat" at the gates of the European Union which forces the external borders.

The answer to the question gave rise to controversy and dissension between European Governments and those in Eastern Europe, but also within the European Union.

The European Union's first response was to open its gates to respond by instinct, "humanitarian protection. Subsequently, in dealing with the effects of this phenomenon, in particular of terrorism, some States have it expressly denied, while others have started to have reservations in relation to initial promises. But the European Union has chosen to impose the solution even relaying Member States opposed to the sharing of refugees through a mechanism of compulsory quotas.

¹ At these plans of the Commission opposed, vehemently, several Member: Hungary, the Czech Republic, Slovakia, Poland and Romania motivating economic, social, cultural and religious aspects. Subsequently, Poland changed its mind and voted for, what seems to have largely contributed to the loss of legislative elections by the Liberals from the Civic Platform and at the victory of the eurosceptic conservative party Law and Justice. Finally, the new Government in Warsaw announced that takes into account to refuse the application of mandatory shares.

² Agenda 2030 for sustainable development, recognizing forced displacement as a threat to progress, which is why the refugees and displaced persons within the country are account vulnerable people.

Thus, it has been ignored a basic principle of the functioning of the European Union, which, throughout its history, has targeted decisions on difficult issues by consensus, so as not to be harmed the interests of the Member States.

As far as we are concerned, we consider that the safety of citizens is vital to the security of States reporting, and the latter is guaranteed by the legal certainty of national law. The issue that arises in this context is to what extent we can talk about legal certainty in the context in which, on the one hand, the European Union will be essential in the legal order of Member States against them and, on the other hand, by rethinking the rules concerning the special scheme known of human rights.

Currently, the national policies of the Member States of the European Union are subject to the minimum standards of protection in the field of human rights. However, recent events such as terrorist attacks, have questioned the effectiveness of safety and public order as well as the effective protection of human rights and freedoms.

In this respect, some Member States have imposed additional measures, beyond European standards, in order to defend the nation.

Among the measures concerned was merely a new concept, of "public safety", by which the European Union intended to invade and monitor the private lives of individuals. In this instance, the notion of not pursuing the prevention of terrorist acts, but also promotes the State access devices that allow total control of computer data and interpersonal communications.

In the light of recent events, the specialty literature has emerged the idea that, in the application of "safety demand" it is necessary to overcome organizational statutes administered by the State and become a fundamental right of man and of the citizen. In this respect, it considers that the safety of the citizens does not preclude compliance with fundamental rights; however, the imposition of duties constraints may affect the dignity of the person. As an example, Mirabelli (2007) show that if the State devotes fewer fundamental rights, then there will be fewer guarantees of personal safety, likely to be subjected to abuse of power, and if they are offered less safe, the exercise of human rights will be affected.

Theoretical demarcation between terrorism and public safety becomes fragile. The law establishing the State of emergency in France, of 20 November 2015, sets out that any person who has a suspicious behavior constitutes a threat to public order and safety.

The law established in a time when France was declared the State of siege, has generated a climate of fear, of which public authorities have prevailed to ensure the safety of French citizens by means of majeure force. Considering the fact that the number of terrorist attacks in the EU Member States has increased, Milca (2016) raises the question of whether States will concentrate in actions that will invoke the increasingly more often a State of emergency on the State safely and in time this situation to become a form of governance.

The restriction of the exercise of certain rights or freedoms may be made "only by law, only if it is necessary, where appropriate, for the protection of national security, of order, of health, of morals and of the rights and freedoms of citizens ...", so it is fully applicable in certain phases of the anti-terrorism fight³.

The restriction of the exercise of certain human rights or freedoms motivated by fear can be considered to be a relational phenomenon, social, or even a ratio between coercion and persuasion that can harm, whereas, the levers by acting right in general and the fundamental characteristics of a nation can lead up to a state bankruptcy. This claim rests on the passing idea of Mihai (2009) that "every legislated law has a trunk" in the sense that the State and interact according to all domestic, national, occupied the civil, political, economic, social and cultural. Therefore, there is an indissoluble between law and the nation in which he is acting, because the force of the right relates to public power force, that is, by excellence, State. In the event that one of these elements will become shaky and contagious.

According to Chircă (2015), "human rights constitute the favorite targets of terrorism because their breach affects strongly the public consciousness". In what concerns us, considering taking in the internal legal order of the represents a risk to the safety of the State and, subsequently, for the safety of legality.

The process of creating the right, as Geny (1922) asserted is really the evolution of social relations, of the real or natural "given" of the positive law contains fundamental conditions underlying humanity. However, the same author recognises that equally true is that these facts do not create legal rules, but they prescribe the contours and especially set up for the environment necessary for the birth of legal norms. If we start from the premise that the exercise of fundamental rights may be affected by the domino effect of some external factors that endanger the safety of both citizens and the nation as a whole, we can conclude that we are witnessing an involution of the right.

Vida (2012) believes that the process of creating the right must highlight, "social foundations, and political transformations that are taking place in society and determines what changes should be made legal, and technical aspects which make it is possible their legislative regulation". In other words, the restriction of the exercise of fundamental rights according to transnational terrorist threats at State cannot fit under the assumption the strengthening of existing rights and freedoms by virtue of the principle of collective safety. Also, the paradigm of fundamental rights should be understood as the universal dimension of the right which is the *sine qua non* a distinct social phenomenon.

The influence of fundamental rights on the process of creating and implementing the law manifests itself by ensuring the validity and applicability, foreseeability of universal values that, once recognized, are imprescriptible. To the

³ The statement is that of art. 53 para. (1) of the Constitution of Romania, but in all modern national laws .

contrary, we can wake up in the middle of a crisis of fundamental rights. In the event that the exercise of fundamental rights is restricted only for the State to protect citizens we learn in front of contradictions. According to Vida (2012), "defining the law, starting from this feature becomes inoperative". In such a situation the legislator must not dispose to terrorist claims through a "barricade", which to secure in place of protect. Obviously, the question arises how high the degree of protection without being censored on certain rights and freedoms. We believe that the answer can be found in the very struggle of birth right, in architectural social finality which, in the opinion of Kant (1972), determined that "the man exists as purpose in itself" and which manifests itself through strengthening the mandatory law and the re-foundation of the legal system. Therefore, in our opinion, the right external constraints should not impose a new legislative identity of fundamental human rights.

The current contradiction between fundamental rights and freedoms of citizens and foreigners cannot be eliminated only through legal measures. It is necessary to act at the root of the causes that generates the migration, primarily the local wars, of the re-inauguration of a social climate that allows a co-existence in the local climate, unadulterated by political, social and economic vicissitudes.

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