

SOME CONSIDERATIONS ON THE EUROPEAN CONVENTION OF THE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND THE CHARTER OF THE FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Abstract:

At European Union level, the concerns related to human rights regulation are quite recent.

The European Convention is a regional legal instrument for respecting human rights. It is also the qualitative synthesis of the international norms in the field, and its sources of inspiration were, in particular, the Universal Declaration of Human Rights and the International Covenants on Human Rights.

The Fundamental Charter of Human Rights is a regional legal instrument on human rights, which includes for the first time in the history of the European Union the ensemble of civil, political, economic and social rights of the citizens of the Member States of the European Union. The text of the Charter includes a preamble and six titles on: dignity, liberties, equality, solidarity, citizens' rights and justice.

Key words: *human rights, European convention, charter, European Union.*

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The end of the Second World War has led to the development of international human rights law, an area less approached at that time. This stage in the history of mankind has led to an analysis of the human being in terms of respecting human rights against the atrocities committed during the Second World War. The United Nations Charter, adopted following the San Francisco Conference, which was signed on 26 June 1945 and which entered into force on 24 October 1945, proclaims in its preamble a call for respecting the human rights: "the belief in the fundamental human rights, in dignity and the value of the human person, in equality of men and women, as well as of nations, large and small." In the beginning of the Charter of the United Nations, in Article 1 its purposes are emphasized: to maintain the international security, develop friendly relations between nations and "achieve international cooperation in solving international economic, social, cultural or humanitarian issues in promoting and enforcing respect for human rights and fundamental freedoms for all people, regardless of race, sex, language or religion." One of the noble purposes of the United Nations Organization is, through its organs and bodies, to undertake actions to promote and protect the rights of the human being through different forms and modalities specific to international law (Suceavă, 1991). Thus, this is the first general ordination of international human rights protection through a fundamental international treaty of universality (Selejan-Guțan, 2011).

The principles based on which the UN is organized and operates, also partially mentioned in the preamble to the Charter, are:

- equal sovereignty of all members;
- fulfilling in good faith the obligations assumed by all members in accordance with the UN;
- the peaceful resolution of all disputes between the Member States, so that international peace and security, as well as justice, are not jeopardized;
- abstention of all members from the threat of force or use of force in international relations against the territorial integrity and political independence of any state or in a manner inappropriate for the purposes of the organization;
- granting any kind of UN assistance to the Member States in any action undertaken in accordance with the Charter;

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- refraining of the members from assisting any country against which the UN has taken preventive or forceful action;
- the UN's imposing to observe these principles also by the non-member states as long as it is necessary to maintain international peace and security;
- not authorizing the UN intervention in matters specific to the domestic jurisdiction of any state, not even in the form of subjecting such issues to the UN members to regulate them according to the provisions of the Charter, with the very important mention that the cases in which one applies the force measures laid down in Chapter VII (Article 2) are excluded.

Article 10 and 13 of the Charter of the United Nations mentions the competence of the UN General Assembly, and in Article 55 letter C), the protection of the human rights is presented as being necessary for the international economic and social cooperation.

The UN Charter has the great merit of introducing the human rights in the international order, and by adhering to this Charter, which is a multilateral international treaty, the states parties recognized that the "human rights" referred to in the Charter are of international interest and not they are the sole object of their internal jurisdiction (Seleja).

What is specific to the UN Charter is to address the interdependence of human rights issues with international peace and security, friendly relations among nations, welfare of the peoples and other socio-economic objectives (Selejan-Guțan, 2011).

The provisions of the UN Charter on Human Rights are laconic, but at the time of their adoption they are of particular significance, since this first opening will foster the further development of the UN human rights system, starting with the adoption of the Universal Declaration of Human Rights in the year 1948 (Scăunaș, 2003).

The UN General Assembly adopted the two international human rights covenants and were opened for signature in December 1966, and entered into force only after a decade, with ratification by 35 states. The two pacts create legal obligations for the parties states, which have the status of an international treaty.

Both pacts contain a common beginning part, composed of a single article, which supports the following rights of the peoples: the right to freely ensure their economic, social and cultural development; to dispose freely of their riches and natural resources; the right to establish their political status.

I. International Covenant on Economic, Social and Cultural Rights

The Covenant defines and describes a series of rights, as well as the measures that are necessary for them to be respected. Thus, this includes rights such as: the right to work; the right to enjoy fair and just working conditions; the right to set up and join trade unions; the right to social security; the right to family protection; the right to enjoy the highest possible standard of physical and mental health; the right to a satisfactory standard of living; the right to education; the right to participate in cultural life.

These rights are detailed and defined in the Covenant. The State ratifying the International Covenant on Economic, Social and Cultural Rights undertakes to ensure the full realization of these rights.

No system of interstate or individual complaints is inserted into the agreement, requiring only the Parties States to report on the measures they have adopted and on the evolution of the rights enshrined in the Covenant.

Every five years, the International Covenant on Economic, Social and Cultural Rights obliges the states to submit a report on the internal implementation of its provisions. The reports are examined by a professional working group of 5 members of the Committee on Economic, Social and Cultural Rights, which draws up a list of specific issues requiring additional information.

With regard to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights does not impose immediate obligations on States Parties, this being justified by the nature of the rights and the existing situation in the states different from an economic, social, and cultural point of view (the Committee for economic, social and cultural rights - set up in 1976 by the UN Economic and Social Council, composed of 18 elected officials on a personal basis).

II. The International Covenant on Civil and Political Rights

This agreement was adopted in 1966 and includes a number of rights, such as the right to life, freedom and security of the person, the freedom to be free from imprisonment, the right of all persons deprived of their liberty to be treated in a humane manner and respect for the dignity inherent to the human being, the right of the child to acquire a nationality and to provide him/her with those protection measures deriving from his/her status as a minor, the right not to be arbitrarily subject to arrest, detention or exile, the right to a fair trial, benefit of the doubt.

The Covenant obliges states to take legislative or other measures to transpose the rights recognized by the Covenant, such as: ensuring the right of the person to make effective complaints, even if the violation of the right was committed by a public authority; to ensure that the competent authority decides on the rights of the person making the complaint with the possibility of judicial redress; to ensure that the competent authorities will respond to any complaint that has been recognized as justified (International Covenant on Civil and Political Rights, Article 2, paragraph 3).

Specific to this Pact is the addition brought by article 27, which states the commitment of the states to recognize the right of the members of ethnic, religious or linguistic minorities to enjoy, together with other members of their group, their own culture, to practice their own religion or to use of their own language (Selejan-Guțan, Crăciunean, 2008).

Article 4 of the Covenant contains a derogation clause which allows States Parties to "suspend public duties during times of public dangers", with the exception of seven of the most important ones:

- the right to life;
- the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment;
- the right not to be closed for non-performance of contractual obligations;
- the right not to be held in slavery and servitude;
- the right of every person to recognize his/her legal personality;
- the principle of non-retroactivity of incriminations (or of the application of more favourable criminal law);
- freedom of thought, conscience and religion.

The obligations of States Parties are set out in Article 2 paragraph 1: "The States Parties in the present Covenant undertake to respect and to guarantee to all individuals within their territory and within their competence the rights recognized in this Covenant, without distinction, in particular in terms of race, colour, sex, language, religion, political or other opinions, national or social origin, wealth, birth or other status." Paragraph 2 of the same article mentions that States Parties "in accordance with their constitutional procedures and the provisions of the present Covenant to act to enable the adoption of legislative or other measures that are necessary to achieve the exercise of the rights" provided for in the Covenant.

Concerning the rights taken from the Universal Declaration of Human Rights, the Covenant furthermore enshrines rights such as: the right of any individual deprived of liberty

to be treated with humanity and respect for the dignity inherent in the human person (Article 10 of the Covenant). Thus, it is stated that:

- those in pre-trial detention will, apart from exceptional circumstances, be separated from the convicted and will be subjected to a distinct regime, according to their condition as non-convicted persons;
- young people in custody will be separated from adults and will decide on their case as soon as possible;
- the penitentiary regime will include treatment of the convicts with the essential aim of their adjustment and their social integration. Young offenders will be separated from adults and subject to a regime appropriate to their age and legal status.

Other rights provided in addition to the Universal Declaration are: the right of the person not to be imprisoned for the sole reason that he/she is unable to perform a contractual obligation (Article 11); the right of every child to protection measures on the part of his/her family, society and the state (Article 24); the right of peoples to self-determination as a collective right enshrined in the Covenant on Economic, Social and Cultural Rights (Article 1); the collective right to protection against propaganda for war and the incitement to national, racial or religious hatred, which constitutes an incitement to discrimination, hostility or violence, and the prohibition of such acts by the states parties (Article 20), etc.

III. The first optional protocol to the International Covenant on civil and political rights

The first Optional Protocol (The main international instruments on human rights to which Romania is a party, Volume I, Universal Instruments, Romanian Institute for Human Rights, Bucharest, 2007) entered into force in 1976 and completes some of the measures provided for in the Covenant. In article 1 and 2 the purpose of this Protocol is mentioned: "Any State that is a party to the Covenant which becomes party to this Protocol shall recognize the competence of the Committee to receive and examine communications from natural persons under its jurisdiction claiming to be victims of violation, by that State Party, of any of the rights set forth in the Covenant. The Committee will not receive any communication regarding the State Party to the Covenant which is not a party to this Protocol" (Article 1) and "Subject to the provisions of Article (1), any natural person who claims to be the victim of a violation of any right stated in the Covenant and who has exhausted all available domestic remedies may submit a written communication to the Committee for consideration." (Article 2)

The Protocol provides individuals with the opportunity to submit individual communications and complaints to the Human Rights Committee. Complainants can only be individuals - natural persons, not groups of persons or legal entities, as in the case of the European Convention (Guțan, 2011).

To be admissible, the complaint must not have been submitted to a similar international court at the same time, and internal remedies must be exhausted beforehand.

Currently, the Committee asks the States Parties to indicate in their reports what measures are taken to meet the Committee's recommendations in cases where the Covenant has been found to have been violated.

IV. The second optional protocol to the International Covenant on civil and political rights

The Second Optional Protocol to the International Covenant on Civil and Political Rights (The main international instruments on human rights to which Romania is a party, Volume I, Universal Instruments, Romanian Institute for Human Rights, Bucharest, 2007) was adopted by resolution of the General Assembly of the UN at its 44th session on 15

December 1989 and entered into force on 11 July 1991. Romania ratified the Protocol on 25 January 1991 by the Law no. 7 (Published in the Official Gazette of Romania, Part I, No. 18 of 26 January 1991).

The protocol has as its primary objective the abolition of the death penalty. Thus, article 1 provides that: "1. No person under the jurisdiction of a State Party to this optional Protocol shall be executed. 2. Each State Party shall take all the necessary measures to abolish the death penalty within the territory under its jurisdiction." Each State Party shall take all the necessary steps to abolish the death penalty within its jurisdiction. There is only one exception to these provisions, stipulated in article 2, namely: "1. No reservation shall be made to this Protocol, except the reservation made on the occasion of the ratification or accession, providing for the application of the death penalty in wartime following a conviction for a military crime of extreme gravity committed over time of war. 2. The State Party shall, at the time of ratification or accession, notify the General Secretariat of the United Nations of the relevant provisions of its domestic law that apply in time of war."

Romania, upon the ratification of this Protocol on 25 January 1991, did not make such a reservation, which means that Romania abolished the death penalty in time of war. In May 2002, the 13th Protocol to the European Convention on Human Rights was adopted concerning the abolishing of the death penalty in any circumstance and which Romania ratified in July 2003.

When formulating such a reservation, it is necessary for the States which ratify them to communicate the corresponding provisions of their domestic law that apply in time of war.

At European level, the concerns over the human rights regulation are fairly recent. One of the most important regional legal instruments is the European Convention on Human Rights.

The European Convention on Human Rights was signed in Rome on 14 November 1950 by 15 European countries and entered into force on 3 September 1953. It can be judged that it is technically a treaty by virtue of which the states undertake certain legal obligations and recognize the rights of each person (Suceavă, 1991).

Individuals have the possibility, through the European Convention on Human Rights, when they consider that their rights have been violated, to open proceedings before the European institutions provided for by the Convention, against the states that have infringed their rights.

The European Convention is the qualitative synthesis of the international norms in the field, and its sources of inspiration were, in particular, the Universal Declaration of Human Rights and International Covenants on Human Rights (Deleanu, 1998). One of the fundamental elements of the European democratic stability is the European Convention on Human Rights (Zlătescu, 2011).

The states have made changes in their internal legislation so that they are in full compliance with the Convention. Some states have fully taken up the Convention in the sense that the injured person complains to a court by directly invoking the violation of the rights attached to it (e.g. Italy, Germany and Switzerland). According to the French Constitution of 1958, the international treaties concluded and approved have a higher value than the internal laws. In the Netherlands, the Convention is superior to the Constitution, and in Austria, the Convention has equal value to the Constitution (Suceavă, 1991).

The following rights are inserted in the European Convention on Human Rights: the right to life, the right to freedom and security of the person, the right not to be subject to ex post facto laws and punishments, the right to a fair trial, the right to respect for private and family life, the right to respect for residence and correspondence, the right to freedom of thought, conscience and religion, the right to freedom of expression, the right to freedom of assembly and association, and to join trade unions, the right to marry and to form a family, the

right to respect for property, electoral rights, the right to education, the right to free movement, freedom of choice of residence.

The Convention provides for a series of prohibitions for the State or its bodies to carry out certain facts such as: torture, cruel, inhuman or degrading treatment or punishment, death penalty, slavery, discrimination in the exercise of the rights and freedoms set forth in the Convention, forced expulsion or extradition of their own citizens.

Some of these rights are considered to be "intangible rights" (Guțan, 2011) because the States Parties can not harm them, any person anywhere and under any circumstances being able to benefit from them: the right to life (Article 2), the right not to be subjected to torture and other inhuman or degrading treatment or punishment (Article 3), the right not to be subjected to slavery (Article 4), the right to non-retroactivity of the criminal law (Article 7), the right not to be judged twice for the same deed or the non bis in idem principle (Article 4 of Protocol No. 7).

The states have the obligation that their legislation does not conflict with the provisions of the Convention, its purpose being not to replace the national legal systems for the protection of human rights, but to constitute an international guarantee that adds to the domestic law (Suceavă 1991).

The text of the Convention has been supplemented in some areas by **additional protocols**. They have been adopted and include a series of rights, as follows:

- Protocol No. 1, drawn up in Paris in 1952, includes the right to education, the right to property, the commitment of States to organize free and secret elections at reasonable intervals;
- Protocol No. 2, signed at Strasbourg on 6 May 1963, grants the European Court of Human Rights the right to give an advisory opinion at the request of the Council of Ministers on legal issues concerning the interpretation of the Convention and its Protocols;
- Protocol No. 4, adopted in Strasbourg on 16 September 1963, provides for rights other than those recognized by the Convention, such as: the right to free movement, the ban on the expulsion of its own citizens and the collective expulsion of aliens, the prohibition of deprivation of liberty for non-compliance with contractual obligations;
- Protocol No. 6, adopted in Strasbourg on 28 April 1983, which abolished the death penalty in peacetime;
- Protocol No. 7, concluded in Strasbourg on 22 November 1984 granting foreigners guarantees before being expelled from their country of residence, the right to recourse to criminal proceedings, the right to reparation in the event of a judicial error, the right not to be judged twice for the same deed, equality of rights and obligations between spouses;
- Protocol No. 8 adopted in Vienna on 19 March 1985 brings certain amendments to the Convention as regards the European Court of Human Rights;
- Protocol No. 12 introduced the general principle of non-discrimination;
- Protocol No. 13, adopted in Vilnius on 3 May 2002, provided for the abolition of the death penalty in all circumstances.

The legal instruments on the respect for the human rights have been complemented at the European Union level by another important document, the Charter of Fundamental Rights of the European Union.

On 12 December 2007, the Presidents of the European Parliament, the European Commission and the Council of the European Union proclaimed and signed the Charter of Fundamental Rights of the European Union.

The Charter contains, in a single text, for the first time in the history of the European Union (Fuerea, 2016), the ensemble of civil, political, economic and social rights of the

citizens of the Member States of the European Union. The Charter begins with a preamble and comprises 54 articles structured in 6 Titles, namely: dignity, liberties, equality, solidarity, citizens' rights and justice.

Within the first Title, Dignity, it is stressed that "human dignity is inviolable". The right to life must be respected, and the death penalty is prohibited, as well as torture and punishments or inhuman and degrading treatments, slavery and forced labour.

The second title emphasizes the respect for the right to privacy and family life, residence and secrecy of communications, as well as the safeguarding of personal data (Article 8 of the Charter).

The equality of all persons before the law is enshrined in Title III. Discrimination on the grounds of "gender, race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or any other opinion, membership of a national minority, wealth, birth, disability, age or sexual orientation" (Article 21 (1)) is prohibited.

The defence of labour law and social protection is regulated in the Fourth Title - Solidarity.

The fifth title - Citizens' rights - refers to the right to vote and to be elected in the European Parliament; the right to vote and to be elected in local elections; the right to refer the matter to the European Ombudsman; the right to petition; freedom of movement and residence; diplomatic and consular protection.

The right of access to justice is governed by Title Six. In Article 47 of this Title it is stipulated that any citizen is recognized as having the right to an effective remedy and the right to a fair trial. Also, article 50 mentions the right not to be tried or convicted twice for the same offense.

The Seventh Title regulates the principle of subsidiarity as regards the institutions, bodies, offices and agencies of the European Union.

The Charter establishes a level of protection of the human rights through article 53, where the following points are emphasized: "None of the provisions of this Charter may be interpreted as impairing or violating the human rights and fundamental freedoms recognized in the relevant fields by the Union and international law as well as international conventions to which The Union or all the Member States are parties, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms and the constitutions of the Member States."

It follows from this article of the Charter that there is no possibility for the Member States or the European Union "to lower their own protection standards, but they are the result of only the constitutional rules and international conventions and only those conventions of which the Union or all its member states are part" (Bocşan, 2017).

Article 53 of the European Convention on Human Rights states that: "Nothing in this Convention shall be construed as limiting or impairing human rights and fundamental freedoms which may be recognized under the laws of either Contracting Party or any other convention of which that contracting Party is part."

The aforementioned provision may be interpreted as meaning that States Parties may have their own higher standards of protection than the Convention requires for its rights. States Parties may also protect other fundamental rights and freedoms than those provided for in the Convention.

From the two articles analyzed above, it follows that "the prohibition to impose limited standards on human rights and fundamental freedoms refers only to the situation of invoking the Convention and the Charter, respectively, in order to achieve such a goal" (Bocşan, 2017).

Conclusions

International human rights law began to develop once with the end of the Second World War. What caused the emergence of all legal instruments of universal vocation and regional vocation were the atrocities committed during the Second World War. The Universal Declaration of Human Rights was one of the legal instruments of universal vocation of particular importance in the evolution of human rights. At European level, the protection of the human rights has been strengthened by the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and by many other regional instruments.

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